

COMPLAINTS MECHANISM

SG/E/2020/21 and SG/E/2021/02

AUTOBAHN A49 Fritzlar – Ohmtal Dreieck (PPP) (Germany)

CONCLUSIONS REPORT

27 September 2022





SG/E/2020/21 & SG/E/2021/02

Conclusions report

27 September 2022

Complaint confidential

No

External distribution

Complainants
Promoter

Internal distribution

Management Committee
Secretary General
Inspector General
Relevant EIB services

Disclaimers

The conclusions presented in this report are based on the information available to the EIB Group Complaints Mechanism up to 17 July 2022. The conclusions are addressed solely to the EIB.

Based on the EIB-CM Policy, if not indicated otherwise, all complaints are treated as non-confidential for the sake of transparency¹.

¹ § 4.6.2 of the CM Policy (2018).

THE EIB GROUP COMPLAINTS MECHANISM

The EIB Group Complaints Mechanism (hereinafter EIB-CM) is a tool enabling the resolution of disputes if any member of the public feels that the European Investment Bank might have done something wrong, i.e. if it has committed an act of maladministration. The Complaints Mechanism is not a legal enforcement mechanism and will not substitute the judgment of competent judicial authorities.

Maladministration means poor or failed administration. It occurs when the EIB fails to act in accordance with a rule or principle that is binding upon it, including its own policies, standards and procedures. The concept of maladministration includes failure by the EIB to comply with human rights, applicable law, or the principles of good administration. Maladministration may relate to EIB's Group decisions, actions or omissions. This may include the environmental or social impacts of the EIB's projects and operations.

One of the main objectives of the EIB Group Complaints Mechanism is to ensure the right to be heard and the right to complain. For more information on the EIB Group Complaints Mechanism please visit: <https://www.eib.org/en/about/accountability/complaints/index.htm>.

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GLOSSARY

| | |
|--------------------|--|
| A49 | Federal motorway (<i>Bundesautobahn</i> in German) in the north of the federal state of Hessen (Germany) |
| Borrower | A49 Autobahngesellschaft mbH & Co. KG (SPV) or Autobahn GmbH des Bundes |
| BUND | Bund für Umwelt und Naturschutz Deutschland, Landesverband Hessen e.V. |
| CHRP | Central Hessen (Mittelhessen) regional plan |
| CJEU | Court of Justice of the European Union |
| EIA | Environmental Impact Assessment |
| EIB | European Investment Bank |
| EIB-CM | EIB Group Complaints Mechanism |
| ESDS | Environmental and Social Data Sheet |
| ESPS | EIB Statement of Environmental and Social Principles and Standards |
| EU | European Union |
| Federation | Federal Republic of Germany |
| FTIP | Federal Transport Investment Plan |
| Hessen | Federal state of Hessen (Hesse) |
| NABU | Naturschutzbund Deutschland e.v. |
| NGO | Non-governmental organisation |
| NHRP | Nordhessen regional plan |
| Planning authority | Ministry for Economic Affairs, Energy, Transport and Housing ² of Hessen |
| PPP | Public-private partnership |
| Promoter | Federal Republic of Germany, represented by the federal state of Hessen. As of 1 January 2021, the Autobahn GmbH des Bundes became the representative for planning, construction and operation of the A49. |
| RART | Regional Authority for Roads and Traffic, in German <i>Amt für Strassen und Verkehrswesen Marburg</i> . The RART acts as a representative of the Federal Government. As of 1 January 2012, <i>Hessen Mobil — Straßen- und Verkehrsmanagement</i> became the relevant regional authority ³ . |
| SEA | Strategic Environmental Assessment |
| TEN-T | Trans-European Transport Network |
| VKE | Transport unit(s) (<i>Verkehrseinheit(en)</i> in German) |

² Before January 2014, it was called Hessian Ministry of Economy, Transport and Rural Development (in German Hessisches Ministerium für Wirtschaft, Verkehr und Landesentwicklung), from January 2014 till January 2019 - Hessian Ministry of Economy, Energy, Transport and Rural Development (in German Hessisches Ministerium für Wirtschaft, Energie, Verkehr und Landesentwicklung) and since January 2019 - Hessian Ministry for Economic Affairs, Energy, Transport and Housing (in German Hessisches Ministerium für Wirtschaft, Energie, Verkehr und Wohnen).

³ According to Art. 2 §1 Para. 1 and 2 of the “Road Rules Amendment Act” from 16.12.2011 [GVBl. I S. 817].

EXECUTIVE SUMMARY

In December 2020 and February 2021, the EIB Group Complaints Mechanism (EIB-CM) received two separate letters from two individuals and registered two complaints concerning the “AUTOBAHN A49 FRITZLAR - OHMTAL DREIECK (PPP)” project. The project consists of the design, construction, financing, operation and maintenance of a section of the A49 motorway in the German federal state of Hessen.

Following the admissibility of the complaint, the EIB-CM carried out an initial assessment in line with section 2.2 of the EIB-CM procedures. The initial assessment report establishing the allegations (see table below) was issued in July 2021.⁴

Based on a review of the available information, the EIB-CM found all allegations to be ungrounded with respect to the project's compliance with the applicable standards. Moreover, the EIB-CM considers that the EIB fulfilled its role as required when carrying out due diligence during appraisal and monitoring.

However, the EIB did not communicate satisfactorily in its Environmental and Social Data Sheet (ESDS) the outcome of the appropriate assessment for the Natura 2000 site crossed by the project and on the public consultation process, specifically the negative campaign. Therefore, the EIB-CM issues one suggestion for improvement, as provided in the table below.

| No. | Allegations | Outcome |
|-----|--|--|
| # 1 | <p>Failure of the project to comply with applicable legislation, including EU environmental law, especially shortcomings of the assessment as required by the EIA Directive and other joint assessments:</p> <ul style="list-style-type: none"> Issues with public access to information (i.e. concerning the EIA results) Non-compliance with the Water Framework Directive (failure to ensure the requirements of non-deterioration in an assessment of impacts relevant to the Water Framework Directive) Issues with compliance with the Habitats Directive (e.g. remaining significant negative impacts on protected habitats and species and inadequate compensation measures) Non-compliance with noise requirements (e.g. unassessed negative noise impacts) | <p>No grounds with a suggestion for improvement:</p> <ul style="list-style-type: none"> To issue an addendum to the ESDS concerning the project's impact on the Natura 2000 site and information on public consultations, appeals and protests. |
| # 2 | The project's non-compliance with the Paris Agreement and the EIB's climate change commitments | No grounds |

⁴ The corrected initial assessment report is available on the EIB-CM website in [English](#) and [in German](#).

1 BACKGROUND

1.1 Project overview

- 1.1.1 In September 2019, the EIB's Board of Directors approved financing of the "AUTOBAHN A49 FRITZLAR — OHMTAL DREIECK (PPP) project (hereinafter, "the project") in Germany⁵, for up to €264 million⁶. The public-private partnership (PPP) project was developed and is being implemented by Deutsche Einheit Fernstraßenplanungs- und -bau GmbH (DEGES)⁷, commissioned by the federal state of Hessen on behalf of the Federal Republic of Germany. The borrower is the special purpose vehicle (SPV) "A49 Autobahngesellschaft mbH & Co. KG," a limited partnership established under the laws of the Federal Republic of Germany.
- 1.1.2 The project is located in the German federal state of Hessen (see Figure 1). It includes the construction of a 30.8 km long section of a greenfield 2x2 lane of A49 motorway between junctions AS⁸ Schwalmstadt and Ohmtal-Dreieck, and the maintenance and operation of four A49 motorway sections with a total length of around 61.8 km. The EIB is only financing the two sections involving capital expenditure (sections (*Verkehrseinheit in German, or VKE*) 30 and VKE 40)⁹.

Figure 1: Schematic presentation of the project¹⁰



⁵ Promoter's project webpage available [here](#).

⁶ The project's description on the EIB website available [here](#).

⁷ More information can be found [here](#). This is a public company partly co-owned by the Federal Government with other states. The state of Hessen joined in 2010.

⁸ Connection point/area or junction (in German *Anschlussstelle*).

⁹ The mileage for VKE 30 is from 43+100 to 56+440 km and for VKE 40 is from 57+000 km to 74+450 km. The mileage can slightly vary depending on inclusion or exclusion of the intersections.

¹⁰ Source: [Strabag erhält Zuschlag für das ÖPP-Projekt A 49 in Hessen \(baunetzwerk.biz\)](#)

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- 1.1.3 The project is part of the comprehensive Trans-European Transport Network (TEN-T)¹¹. It is expected to streamline traffic flows, improve road safety on the existing A5 and A7 motorways and therefore reduce congestion and accidents on existing roads.
- 1.1.4 At the time of its approval for EIB financing, the project was expected to start in 2020 and reach completion by the end of 2023 at the latest.

1.2 Federal transport planning

- 1.2.1 At federal level, the highest level document for transport network development is the Federal Transport Investment Plan (FTIP)¹², which lays out the overall strategy for the development of the Federal Government's transport infrastructure. Although these plans are developed by the Federal Ministry of Transport and Digital Infrastructure, they are adopted by the Federal Bundestag as an appendix to **the Trunk Road Extension Act via a legislative procedure** (see § 2.2.7).
- 1.2.2 In 1992, the FTIP included the motorway from Kassel to Giessen¹³ as the A49 with the section VKE 10. In 2003, the plan was expanded to include sections between Bischhausen and Stadtallendorf (VKE 20 and VKE 30) and between Stadtallendorf and the A5 Motorway (VKE 40). Those investments were qualified as "new investments with special environmental planning procedures" not excluding impacts on the Natura 2000 network, and were also called priority projects¹⁴.
- 1.2.3 Since 2016, the FTIP (known as FTIP-2030) has included the motorways, roads, railways and waterways at federal level which are to be built, expanded, renovated or modernised by 2030. It also defines the scope of the investments.¹⁵ The A49 motorway is part of the FTIP as an ongoing high priority project: from Neuental to Schwalmstadt (VKE 20 under construction, not financed by the EIB) and from Schwalmstadt connecting to the A5 motorway (VKE 30 and VKE 40). The FTIP-2030 was subject to a strategic environmental assessment (SEA) in line with the requirements of the SEA Directive¹⁶ and **it was the first plan of this type to have public participation**¹⁷.

1.3 Regional (land use) plans

- 1.3.1 The first relevant North Hessen (Nordhessen) regional plan (NHRP), in which the project can be located with a roughly outlined alignment, was published in 2001¹⁸. The next NHRP was adopted in 2010 and published in 2011¹⁹. Land use planning is carried out with an SEA (known as a Stage I Environmental Impact Assessment (EIA) procedure in the national documentation).

¹¹ The TEN-T roughly outlines the alignment of the project on the TENtec Interactive Map Viewer available [here](#).

¹² The Federal Transport Investment Plan (in German *Bundesverkehrswegeplan*, hereinafter FTIP).

¹³ The section was for 27 km, of which 8.3 km was built at the end of 1991.

¹⁴ The projects required planning permission after identified environmental risks were addressed in an appropriate procedure. Projects qualified as priority projects (*Vordringlicher Bedarf* in German) may be built.

¹⁵ Bundesverkehrswegeplan 2030.

¹⁶ Information on the SEA procedure is available [here](#) in German.

¹⁷ During a period of six weeks (from 21 March until 2 May 2016), the public could submit written comments on the draft FTIP 2030 and the associated environmental report in a procedure involving the participation of the authorities and the public. The documents were made available for inspection by any person in 20 cities spread across the Federal Republic of Germany. In addition, the documents were available for inspection on the Federal Ministry of Transport and Digital Infrastructure's website. Detailed appraisal results for the individual projects were made available in an online project information system. After the participation process of the authorities and the public was concluded, the Federal Ministry of Transport and Digital Infrastructure revised the FTIP draft on the basis of the evaluated comments. The consultations' report on the draft [FTIP 2030](#) consolidated the submitted comments from the authorities and the public and how they have been taken into account, last accessed 1 June 2022.

¹⁸ The Nordhessen (North Hessen) regional plan was approved in May 2001 and published in August 2001.

¹⁹ Published on 31 January 2011.

- 1.3.2 The planning procedure of the Central Hessen (Mittelhessen) regional plan (CHRP) was concluded in 2000²⁰ with a “Herrenwald” variant²¹. The project was first approved within the CHRP published in 2001²². The next round of the CHRP included a modified Herrenwald variant due to a Natura 2000 site, which was reported to the European Union in 2004²³. The project was therefore subject to an Appropriate Assessment and an SEA. The draft CHRP was published in 2009, while the final plan was adopted in 2010 and published in 2011²⁴.

Textbox 1 - Planning procedure in Hesse

The road construction planning procedure in Hessen is based on the provisions of the Hessian Administrative Procedures Act (HVwVfG), the Federal Trunk Roads Act (FStrG) and the Hessian Roads Act (HStrG)²⁵. Of central importance is the hearing procedure regulated in Section 73 of the Administrative Procedures Act with the possibility of submitting objections and statements as well as the generally required hearing. In Hessen, the competent regional council is the hearing authority in planning procedures under road law.

Planning permission concludes the planning process. It represents an administrative act that can be challenged. Planning permission consolidates and simplifies the process: it replaces all official approvals that would otherwise have been required for the project. The planning authority is obliged to check the compatibility of the project with all public law regulations that would otherwise have been checked in the superseded official approval procedures. The Ministry for Economic Affairs, Energy, Transport and Housing is **the planning authority** for federal motorways in Hessen.

Until 2020, federal motorways²⁶ and federal highways were built and administered by the states²⁷ on behalf of the Federation. Following a change in federal law, the planning and management of federal motorways is in the remit of the federal administration²⁸. However, **the federal state of Hessen** has not handed over the responsibility for the planning permission of federal motorways to the Federal Highway Authority.

A49 in the Trans-European Transport Network (TEN-T)

- 1.3.3 The A49 motorway was identified as part of the TEN-T in 1996, as per the decision on EU guidelines for the development of the Trans-European Transport Network (see § 2.2.32).²⁹

1.4 Project approval procedure at the planning permission stage

Section VKE 30

- 1.4.1 On 24 August 2006, the Regional Authority for Roads and Traffic (hereinafter the RART) asked to carry out a project planning procedure. The procedure included the environmental impact assessment (EIA), which was conducted for the section between Schwalmstadt and

²⁰ There were two earlier Mittelhessen regional planning procedures concluded in 1995 and 1999.

²¹ The variant is named after a forest area called Herrenwald, which it crosses.

²² Central Hessen's regional plan was approved in April 2001 and published on 21 May 2001.

²³ Information from the EU database on Natura 2000 sites available [here](#).

²⁴ The draft plan was published from 24 August to 23 September 2009 and the final plan was published on 31 January 2011.

²⁵ Information on the planning procedure is available [here](#) in German.

²⁶ Federal motorways (in German *Bundesautobahn*) are approved in (i) a multi-stage procedure: investment planning, spatial planning, routing procedure, plan approval procedure, or, (ii) in a simple case: planning permission.

²⁷ State highway department.

²⁸ Article 90 of the Basic Law was changed and came in force as of 1 January 2021. *Fernstrassenbundesamt*, more information available [here](#).

²⁹ Decision No. 1692/96/EC of the European Parliament and of the Council of 23 July 1996 on Community guidelines for the development of the trans-European transport network, O.J., L 228 of 9 September 1996. The document is no longer in force. It is available [here](#).

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Stadtallendorf (VKE 30). The project's EIA included public information³⁰, participation and consultation³¹ with the impacted government agencies and utilities (water) as well as the water association³², the Hessen' association of farmers, forest owners, fishers and eco-farmers and eight officially recognised nature conservation organisations in Hessen³³.

- 1.4.2 Until November 2007, the RART processed and took into account the objections provided by the government agencies, public and associations. On 9 December 2008, a non-public hearing with the impacted municipalities, government agencies and associations took place. The public was informed in the local newspapers and by official bulletins that due to the high number of objections received, the plan would have to be reviewed and modified³⁴.
- 1.4.3 **The first request for modification** of the planning permission³⁵ was presented in February 2010. The changes were subject to consultation following the same procedure as presented above³⁶, with the objection period ending in August 2010³⁷ and with two hearings taking place in November 2010. After extensive consultations on a number of new issues raised, the procedure was closed in December 2010 with some objections remaining unsettled.
- 1.4.4 **The second request for modification** was presented in July 2011 with an updated EIA report. Consultations were carried out, with the objection period ending in September 2011. The planning authority approved planning permission for VKE 30 in January 2012³⁸. The planning permission presents the modifications resulting from the above steps (see also §§ 1.4.11-1.4.13).

Section VKE 40

- 1.4.5 On 22 December 2006, the RART applied for the planning procedure for section VKE 40 of the motorway³⁹ between Stadtallendorf and Gemünden (Section VKE 40 has a length of 17.45 km). The plan of the project was made available and opened for comments from the public in the municipalities of Stadtallendorf, Kirtorf, Homberg (Ohm), Gemünden (Felda), Kirchhain, Amöneburg, Mücke and Alsfeld, with the objection period ending in May 2007⁴⁰. The public and

³⁰ Project information (14 binders) was made available to the public between 11 September 2006 and 11 October 2006 in Schwalmstadt, Neustadt (Hessen), Building Authority. The public was informed in the local newspaper "Sonntagszeit" of HNA from Stadtallendorf, municipality (19 and 20 August 2006); in the local newspaper "Oberhessische Presse" of Neustadt municipality (24 August 2006), in the official bulletin of Willinghausen municipality (31 August 2006) and in the local newspaper HNA (8 September 2006). The public notification also provided the information that the process was also in accordance with § 9 Abs. 1, Environmental Impact Assessment Act (Umweltverträglichkeitsprüfungsgesetz, in German) regarding public participation.

³¹ Objections could be presented until 25 October 2006 in writing or orally.

³² The Water Association — Schwalm — was informed on 25 August 2006 with a full set of planning documents.

³³ Nature conservation organisations received a letter informing them about the plan communicated to the public and the possibility of presenting their comments by 30 November 2006. In an annex to the letter, the organisations received a reduced set of plan documents (maps and various and reports) and were offered the option of receiving a full set of the plan documents for their review.

³⁴ A new planning procedure was planned to be launched in the first quarter of 2009, with a subsequent public hearing in the second quarter. An information meeting was organised for two local farmer associations on 29 June 2009.

³⁵ In German Planänderungsantrag.

³⁶ Nature conservation and other associations were informed by the notification in the local press and official bulletins. Additional agricultural associations were notified by letter, due to the expected plan's impact on them. The BUND Hessen e.V. requested on 9 July 2010 receipt of the documents in digital form. A CD was sent on 13 July 2010.

³⁷ Various objections were provided by private individuals, government agencies and associations to which the RART (Amt für Strassen- und Verkehrswesen Kassel) provided the respective answers. The subsequent hearings on 15 and 17 November 2010 were restricted to communal or government agencies, associations (*Träger öffentlicher Belange* in German) and private individuals with material impacts on their land/real estate property or economic situation.

³⁸ The planning authority is the Hessian Ministry for Economic Affairs, Energy, Transport and Housing, see Glossary for the changes of the title. Planning permission Ref.VI 1-A-61-k-04 # (2.116) of 4 January 2012.

³⁹ The regional council then checks the completeness of the documents submitted and arranges for the affected municipalities to display the plans for all citizens for one month.

⁴⁰ Consultation phase was between 19 March 2007 until 19 April 2007.

environmental associations (NGOs) concerned were informed about the availability of the plan and the deadline for comments⁴¹. The draft plan was consulted with other impacted government agencies and public utilities (telecommunications)⁴² who provided around 400 objections and comments. As a result, the project was amended from, among other things, nature conservation perspective.⁴³

- 1.4.6 **The first request for modification (2010)**⁴⁴ was presented in the municipalities of Stadtallendorf, Kirtorf, Homberg (Ohm), Gemünden (Felda), Kirchhain, Amöneburg, Mücke and Alsfeld, with the objection period ending in June 2010⁴⁵. The public and (environmental) associations concerned were informed in the customary way about the availability of the plan and the deadline for comments.⁴⁶
- 1.4.7 Hearings were organised with impacted government agencies and interested public institutions⁴⁷. The public was informed about the hearings in the local newspapers at least one week before hearing. Seven hearings with private individuals and associations took place in Stadtallendorf, Homberg and Giessen (announced in the local newspapers)⁴⁸. The majority of the objections made by private individuals could not be addressed during the hearings, while the government agencies and interested public institutions supported the plan in principle. Other impacted government agencies, entities and environmental and other associations were informed in the same way as during the key planning procedure⁴⁹. The regional council forwarded the summarised objections, statements and replies as well as the result of the discussions to the planning authority.
- 1.4.8 **The second request for modification (2011)**⁵⁰ was submitted in July 2011. The changes underwent screening, with the conclusion that there was no need to do a full EIA. The consultation process was carried out, with the objection period ending in April 2012.
- 1.4.9 The planning authority visited two sites and requested further information. In May 2012, both the environmental authority and the water authority approved permits with measures for the two sites. All objections to the procedure and the EIA were rejected after clarifications were provided⁵¹. The planning authority adopted the planning permission for VKE 40 in May 2012⁵². The appeals against the planning permission for VKE 40 are summarised in Appendix 1 of this report.
- 1.4.10 An amendment to the planning approval decision for VKE 40 (2012) was approved in 2017⁵³, authorising the destruction of known historical monuments due to overriding public interest. The

⁴¹ Details of the procedure are available in the Teil-Vorlagenbericht des Regierungspräsidiums Giessen vom 30 March 2011 (page 75).

⁴² Information was provided between 15 March 2007 and 15 October 2007.

⁴³ [Der Weiterbau der A49 | wirtschaft.hessen.de](http://DerWeiterbau.der.A49.wirtschaft.hessen.de), last accessed on 1 June 2022.

⁴⁴ In German Planänderungsantrag.

⁴⁵ Consultation phase was between 19 April 2010 until 18 May 2010.

⁴⁶ Details of the procedure are available in the Teil-Vorlagenbericht des Regierungspräsidiums Giessen of 30 March 2011.

⁴⁷ In German Träger öffentlicher Belange. Hearings took place on 7 and 8 October 2010.

⁴⁸ Hearings took place between 29 November 2010 and 18 January 2011.

⁴⁹ Details are described in a separate report of the Giessen regional council dated 30 March 2011.

⁵⁰ In German Planänderungsantrag.

⁵¹ Objections including the questioning of the proper application of procedures during the public consultation were rejected (such as the claim that the publication of the first requested planning permission change and the subsequent hearings were not carried out properly). The decision was justified by the fact that all dates were published in the official channels for publication in the impacted municipalities and that the government agencies, utilities, the sponsor and private individuals who had presented objections were informed in writing. Another objection regarding the completeness of the documents presented for the first request of change of planning permission was rejected (only the changed plan has to be presented, not the original plan presented — as claimed by the participant).

⁵² Planning permission Ref.: 61 k 04/2.120 of 30 May 2012.

⁵³ Request received on 30 May 2016 from Hesse archaeological authority and amendment issued on 20 January 2017 without the need to restart the planning approval procedure.

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amendment contained information on legal remedies. In 2019, another amendment was issued following a request from the promoter to examine the planning documents for landscape conservation measures. The planning permission approving authority established that the notified modifications did not require a renewal of the EIA procedure or the issue of new planning permission. The decision of 2019 adopted the proposed changes with justification⁵⁴.

Appeals and petitions to the European Parliament

- 1.4.11 The administrative procedures leading to the approval of the project components (VKE 30 and VKE 40) were subject to active participation from the environmental NGOs concerned and civil society.
- 1.4.12 During the planning procedure for VKE 30, the German Nature Conservation Association (NABU)⁵⁵ and the Federation for the Environment and Nature Conservation (BUND)⁵⁶ took part in public consultations and expressed their opposition to the project. The authorities stated that it was impossible to reach an amicable settlement on the substance and went ahead with the procedure. In 2012, the NABU appealed the decision to grant the VKE 30 project planning permission. The appeal was dismissed, making the planning permission final in June 2013.
- 1.4.13 The planning decision for the VKE 40 section was appealed several times between 2012 and 2019 (see Appendix 1). The latest appeals were dismissed in 2020 and no further legal proceedings are still open, to the knowledge of the EIB-CM.

1.5 Complaints

- 1.5.1 On 15 December 2020, the EIB Group Complaints Mechanism (hereinafter: EIB-CM) received a complaint from an individual regarding the project (see Section 1.1). The original letter concerned allegations of negative environmental impacts of the project. The EIB-CM sought further clarification. After discussing the matter with the complainant, the EIB-CM received additional information regarding the issues of concern.
- 1.5.2 On 4 February 2021, the EIB-CM received a second complaint from another individual regarding the same project with largely overlapping allegations.
- 1.5.3 At the initial assessment stage, the EIB-CM decided to proceed with an investigation of the allegations contained in both complaints, as reflected in the initial assessment report and described in Table 1 below.

⁵⁴ Planänderungsbescheid of 17 January 2019 related to landscape conservation measures VIII.13 A, IX.4.4, XI.13.2A (flowering fields). The statement communicated to the public, that the first and second planning permission changes were not subject to EIA, was not correct. The approval authority considered that this administrative error was irrelevant because all documents were made available to the public, the public had the possibility to comment and both requests for changes did not lead to additional material or new environmental impacts. There were modifications within the planning permission procedure and after the issue of the planning permission in 2012. The latter procedures did not result in an amendment of the EIA report.

⁵⁵ In German Naturschutzbund Deutschland, Landesverband Hessen e.V.

⁵⁶ In German Bund für Umwelt und Naturschutz Deutschland, Landesverband Hessen e.V.

Table 1 — Allegations subject to compliance review

| No. | Description |
|-----|--|
| # 1 | <p>Failure of the project to comply with applicable legislation, including EU environmental law, especially shortcomings of the assessment as required by the EIA Directive and other joint assessments:</p> <p>1.1. Issues with public access to information (i.e. concerning the EIA results)</p> <p>1.2. Non-compliance with the Water Framework Directive (e.g. failure to ensure the requirements of non-deterioration in an assessment of impacts relevant to Water Framework Directive)</p> <p>1.3. Issues with compliance with the Habitats Directive (e.g. remaining significant negative impacts on protected habitats and species and inadequate compensation measures)</p> <p>1.4. Non-compliance with noise requirements (e.g. unassessed negative noise impacts)</p> |
| # 2 | The project's non-compliance with the Paris Agreement and the EIB's climate change commitments |

- 1.5.4 The initial assessment report was issued on 7 June 2021. After a swift response from the complainant (Ref. SG/E/2020/21), it was corrected for factual inaccuracies⁵⁷. A new version of the initial assessment report was issued on 8 July 2021, as provided on the EIB CM website⁵⁸, and communicated to the stakeholders.

1.6 Work performed

- 1.6.1 Shortly after it received complaint ref. SG/E/2020/21, the EIB-CM conducted a kick-off meeting with the EIB services concerned during which it requested clarifications and further details regarding the EIB's project due diligence. After receiving a second complaint (Ref. SG/E/2021/02), the EIB-CM decided to merge the two complaints moving forward due to largely overlapping allegations.
- 1.6.2 In June 2021, the EIB-CM issued the initial assessment report⁵⁹ followed by a letter communicating to the complainants the correction of two factual errors in the report (see footnote 66). A corrected version of the initial assessment report was prepared and published on the EIB-CM webpage in July 2021⁶⁰.
- 1.6.3 Within the report, the EIB-CM established the allegations, which were subject to a compliance review.
- 1.6.4 During the investigation phase, the EIB-CM was in touch with the complainant of the case SG/E/2020/21 by phone and received several additional documents on the concerns raised. The EIB-CM remained at the disposal of the complainants and kept them informed on the investigation procedure. The EIB-CM reviewed information provided by the complainants in support of their allegations, as well as information publicly available and information made available by the EIB services.

⁵⁷ One inaccuracy was the Latin name of protected species: instead of "Kammuschel (Pectinidae)", it should read "Kammolch (Triturus cristatus)". Another factual inaccuracy had to do with the issues brought by the complainant with regard to the opinion of the European Commission.

⁵⁸ The initial assessment report (2021) is available here in [EN](#) and in [DE](#). It provides more details on the complaints.

⁵⁹ A correction was introduced and communicated to the complainants on 8 July 2021.

⁶⁰ The corrected initial assessment report is available here in [English](#) and [in German](#).

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- 1.6.5 The EIB-CM prepared this conclusions report based on a desk review of the submitted information as well as collected project-related documentation and publicly available information.

2 REGULATORY FRAMEWORK

2.1 The EIB Group Complaints Mechanism Policy and Procedures

- 2.1.1 The EIB Group Complaints Mechanism Policy⁶¹ tasks the EIB-CM with handling complaints concerning alleged maladministration by the EIB⁶². Maladministration means poor or failed administration⁶³. Maladministration may also relate to the environmental or social impact of the EIB Group's activities, and to the project cycle-related and other applicable policies of the EIB.
- 2.1.2 The policy specifies that the EIB-CM will analyse the EIB's activities with a view to determining whether the maladministration attributed to the EIB has taken place⁶⁴.
- 2.1.3 The EIB Group Complaints Mechanism Policy and Procedures⁶⁵ regulate the work of the EIB-CM. The EIB-CM compliance review includes an investigation of compliance with existing policies, procedures and standards⁶⁶.
- 2.1.4 It is important to note that according to Article 4.3.2 of the EIB Group Complaints Mechanism Policy, "[c]omplaints against [...] national, regional or local authorities (e.g. government departments, state agencies and local councils) are not handled by the EIB-CM."
- 2.1.5 As indicated below, the EIB environmental and social standards require the project's compliance with applicable national and EU law, which is the responsibility of the promoter and local authorities. Furthermore, Article 4.3.14 of the EIB-CM Policy states that "the EIB Group has a duty to verify compliance with its applicable policies, procedures or standards."
- 2.1.6 Finally, Article 1.4.5 of the EIB-CM procedures states: "An EIB-CM review will not pass judgment on activities under the sole responsibility of third parties, notably those of the promoter or borrower, or of authorities at local, regional or national level, of European institutions or international organisations. Unless an infringement of EU law is established by the European Commission or a competent judicial authority, an EIB-CM review will not call into question the correctness of the transposition of EU law into national law by EU Member States. The EIB-CM will refer the matter to the [European Commission] in case of serious concerns and inform the Management Committee accordingly."
- 2.1.7 The EIB-CM records its findings and conclusions in the form of a conclusions report⁶⁷. If it issues certain recommendations in the conclusions report, the policy tasks the EIB-CM with monitoring the implementation of the recommendations⁶⁸.

2.2 Project-applicable standards

- 2.2.1 The project must comply with the project applicable standards, which include, but are not limited to, relevant environmental law and the EIB's environmental and social standards⁶⁹.

⁶¹ Available at: https://www.eib.org/attachments/strategies/complaints_mechanism_policy_en.pdf.

⁶² § 5.1.3 of the EIB Group Complaints Mechanism Policy (2018).

⁶³ § 3.1 of the EIB Group Complaints Mechanism Policy (2018).

⁶⁴ § 5.3.3 of the EIB Group Complaints Mechanism Policy (2018).

⁶⁵ Available at: https://www.eib.org/attachments/strategies/complaints_mechanism_procedures_en.pdf.

⁶⁶ § 4.3.14 and § 5.3.3 of the EIB Group Complaints Mechanism Policy (2018).

⁶⁷ § 6.2.5 of the EIB Group Complaints Mechanism Policy (2018).

⁶⁸ § 5.3.1, indent 4 of the EIB Group Complaints Mechanism Policy (2018).

⁶⁹ The EIB environmental and social standards are described in the EIB Statement of Environmental and Social Principles and Standards (ESPS, 2009); the EIB's Environmental and Social Handbook (2013, Volume II) and the EIB's Environmental and Social Standards (2018).

Relevant EU environmental law

- 2.2.2 The **Strategic Environmental Assessment Directive**⁷⁰ (SEA Directive) provides the appraisal framework for the strategic documents involved in an environmental assessment. The "environmental assessment" involves preparing an environmental report, **carrying out consultations**, taking the environmental report and the results of these consultations into account in decision-making, and providing information on the decision. The environmental report shall identify, describe and evaluate the plan or programme's likely significant effects on the environment, and propose reasonable alternatives, taking into account the plan or programme's objectives and geographic scope⁷¹.
- 2.2.3 The **Environmental Impact Assessment Directive**⁷² (EIA Directive, as amended), requires the authorities to do the following:
- If an EIA is required, the developer must prepare and submit an EIA report. The information to be provided by the developer must include an **outline of the main alternatives** studied by the developer and an indication of the main reasons for the choice of a particular alternative, taking into account the environmental effects⁷³.
 - Within **reasonable timeframes and** allowing sufficient time for the public to participate effectively, the following information should be made available to the public concerned: any information gathered, the main reports and advice issued to the competent authority or authorities at the time the public concerned is informed, and any relevant information which only becomes available after the time the public concerned was informed about the EIA report. The public concerned must be given early and effective opportunities to participate in the environmental decision-making procedures and must be entitled to express comments and opinions when all options are open to the competent authority or authorities before the decision on the request for development consent is taken⁷⁴.
- 2.2.4 The **Water Framework Directive**⁷⁵ requires competent authorities to prevent deterioration of the status of surface and ground water bodies⁷⁶. In July 2015, the Court of Justice of the European Union confirmed that the competent authorities are required, unless a derogation is granted, to refuse authorisation for an individual project where it may cause a deterioration of the status of a water body⁷⁷. Since then, it has been clear that before any project is approved, a review of the individual water bodies concerned must be carried out in line with this Directive⁷⁸. According to independent technical experts, this also means that a check must be run to verify that a deterioration of the status of surface and ground water bodies has been ruled out, and that there are no obstacles that might prevent the objectives set being achieved on time⁷⁹.

⁷⁰ Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment.

⁷¹ Articles 4 to 9 of the SEA Directive describe the requirements and the elements of the SEA procedure to be transposed into national law. Public consultations' requirements stem from Article 6 of the Directive.

⁷² At the time of the EIA, Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment (EIA Directive, as amended on 23 April 2009, available [here](#)) was applicable. A consolidated version of the EIA Directive 2011/92/EU (as amended by Directive 2014/52/EU) is available [here](#).

⁷³ Articles 5(1) and 5(3), EIA Directive 85/337/EEC (as amended).

⁷⁴ Articles 6(3), 6(4) and 6(6), EIA Directive 85/337/EEC (as amended).

⁷⁵ Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy, as amended, available [here](#), accessed on 23 May 2022.

⁷⁶ Article 4(1)(a) and (b) of the Water Framework Directive.

⁷⁷ Para. 51 of Case C-461/13, available at: [CURIA - Documents \(europa.eu\)](#), accessed on 23 May 2022.

⁷⁸ [Press Release No. 37/2020 | Federal Administrative Court \(bverwg.de\)](#), accessed on 23 May 2022.

⁷⁹ Section 1.1 of the November 2020 Expert Report, available at: [1. ÜBERSCHRIFT1 \(hessen.de\)](#).

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- 2.2.5 **The Habitats Directive**⁸⁰ requires competent authorities to establish Natura 2000 — a network of protected sites⁸¹ with specific conservation objectives⁸². The competent authorities must subject any project likely to have a significant effect on a Natura 2000 site to an appropriate assessment of its implications for the site in view of the site's conservation objectives⁸³. A competent authority may agree to the project only after ascertaining that it will not adversely affect the integrity of the site⁸⁴. If, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a project must nevertheless be carried out for imperative reasons of overriding public interest, the competent authorities must take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected and to inform the European Commission of the compensatory measures adopted⁸⁵. The appropriate assessment can be carried out as part of the EIA⁸⁶.
- 2.2.6 **The Noise Directive**⁸⁷ defines a common approach intended to avoid, prevent or reduce harmful effects caused by exposure to environmental noise. The Directive sets the legal basis for harmonised calculations to perform strategic noise mapping and implement subsequent action plans⁸⁸.

Relevant national environmental legislation

- 2.2.7 The Consolidation of Laws Act⁸⁹ states that the planned construction and extension works must comply with the Federal Trunk Roads Act. A needs assessment must be carried out for route planning and for planning permission⁹⁰. The Trunk Road Extension Act⁹¹ is the legal basis for the construction, upgrading and capital maintenance investment in federal motorways and federal roads.⁹²
- 2.2.8 The SEA procedure is specified in Section 14 of the Environmental Impact Assessment Act (EIA Act)⁹³. It involves preparing an SEA report, carrying out consultations, taking the SEA report and the results of the consultations into account in decision-making, and providing information on the decision.

⁸⁰ Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, as amended, available [here](#), accessed on 3 May 2022.

⁸¹ Special areas of conservation (SACs) — Article 3 of the Habitats Directive.

⁸² Article 4(4) of the Habitats Directive.

⁸³ Article 6(3) of the Habitats Directive.

⁸⁴ Article 6(3) of the Habitats Directive.

⁸⁵ Article 6(4) of the Habitats Directive.

⁸⁶ Article 1(2) of the Directive 2014/52/EU of the European Parliament and of the Council of 16 April 2014 amending Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment, available [here](#), accessed on 3 May 2022.

⁸⁷ EU Directive 2002/49/EC of the European Parliament and of the Council of 25 June 2002 relating to the assessment and management of environmental noise (Noise Directive), as amended, available [here](#).

⁸⁸ Article 1: adoption of action plans by the Member States, based upon noise-mapping results, with a view to preventing and reducing environmental noise where necessary and particularly where exposure levels can induce harmful effects on human health and to preserving environmental noise quality where it is good.

⁸⁹ Article 27 of Section 1.2 relating to the Trunk Road Construction Act of Consolidation of Laws Act of 30 June 1990. The objectives the Federal Trunk Roads Act are provided in its Section 1(1).

⁹⁰ Sections 16 and 17 of the Federal Trunk Roads Act.

⁹¹ Trunk Road Extension Act ([FStrAbG](#)) (in German).

⁹² The link to procedure is available [here](#) (in German).

⁹³ In German *Umweltverträglichkeitsprüfungsgesetz* of 24 February 2010 (BGBl. I, p. 95), most recently amended by the Act of 6 October 2011 (BGBl. I, p. 1986).

- 2.2.9 The EIA procedure is enacted in the EIA Act⁹⁴ and the General Administrative Regulation for the Implementation of the EIA Act.⁹⁵ The list of projects subject to an EIA is provided in Annex 1 to the EIA Act⁹⁶.
- 2.2.10 The Habitats Directive is transposed into national legislation through various acts, such as the Federal Environmental Impact Assessment Act⁹⁷ and individual state legislation. The Federal Nature Conservation Act enables the protection of priority nature conservation areas of outstanding significance that are part of the network of Natura 2000 sites⁹⁸.
- 2.2.11 The Water Framework Directive is transposed into national legislation through various acts, such as the Federal Water Management Act⁹⁹ and individual state legislation¹⁰⁰.
- 2.2.12 Noise assessment is part of the EIA procedure and is guided by a number of national regulations and guidance documents, such as the 16th Regulation implementing the Federal Immission Control Regulation¹⁰¹ (Traffic Noise Protection Regulation), Noise Protection Guidance for Roads (Edition 1990) and Rural Roads Guidelines. Other national acts such as the Land Use Act may also be applicable.

***The EIB Statement of Environmental and Social Principles and Standards*¹⁰²**

- 2.2.13 The EIB Statement of Environmental and Social Principles and Standards (ESPS, 2009) states that “whereas the EIB finances projects for a number of EU policy reasons, among the priority lending priorities of the Bank in support of sustainable development is the protection and improvement of the natural environment and the promotion of sustainable communities.”
- 2.2.14 The ESPS must be applied by the EIB services in all its operations. It also informs promoters, the public, affected communities and other stakeholders, including other EU institutions, in particular, the European Commission, other multilateral financial institutions, financial and business partners, and representatives of civil society, including non-governmental organisations, as to the requirements of the Bank.
- 2.2.15 All projects financed by the EIB are required to undergo an EIB appraisal. The EIB will not finance projects that do not comply with EU and national environmental law in force at the time of appraisal. Within the European Union, the EIB assumes that national law correctly transposes EU environmental law and that the competent authorities are enforcing the national law. The finance contract describes the obligations of the promoter, on top of those legal requirements. The EIB monitors the environmental performance of the project, especially the fulfilment of any specific obligations described in the finance contract, based on the reports from the promoter and from its lenders technical advisor.

⁹⁴ In German *Umweltverträglichkeitsprüfungsgesetz* of 24 February 2010 (BGBl. I, p. 95), most recently amended by the Act of 6 October 2011 (BGBl. I, p. 1986).

⁹⁵ In German *Allgemeinen Verwaltungsvorschrift zur Ausführung des Gesetzes über die Umweltverträglichkeitsprüfung (UVPVwV)* of 18 September 1995 (GMBI.1995 S.671).

⁹⁶ Annex 1, Column 1, No 14.3, provides that the construction of a federal motorway is subject to an EIA.

⁹⁷ Available [here](#), accessed on 17 May 2022.

⁹⁸ Section 7(1)(8) of the Federal Nature Conservation Act (BNatSchG).

⁹⁹ (Wasserhaushaltsgesetz) Available at: [WHG — unofficial table of contents \(gesetze-im-internet.de\)](#), accessed on 17 May 2022.

¹⁰⁰ E.g. Hessen Water Act, available at: [Bürgerservice Hessenrecht — Table of Contents HWG | State standard Hessen | Table of Contents | valid from: 06.06.2018](#), accessed on 17 May 2022.

¹⁰¹ In German *Bundes-Immissionsschutzgesetz — BImSchG* of 26 September 2002 (as amended in 2011).

¹⁰² The EIB Statement of Environmental and Social Principles and Standards (2009) is available [here](#) (in English), accessed on 23 May 2022.

EIB Environmental and Social Standards¹⁰³***Standard 1: Assessment and management of environmental and social impacts and risks***

- 2.2.16 The overall objective of Standard 1 is to outline the promoter's responsibilities in the process of assessing, managing and monitoring environmental and social impacts and risks associated with the operations, including stakeholder engagement. The promoter must ensure that stakeholders are appropriately engaged with on environmental and social issues that could potentially affect them through a sustained public participation process comprising both information disclosure and meaningful consultation.
- 2.2.17 The promoter must carry out an environmental and social assessment for any project, which is likely to have significant environmental and social impacts and risks. The promoter will be responsible for putting in place its own systems for a comprehensive and rigorous assessment of environmental and social impacts and risks, using an integrated approach to achieve a high level of protection of the environment taken as a whole.
- 2.2.18 The promoter must establish and maintain throughout the project's lifecycle a process for identifying its environmental and social impacts and risks. The process will consider all relevant environmental and social impacts, along with the stakeholders who are likely to be affected by the project.
- 2.2.19 A comprehensive environmental and/or social assessment is carried out for projects classified under Annex I of the EU EIA Directive, and/or where an ESIA is required by national legislation or for projects where likely significant impacts and risks for the environment, population, human health and well-being have been determined. These projects require specific formalised and participatory assessment processes.
- 2.2.20 The EIB is required to submit projects it intends to finance to the Commission for an opinion¹⁰⁴. As part of this process, the EIB inter alia shares environmental information with the Commission, such as names of nearby protected areas and whether the project complies with the Habitats Directive¹⁰⁵.
- 2.2.21 During its appraisal, the EIB verifies that the project is in line with the EIB's environmental and social standards, including whether the appropriate assessment procedure set out in the Habitats Directive has been carried out¹⁰⁶.

Standard 3: Biodiversity and ecosystems

- 2.2.22 The EIB will only finance a project within a protected area, or within a nationally or internationally designated or recognised area for biodiversity conservation, if the promoter is able to demonstrate that the project has a legally valid permit and that the design of the project is consistent with any management plan for such areas. In the absence of such a plan, projects should be compatible with the achievement of the relevant conservation objectives used to designate the area in question.
- 2.2.23 Projects located in the European Union that may have a significant effect on a site designated or in the process of being designated Natura 2000, shall be subject to the assessment procedures required under Articles 6(3) and 6(4) of the EU Habitats Directive. The use of the European Commission guidelines for applying Articles 6(3) and 6(4) of the Habitats Directive is recommended.

¹⁰³ The EIB Environmental and Social Standards (2018) is available [here](#) (in English).

¹⁰⁴ Article 19 of the EIB Statute, available [here](#), accessed on 4 May 2022.

¹⁰⁵ Volume II, §§ 79 to –82 of the EIB Environmental and Social Handbook (2013), available [here](#), accessed on 4 May 2022.

¹⁰⁶ Volume II, § 90 of the December 2013 EIB Environmental and Social Handbook (2013).

- 2.2.24 For projects within the Natura 2000 network, the EIB requires the promoter to ensure that the assessment is able to demonstrate, with supporting evidence, that (i) there will be no significant effects on a Natura 2000 site; or (ii) there will be no adverse effects on the integrity of a Natura 2000 site; or (iii) there is an absence of alternatives to the project or plan that is likely to have adverse effects on the integrity of a Natura 2000 site; and (iv) there are compensation measures which maintain or enhance the overall coherence of the Natura 2000 network and the project is justified by imperative reasons of overriding public interest¹⁰⁷.
- 2.2.25 Cumulative impacts of the project should be appropriately assessed: (a) between the different elements of the projects (no “salami-slicing” of impacts); (b) with regard to other projects in the same area likely to have similar impacts; and (c) with regard to other activities, threats and pressures in the wider landscape that might have similar or related impacts on biodiversity and ecosystems.

Standard 4: Climate

- 2.2.26 Climate change considerations should be taken into account at all stages of the EIB’s project cycle. In particular, during the pre-appraisal and appraisal stage, the following analysis is carried out **selectively**: (i) adjustment economic and financial rates of return, (ii) carbon footprint assessment, (iii) climate change vulnerability assessment, and (iv) carbon credit potential assessment.
- 2.2.27 The EIB carries out a systematic assessment of the absolute and relative carbon emissions of all new single scheme investment loans. The carbon footprint is calculated for projects above the thresholds according to a carbon footprint methodology developed, tested and widely used by the EIB¹⁰⁸. The economic value of the likely impact of the operation on climate change, where significant, should be as far as practical factored into the calculation of the operation’s economic rate of return (ERR)¹⁰⁹.
- 2.2.28 The EIB requests information from project promoters on the climate change risks the projects face, but also the climate change risks in the system within which they operate, for instance vulnerability in the supply chain or surrounding infrastructure, communities and ecosystems. Where significant risks are identified, the EIB requires the promoter to identify and apply the necessary physical or soft measures at the planning, design and implementation stage to reduce these risks and to establish appropriate monitoring systems to ensure the sustainability of the project.

Standard 10: Stakeholder engagement

- 2.2.29 The specific objectives for the promoter include establishing and maintaining a constructive dialogue between the promoter, the affected communities and other interested parties throughout the project life cycle, ensuring that all stakeholders are properly identified and engaged, engaging stakeholders in the disclosure process, and conducting engagement and consultations in an appropriate and effective manner throughout the project lifecycle, in line with the principles of public participation, non-discrimination and transparency.
- 2.2.30 In terms of monitoring, the promoter will make all necessary arrangements to ensure stakeholder engagement during the monitoring phase. The promoter will therefore endeavour to involve independent third parties or to facilitate community-driven monitoring, where practical and acceptable for the communities concerned.

¹⁰⁷ Volume I, Standard 3, § 66 of the EIB Environmental and Social Handbook (2013).

¹⁰⁸ At the time of the stage II appraisal, the version 11 of the applicable EIB Project Carbon Footprint Methodologies (2018) was valid. The latest version of the Methodologies is available [here](#), last accessed 17 June 2022.

¹⁰⁹ B.2.4.2, Volume II of the December 2013 EIB Environmental and Social Handbook (2013).

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2.2.31 In terms of reporting, the promoter will regularly communicate and report back to the communities and individuals affected, whether through non-technical summaries of progress updates, engagement activities, public meetings or targeted issue-based hearings.

The Trans-European Transport Network (TEN-T) programme and the Transport Policy of the European Union

2.2.32 The TEN-T was formally launched in 1996 when the European Parliament and the Council issued a decision¹¹⁰ establishing the Guidelines for the development of TEN-T. In 2010, the guidelines have been updated modifying corridors and including the maps¹¹¹. In 2013, the above decision establishing the Guidelines was repealed by the Regulation on Union guidelines for the development of the Trans-European Transport Network and repealing Decision No 661/2010/EU (TEN-T Regulation)¹¹².

2.2.33 The infrastructure development of the TEN-T is closely linked to the implementation and further advancement of the Transport Policy of the European Union¹¹³. 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)¹¹⁴.

2.2.34 The TEN-T policy^{115, 116}:

- 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 the network — existing and planned parts — which integrate EU legislation in force and lead the way infrastructure-wise to achieving key policy objectives.
- Highlights the importance of nodes as an integral part of the network.
- Notably through the new core network corridor approach, advances sustainable transport solutions which lead the process towards achieving the European Union's long-term transport policy objectives (meeting future mobility needs while ensuring resource efficiency and reducing carbon emissions).

2.2.35 ***The EIB's Transport Lending Policy***¹¹⁷ sets out the following:

- The EIB's objectives reflect three key EU public policy goals: (i) increased growth and employment potential (for instance, the TEN-T); (ii) economic and social cohesion; and (iii) environmental sustainability. The TEN-T policy is a key source of transport lending for the EIB with a focus on projects contributing to EU objectives.

¹¹⁰ Decision No 1692/96/EC of the European Parliament and of the Council of 23 July 1996 on Community guidelines for the development of the trans-European transport network available [here](#) (amended by Decision No.884/2004/EC available [here](#) and Regulation (EC) No 1791/2006).

¹¹¹ Decision No 661/2010/EU of 2010 available [here](#).

¹¹² 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 (available [here](#) (as amended)).

¹¹³ White Paper on Transport: Roadmap to a Single European Transport Area — towards a competitive and resource efficient transport system, COM(2011)144 available [here](#), last accessed 5 July 2022.

¹¹⁴ See TEN-T Regulation (2013) available [here](#), last accessed 30 May 2022.

¹¹⁵ TEN-T Guidelines were in revision in 2021.

¹¹⁶ Memo (European Commission) Ref. MEMO/09/47 (2009): Green Paper: TEN-T policy review. Towards a better integrated trans-European transport network at the service of the common transport policy, available [here](#), last accessed 5 July 2022.

¹¹⁷ EIB's Transport Lending policy (2011) available [here](#).

- The EIB takes multi-stage and multi-dimensional approach to selecting and appraising transport projects. The goal is to maximise the value added by the Bank's lending so that it makes the best possible contribution to furthering EU policy.
- The EIB's investments reflect one or more of these public policy goals and the Bank finances transport projects if they help meet the objectives set in the Bank's Statute and Corporate Operational Plan. The EIB's project pipeline reflects the investment needs of promoters who generate and implement projects.
- The EIB conducts extensive technical due diligence on all of the projects presented to it for funding. This appraisal process has certain common aspects for all sectors. In addition, each sub-sector has a number of specific considerations.

2.3 Responsibilities of the EIB

- 2.3.1 In line with the ESPS¹¹⁸, the responsibility for compliance with the project-applicable standards lies with the promoter and local authorities. However, the EIB will not finance projects that do not meet project applicable standards. **The EIB performs its due diligence during project appraisal and monitoring** to establish whether the projects meet the project-applicable standards (see also § 2.2.1).
- 2.3.2 The ESPS requires the EIB to appraise projects it finances. The appraisal takes place prior to the signature of the finance contract¹¹⁹. The appraisal aims to, amongst other things, assess the project's impact and whether the project complies with the project-applicable standards. Sometimes, conditions for disbursement are set as a result of the appraisal. The promoter must complete these conditions to the satisfaction of the EIB prior to the disbursement of the EIB financing¹²⁰.
- 2.3.3 The EIB's Environmental and Social Handbook (2013, Volume II) (hereinafter, the Handbook), describes in details the EIB's due diligence and monitoring procedures¹²¹. The key points include the following:
- The Handbook provides an overview of the EIB's environmental and social standards, documentation, internal due diligence and the information required from the promoter. For all projects requiring an EIA, at least a non-technical summary will be made public, either on the EIB's project website or by a link to the promoter's website.
 - The EIB's environmental and social experts support the EIB's appraisal teams in the environmental and social assessment of operations. Their level of intervention is determined by the level of environmental and social due diligence required, the significance and complexity of the potential impacts and risks identified at the pre-appraisal stage.
 - The members of the environmental assessment group¹²² that represent the EIB work to ensure the quality and consistency of the environmental and social due diligence throughout the EIB project cycle. The EIB's environmental and social experts will provide support to individual members of the group, as and when required.
 - The EIB's environmental and social due diligence is recorded in the Environmental and Social Data Sheet (ESDS), which is reviewed by a member of the environmental assessment group. There should be an indication whether the project has an impact on protected nature conservation sites, protected species or on areas of important biodiversity, including information on assessments carried out in compliance with Article 6 of the Habitats Directive

¹¹⁸ The Statement part of the 2009 EIB Statement of Environmental and Social Principles and Standards (2009).

¹¹⁹ Information on the EIB project cycle is available [here](#), last accessed on 1 June 2022.

¹²⁰ § 256, indent 2, Volume II of the EIB's 2013 Environmental and Social Practices Handbook.

¹²¹ More specific requirements in relation to EIB's role are provided in the sections above in the report that are dealing with the specific standards applicable. This paragraph refers more generally to EIB's role as per Volume II of the EIB's 2013 Environmental and Social Practices Handbook (2013).

¹²² The members of the environmental assessment group are called ENVAGs.

or any other international convention. **If the proposed project or the project promoter is subject to a negative campaign, it should be noted in the ESDS.**

- Once the promoter signs the finance contract, the EIB is required to monitor the project. The monitoring aims to ensure compliance of the project with the EIB's approval conditions.

3 PROJECT CYCLE

The EIB's project cycle consists of pre-appraisal, appraisal, decision for financing, signing of the finance contract and project monitoring¹²³.

3.1 Pre-appraisal

- 3.1.1 The project's pre-appraisal in 2018 stated that the project's EIA and other environmental related requirements would be assessed during the appraisal phase.
- 3.1.2 The EIB services highlighted that, as part of the TEN-T, the project serves several transport functions, from international to local level. They noted that the project aims at eliminating capacity bottlenecks and increasing travel safety. Heavy good vehicles will make up around 20% of annual average daily traffic on the A49 in 2025.
- 3.1.3 The EIB services committed to analysing (i) the carbon footprint of the project and its environmental impact and (ii) the potential measures to adapt the infrastructure/motorway to the expected climate change impacts.
- 3.1.4 The pre-appraisal noted that the project promotes overarching objectives of the European Union, such as the proper functioning of the EU market and strengthening of economic and social cohesion and that it contributes to the completion of the TEN-T network.

3.2 Appraisal and Environmental and Social Data Sheet (ESDS)

- 3.2.1 Considering that the project is a public-private partnership (PPP), the EIB procedures make the project subject to a two-stage appraisal. Stage I of the EIB appraisal was completed in 2019. The appraisal noted the existence of an SEA and two relevant EIA procedures dated 2013 and 2017. Moreover, the appraisal noted that:
 - The project is a greenfield motorway section with 6 viaducts, 1 railway overpass, 1 wildlife crossing, 18 overpasses of 35 to 58 metres, 18 underpasses for roads, rivers and culverts, 1 wildlife underpass and at least 9 rainwater catchment reservoirs. Also, an area of approximately 30, 000 m² of noise protection walls has been recorded together with Natura 2000 compensation (not included in the project investment costs).
 - Environmental impacts during construction include vegetation loss, disruption to wildlife, temporary modification of water bodies, and increased noise levels from heavy equipment and traffic. The main impacts at operation stage will stem from noise and increased severity. The residual environmental impacts after mitigation are expected to be limited.
 - The project will have a marginally positive environmental impact, as it will relieve congestion. The EIB estimated that the project will lead to a decrease of 12,000 tonnes of CO₂ emissions per operating year.

¹²³ See footnote 119.

- An appropriate assessment was carried out for the site called “Wieragrund von Schwalmstadt”¹²⁴ because of the likelihood of significant negative impacts. The measures taken to compensate and mitigate the substantial impacts on flora and fauna are considered adequate by the competent authority.
 - The appraisal did not propose any environmental or social safeguards to be included in the finance contract. The appraisal noted that the project progress reporting deadlines and frequency of reporting would be determined in the EIB’s stage II appraisal¹²⁵.
 - No particular measures to address climate change risks have been noted. The project was found to decrease CO₂ emissions by 4% over a 25-year study period, giving an average decrease of 11 kt of CO₂ per year. The estimate reflected the capabilities of the methodologies used at the time, the results of which might evolve in the future.
- 3.2.2 As part of the appraisal, the EIB services prepared the **ESDS**, which was provided to the Board of Directors for the project’s approval. The ESDS¹²⁶ states that:
- **The need for the project was identified** in the Federal Transport Investment Plan-2030, which was subject to an SEA. The approval document notes that the implementation of FTIP should solve the congestion problems of the roads currently serving the area and should also entail improvements in travel safety and time savings. The proposed project scope falls under Annex I of the EIA Directive 2011/92/EC amended by Directive 2014/52/EU with a mandatory EIA. The competent authority¹²⁷ issued the planning permission decisions for section VKE 30 in June 2013 and for section VKE 40 in December 2017.
 - Because the project crosses a Natura 2000 site, an appropriate assessment was carried out. The EIB services noted that the appropriate assessment concluded that the project does not, either alone or combined with other plans and projects, affect the preservation of the main elements of this Natura 2000 site.
 - The main impacts at operation stage will stem from noise and increased separation (barrier effect). Mitigation measures have been listed, with the residual impact after mitigation expected to be limited.
 - The project is included in the EIB Carbon Footprint exercise and provides estimates of CO₂ emissions in absolute terms and emission savings in a standard year of operation.
 - Public consultation is embedded in the EIA process and other elements of the project planning procedure. Public consultation is complete on all sections of the project.

The ESDS did not provide any environmental or social conditions precedent or undertakings for inclusion in the finance contract. During the stage II approval of the project loan, the EIB’s governing bodies did not add any environmental or social conditions or undertakings for inclusion in the finance contract.

3.3 Signature of the finance contract

- 3.3.1 The project description in the finance contract mirrors the description in the appraisal. The conditions and undertakings for the finance contract were set in the stage II appraisal.

¹²⁴ FFH-Gebiet 5120-301. This is not the site for which the appropriate assessment has been carried out.

¹²⁵ The stage II appraisal of the EIB took place in 2020.

¹²⁶ Environmental and Social Data Sheet (ESDS) available [here](#) (in English).

¹²⁷ Hessian Ministry of Economics, Transport and Regional Development (in German *Hessisches Ministerium für Wirtschaft, Verkehr und Landesentwicklung*).

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- 3.3.2 In line with regular contractual clauses on environmental matters, the finance contract for the A49 project requires the promoter to implement and operate the project in compliance with EU and national environmental law¹²⁸. The finance contract also requires the promoter to ensure that all the relevant approvals have been obtained and are in full force prior to the disbursement of each tranche of the loan (including the first tranche)¹²⁹. Non-compliance with this condition would block the disbursement of the EIB's funds¹³⁰. The finance contract requires the promoter to provide the EIB with information concerning the project¹³¹.
- 3.3.3 The finance contract contains an additional condition precedent requiring the receipt of a declaration from the competent authority on the assessment carried out under Article 6 of the Habitats Directive (92/43/EEC).

4 FINDINGS AND CONCLUSIONS

4.1 Allegation 1: Failure of the project to comply with applicable legislation

- 4.1.1 The allegation regarding the failure of the project to comply with applicable legislation, including EU environmental law, especially regarding shortcomings of the assessment as required by the EIA Directive and other joint assessments, refers more particularly to:
- Issues with public access to information (i.e. concerning the EIA results);
 - Non-compliance with the Water Framework Directive (such as failure to ensure the non-deterioration requirements were fulfilled in an assessment of impacts relevant to the Water Framework Directive);
 - Issues with compliance with the Habitats Directive (such as remaining significant negative impacts on protected habitats and species and inadequate compensation measures); and
 - Non-compliance with noise requirements (such as unassessed negative noise impacts).

Findings on compliance with applicable standards related to public access to information (i.e. concerning the EIA results)

- 4.1.2 During its investigation, the EIB-CM assessed the alleged issues with public access to information within the decision-making procedures for the project. The allegation and the sub-element are linked by the allegedly insufficient public access to information and consultations when considering alternative means of achieving the project's objectives (such as other modes of transport and mobility management). An overview of the decision-making process on the project is provided in sections 1.2 — 1.4 of this report.
- 4.1.3 The EIB's environmental and social standards require public information and consultation during the SEA and EIA. Both Directives have requirements regarding the alternatives, but in a different form: while the SEA Directive requires that the alternatives be identified, described and evaluated taking into account the objectives and the geographic scope of the plan or programme, the EIA Directive requires that the EIA report include an outline of the main alternatives studied by the developer and an indication of the main reasons for the choice of a particular alternative, taking into account the environmental effects (see § 2.2.3).

¹²⁸ Section 1(a) of the EIB template contractual clauses on environmental matters, available [here](#), accessed on 23 May 2022.

¹²⁹ Section 1(b) of the EIB template contractual clauses on environmental matters.

¹³⁰ § 256, Volume II of the EIB Environmental and Social Handbook (2013).

¹³¹ Section 1(c) of the EIB template contractual clauses on environmental matters.

- 4.1.4 It is important to point out that in Germany, road planning and implementation is at least a three-stage procedure. The starting point is the Federal Transport Investment Plan (FTIP; see Textbox 2 below) concluding with a legislative procedure. The appropriate FTIP for the project was adopted in 2003 and followed by the project's inclusion in an appendix to the Trunk Road Extension Act (see § 1.2.2). As stated above, the said process was not accompanied by the SEA procedure. Therefore, the public consultations and access to information were governed by the national law applicable at the time.

Textbox 2 — Federal transport planning

The Federal Transport Investment Plan (*Bundesverkehrswegeplan* in German, hereinafter FTIP) is currently developed by the Federal Ministry of Transport and Digital Infrastructure every 15 years. It is then adopted by the German Bundestag as an appendix to the Federal Trunk Road Extension Act via a legislative procedure. This appendix is the requirements' plan for federal highways (*Bedarfsplan für Bundesfernstraßen*, in German). Once a project has been included in the requirements' plan for federal highways (including its urgency and financing from the federal budget), it is considered to be legally established. The FTIP is based on a cost-benefit analysis. Impacts that are difficult or impossible to monetise are examined separately in environmental, nature conservation, spatial planning and urban development assessments.

Following an amendment to the Law on Motorways and Highway Expansion (*Fernstraßenausbaugesetz* in German) in 1990, via the third Federal Legal Validation Act (*Rechtsbereinigungsgesetz* in German), once a motorway is introduced in the requirements' plan for federal highways, alternative transport solutions can no longer be investigated (only alternative routes).

- 4.1.5 The project was first included in the FTIP of 1992 as the A49 and then in the FITP of 2003¹³² (see § 1.2.2), both of which were adopted before the SEA Directive came into force. The FTIP-2003 qualified the project components (VKE 30 and VKE 40) as "new investments with special environmental planning procedures" not excluding the project's impacts on the Natura 2000 network, later included under the Trunk Road Extension Act (see Textbox 2). By being included in the Annex of the above mentioned act, the project became mandatory, though it had to go through a development content procedure (see Section 1.3). The planning and decision making procedure for the FTIP relevant to the project in question started before 2004. Evidence suggests that after the Directive came into force, the FTIP was subject to the procedure as required by the SEA Directive (see §§ 1.2.3); therefore the public was consulted and provided with information, as required.
- 4.1.6 Later, the project was included and analysed within the regional planning and transport network determination procedures (see Section 1.3). The relevant procedures for the regional plans for North Hessen and Central Hessen were subject to SEA and public consultations, with both plans adopted in 2010. The SEA for the plan for Central Hessen included the assessment, as required by the Habitats Directive (see § 1.3.2), which also requires public consultations.
- 4.1.7 If the public is not satisfied with the alternative selection process (including the project's justification), the planning procedure leading to the selection of the preferred alternative (and its

¹³² The FTIP-2003 was not subject to an SEA (before the SEA Directive came into force), but it was analysed in terms of environmental risks (see § 1.2.2), especially since the project was required for imperative reasons of overriding public interest (IROPI). The latter has to be proven in case of the likely significant impacts on the Natura 2000 network as per the Habitats Directive. It must be noted that the relevant Natura 2000 site "Herrenwald östlich Stadttallendorf" was proposed in November 2004. However, the German authorities already anticipated the likelihood of significant negative impacts on the site in question and planned an appropriate procedure. As such, the project had undergone appropriate assessment at the stage of the planning permission in terms of alternative alignments without questioning the type of the project or a review of alternative transport solutions. The plan noted the "urgent need" for the project underlining a number of issues it will help to solve.

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SEA) should provide the public with an opportunity to be consulted on, information on and access to justice on that matter. It is however beyond the mandate of the EIB-CM to establish how public information, participation and access to justice is enabled in the context of the procedure for the Trunk Road Extension Act and the regional land use planning given the above (the project was included in the Appendix of this Act and thus became mandatory). Moreover, as the project in question was approved via a legislative procedure before the SEA Directive came into force, the question of compatibility of German law with EU law and the Aarhus Convention falls beyond EIB-CM's remit as well. Last but not least, the EIB-CM notes that once a project is made part of TEN-T, its implementation becomes not only a national but also a European objective.

- 4.1.8 The planning permission process for the two project components was carried out following the requirements of the EIA Directive (see Section 1.4), which requires public consultation, information and access to justice. The EIA Directive, however, does not require a comparison of alternatives, but necessitates an outline of the main alternatives studied and a description of the main reasons for choosing the preferred alternative (see § 2.2.3¹³³).
- 4.1.9 The project components (VKE 30 and VKE 40) received planning permission in 2012. The **EIA procedures** included the preparation of EIA reports, the provision of information to stakeholders including the public, consultations with the public (see more particularly §§ 1.4.1 — 1.4.8) and decision making. Moreover, planning permissions can be appealed and this right was exercised by the public —, by individuals and NGOs. The appeal against the planning permission for VKE 30 was rejected in 2013 (see § 1.4.12), while the planning permission for VKE 40 was also appealed several times until the last two appeals were examined in June 2020 (see Appendix 1). The national court found the planning permissions for both sections valid and rejected the appeals (see § 1.4.13). The above also demonstrates that the right of public access to justice was exercised at the planning permission stage. As none of the procedures invalidated the decisions concerned, the EIB CM considers that the planning permission for the project is valid (see §§ 2.1.4 and 2.2.15).
- 4.1.10 The EIB-CM did not identify any relevant infringement established by the Court of Justice of the European Union vis-à-vis the transposition of the EIA Directive¹³⁴ and SEA Directive.
- 4.1.11 Normally, legal and policy changes after the launch of project planning do not apply to projects with completed approval stages¹³⁵. The EIB-CM is not in a position to question documents adopted within decision-making procedures, which were found to be in compliance with the law, even more so in the absence of an established infringement.

Findings on the EIB's role related to public access to information (i.e. concerning the EIA results)

- 4.1.12 The EIB appraisal noted that the project was subject to an **SEA as part of the preparation of the FTIP-2030** (see § 1.2.3 and § 3.2.2). The EIB-CM established that the FTIP-2030 and its SEA did not re-examine the project in question. However, the project was indeed a part of the FTIP analysis.
- 4.1.13 The EIB appraisal noted that public consultation was embedded in the EIA and other processes involved in the planning permission. Once the SEA Directive came into force, the FTIP and the regional plans for North and Central Hessen were subject to SEA procedures (see Sections 1.2 and 1.3). The relevant planning permissions were also subject to an EIA, as described in Section

¹³³ On the analysis of alternatives for the purpose of the assessment as per the Habitats Directive, please see § 4.1.24.

¹³⁴ Initiation of an infringement procedure, as announced by the European Commission on [9 June 2021](#) is not relevant to the project as it relates to specific projects, mostly rail-related, as specified in the announcement itself.

¹³⁵ An example is the Noise Directive, which requires to prepare noise maps in order to address issues with excessive noise (see §2.2.6)

1.4. The EIB services confirmed that SEA and EIA procedures were applied to the decision-making stages, as appropriate.

- 4.1.14 The Bank's appraisal did not establish any issues with public access to information or the public consultation procedure for the project or its components in question. However, the EIB's ESDS has shortcomings as it does not refer to a number of the points required by EIB environmental and social standards (see §2.3.3): **the ESDS does not make any mention of issues raised by the public during the EIA consultations nor does it acknowledge that the project was subject to a negative campaign.**
- 4.1.15 As regards the alternatives, since the core alternative was settled before the planning permission issue, and because the project was included in TEN-T (see § 1.3.3), the EIB had to appraise the project as proposed by the promoter, and was not in a position to question its rationale, as required by its Transport lending policy (see §2.2.35). Verifying the compliance of old documents would be beyond the scope of the EIB's due diligence, especially since the appeals meant that the project was also subject to a national judicial review.

Findings on compliance with applicable standards related to the Water Framework Directive

- 4.1.16 In September 2019, an environmental NGO¹³⁶ asked the planning authority to: (i) withdraw; (ii) revoke; or (iii) suspend the planning decision for VKE 40 in order to carry out a supplementary procedure for a water body¹³⁷. The NGO based its request on the fact that the examination of water law was inadequate with regard to the 2015 CJEU ruling¹³⁸ (see § 2.2.4). In September 2019, the planning authority rejected the request. The NGO appealed this decision.
- 4.1.17 In June 2020, the Federal Administrative Court upheld the 2012 planning decision¹³⁹. However, the court stated that the planning decision proved to be erroneous taking into account the 2015 CJEU ruling (see § 2.2.4). More specifically, the court noted that while the decision contained extensive studies on road drainage and drinking water protection, there was no examination against the specific requirements of the Water Framework Directive, a requirement in line with the 2015 CJEU ruling. Nevertheless, the court upheld the planning decision stating that a suspension of the decision's enforcement is not necessary and that the flexible rules of German water legislation offer sufficient possibilities to ensure that the project is not in permanent conflict with the Water Framework Directive. If necessary, the Court concluded, the protective measures can be ordered retrospectively and the legally independent water permits can be adapted or even revoked.
- 4.1.18 In November 2020, at the request of the planning authority, independent technical experts delivered a report for the implementation of the Federal Administrative Court ruling (see §4.1.17). The report concluded that VKE 40 component, including the associated technical installations, will not lead to a deterioration of any of the elements of surface and groundwater bodies under the Water Framework Directive and that all practically appropriate measures are taken to minimise negative effects on the water status¹⁴⁰.

¹³⁶ Bund für Umwelt und Naturschutz Deutschland - BUND is a grassroots NGO with more than 480,000 members and supporters. It was founded in 1975 to promote nature conservation and protect the environment. – www.bund.net.

¹³⁷ § 4 of the Case 9 A 22.19, available at: [Press Release No. 37/2020 | Federal Administrative Court \(bverwg.de\)](https://www.bverwg.de/press-releases/37-2020); [Press Release No. 37/2020 | Federal Administrative Court \(bverwg.de\)](https://www.bverwg.de/press-releases/37-2020), accessed on 23 May 2022.

¹³⁸ Case C-461/13, available at: [CURIA - Documents \(europa.eu\)](https://eur-lex.europa.eu/curia/doclist/curia.do?doc=DOCUMENT_LIST&docId=3247000), accessed on 23 May 2022.

¹³⁹ Cases 9 A 22.19, available at: [Press Release No. 37/2020 | Federal Administrative Court \(bverwg.de\)](https://www.bverwg.de/press-releases/37-2020) and 9 A 23.19, available at: [Press Release No. 37/2020 | Federal Administrative Court \(bverwg.de\)](https://www.bverwg.de/press-releases/37-2020), accessed on 23 May 2022.

¹⁴⁰ See Section 6 of the November 2020 Expert Report, available at [1. ÜBERSCHRIFT1 \(hessen.de\)](https://www.ueberschrift1.de).

Findings on the EIB's role related to the Water Framework Directive

- 4.1.19 In September 2019, as part of the Stage I appraisal, the EIB noted that the project's environmental impacts during construction and operation included temporary modification of water bodies¹⁴¹.
- 4.1.20 In February 2020, as part of the stage II appraisal, the EIB noted that there was an ongoing court case challenging the validity of the planning decision. The EIB noted that the risk posed by this court case were that the decision might be partially or totally revoked, which in addition to cost overruns, could either delay the project or even lead to its cancellation.
- 4.1.21 Since court proceedings were still ongoing at that time, the EIB required the promoter to inform it if any of the approvals are successfully challenged in a court case and any subsequent developments.
- 4.1.22 In the context of EIB's monitoring of the project, in 2021, it was reported that there were no irregularities established concerning the water protection measures. Monitoring of water quality and water protection measures, such as the measures against erosion and silting of rivers, was conducted. Moreover, it was reported that there was a close contact with the authorities.

Findings on compliance with applicable standards related to the Habitats Directive

- 4.1.23 VKE 40 crosses the western part of the "Herrenwald östlich Stadtallendorf" Natura 2000 site^{142, 143}.
- 4.1.24 The EIA process included the appropriate assessment of the impact of the project on the Natura 2000 site. Twelve possible alternative motorway routes were assessed and, according to competent authorities, none of the alternatives could adequately reach the goals of the national traffic plan without affecting the Natura 2000 site¹⁴⁴. The assessment concluded that the construction of this section will have a significant impact on the Natura 2000 site¹⁴⁵, therefore, triggering specific mitigation and compensation measures¹⁴⁶.
- 4.1.25 In line with the Habitats Directive (see § 2.2.5), the European Commission gave a positive opinion on the project in 2010¹⁴⁷. The Commission considered the project to be of overriding public interest due to the reduction of (i) local air pollution by up to 75 %; (ii) noise levels by almost 10 dB(A); and (iii) traffic by 100 000 journey per day between individual districts¹⁴⁸. The Commission said that its positive opinion was conditional on the proper implementation and monitoring of the compensation measures and a detailed report to be submitted to the Commission¹⁴⁹.

¹⁴¹ Environmental and Social Data Sheet (ESDS) available [here](#) (in English).

¹⁴² (DE 5120-303) - For more information on the site see: [N2K DE5120303 dataforms \(europa.eu\)](#), accessed on 4 May 2022.

¹⁴³ Section III of the December 2010 Commission Opinion on request of Germany pursuant to Art. 6 (4) Sub Par. 2 of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, concerning the construction of the extension of the motorway A49 by linking the end of the completed A 49 at Neuental with the A5 in Hessen (Germany) (C(2010) 8438) (Habitats Commission Opinion), available at: [untitled \(europa.eu\)](#), accessed on 4 May 2022.

¹⁴⁴ Section VI of the Habitats Commission Opinion, available at: [untitled \(europa.eu\)](#), accessed on 4 May 2022.

¹⁴⁵ For more information on the exact impact: see Section V of the Habitats Commission Opinion, available at: [untitled \(europa.eu\)](#), accessed on 4 May 2022.

¹⁴⁶ Section VI of the Habitats Commission Opinion, available at: [untitled \(europa.eu\)](#), accessed on 4 May 2022.

¹⁴⁷ Habitats Commission Opinion, available at: [untitled \(europa.eu\)](#), accessed on 4 May 2022.

¹⁴⁸ February 2012 Corrigendum to Commission Opinion C(2010) 8438 final of 3 December 2010 on request of Germany pursuant to Art. 6 (4) Sub Par. 2 of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, concerning the construction of the extension of the motorway A 49 by linking the end of the completed A49 at Neuental with A5 in Hessen (Germany) (C(2012) 911 final), available at: [hessen_corr_en.pdf \(europa.eu\)](#), accessed on 4 May 2022.

¹⁴⁹ Section VII of the Habitats Commission Opinion, available at: [untitled \(europa.eu\)](#), accessed on 4 May 2022.

- 4.1.26 In 2011, the European Parliament registered a petition from an NGO¹⁵⁰ challenging the accuracy of the information that the European Commission based its positive opinion on in 2010¹⁵¹. The Commission relied on the documents submitted by Germany that formed part of the national planning decision procedure¹⁵². The Commission informed the petitioner that it is the competence of the national courts to verify the factual accuracy of data used as the basis of a project's authorisation¹⁵³. That said, the Commission published a corrigendum to its observations in 2012 (due to a translation error)¹⁵⁴.
- 4.1.27 In 2017, the European Parliament registered a petition from the same NGO asking for the withdrawal of the positive opinion given by the Commission in 2010¹⁵⁵. In its reply, the Commission noted that: (i) the petitioner did not provide any new information; (ii) a court in Germany ruled on this issue and did not identify any significant errors in the documents provided by Germany to the Commission; and (iii) the court in Germany ruled that the project was justified by overriding public interest¹⁵⁶.
- 4.1.28 In March 2021, the European Ombudsman closed a case concerning the European Commission's positive opinion¹⁵⁷. The complainant was the challenging accuracy of the information reviewed by the Commission. The European Ombudsman noted that the case had already been dealt with by two European Parliament petitions and by the court in Germany. The European Ombudsman also concluded that the complaint concerned a matter outside the Ombudsman's remit.
- 4.1.29 It is worth noting that in February 2021, the European Commission referred an infringement procedure against Germany over the proper implementation of the Habitats Directive before the Court of Justice of the European Union¹⁵⁸. The Commission considers that Germany did not set sufficiently detailed and quantified conservation objectives for all special areas of conservation¹⁵⁹ in Germany. The court had not yet issued its ruling as of July 2022.

Findings on the EIB's role in relation to the Habitats Directive

- 4.1.30 As required (see §2.2.20), the EIB sought the opinion of the European Commission in December 2018. The EIB informed the Commission that the EIB-funded section of the motorway directly crosses the Natura 2000 site¹⁶⁰. In January 2019, the Commission informed the EIB that the project will have a significant effect on the Natura 2000 site but that, nevertheless, the Commission had previously given its positive opinion on the project (see §4.1.25). Therefore, the Commission issued a favourable opinion on the EIB project in February 2019.
- 4.1.31 In September 2019, the EIB concluded that there was a number of Natura 2000 sites in the vicinity of the project, one of which was being crossed by the new motorway. The EIB noted in its ESDS that one Natura 2000 site was identified by the screening and an appropriate assessment was therefore carried out. The EIB noted in the ESDS that "[t]he appropriate

¹⁵⁰ Botanische Vereinigung für Naturschutz in Hessen (Germany).

¹⁵¹ Section 1 of the Petition 0639/2011, available at: [CM PETI \(europa.eu\)](#), accessed on 4 May 2022.

¹⁵² Petition No 1459/2016, available at: [CM PETI \(europa.eu\)](#), accessed on 4 May 2022.

¹⁵³ Section 4 of the Petition 0639/2011, available at: [CM PETI \(europa.eu\)](#), accessed on 4 May 2022.

¹⁵⁴ The EC issued Corrigendum C(2012) 911 final on 15 February 2012, available [here](#).

¹⁵⁵ Section 1 of the Petition No 1459/2016. See: [CM PETI \(europa.eu\)](#), accessed on 4 May 2022.

¹⁵⁶ Sections 3, 4, and 5 of the Petition No 1459/2016. See: [CM PETI \(europa.eu\)](#), accessed on 4 May 2022.

¹⁵⁷ Case 245/2021/SF, available at: [Decision in case 245/2021/SF on how the European Commission has dealt with an application by Germany for authorisation to build a motorway in a nature reserve under the Habitats Directive | Correspondence | European Ombudsman \(europa.eu\)](#), accessed on 4 May 2022.

¹⁵⁸ https://ec.europa.eu/commission/presscorner/detail/EN/IP_21_412, accessed on 4 May 2022.

¹⁵⁹ Please note that the Commission referred to the Sites of Community Importance. In line with Article 4 of the Habitats Directive, once a site of Community importance has been adopted, the Member State concerned shall designate that site as a SAC.

¹⁶⁰ "Herrenwald östlich Stadtallendorf" (DE 5120-303).

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assessment concluded that the project does not, either alone or combined with other plans and projects, affect the preservation of the main elements of this Natura 2000 site”¹⁶¹.

- 4.1.32 As part of its finance contract, the EIB required for the first disbursement the receipt of a declaration from the competent authority on the appropriate assessment. The EIB considered the EIA decision as an equivalent for meeting this condition.
- 4.1.33 In the context of EIB’s monitoring of implementation of the project, it was reported that the following was monitored: (i) installation of amphibian protection fences and trap buckets; (ii) relocation of protected species (such as sand lizards and tree frogs); and (iii) measures to disturb wild animals and prevent nesting on construction site.

Findings on compliance with applicable standards related to noise

- 4.1.34 The EIB’s standard 1 requires noise impacts to be assessed within the EIA procedure using one or a combination of techniques. The EIA Directive (2011) does not have any emphasis on monitoring, unlike the amendment introduced by the EIA Directive of 2014 (in force from May°2017).
- 4.1.35 The project, among other things, aims at contributing to noise reduction in urban areas. Hessen is the fifth most populous federal state of Germany with almost a third of the population indicating that noise is an issue¹⁶². The project was planned for several decades, and its approval procedure preceded the preparation of the noise maps required by the Noise Directive (see §2.2.6). The project may help reduce traffic noise in some urban areas, which is the objective of the said Directive. However it will inevitably cause noise in new places, such as greenfield areas. In 2016, the European Commission issued a formal notice regarding the application of the Noise Directive in Germany, which was followed up by a reasoned opinion in 2017. Nevertheless, the EIB-CM did not establish a link between this procedure and the project, as the area of concern has noise maps prepared¹⁶³.
- 4.1.36 The project’s EIA recognised the project’s noise impacts. Mitigation measures are therefore planned including the entitlement of property owners to reimbursement by the project promoter for the costs of noise abatement measures¹⁶⁴. The noise impacts arising from the project were mitigated by passive and active measures, such as noise barriers and landscaping.
- 4.1.37 During the planning procedures, both project sections were modified twice leading to modified project solutions and environmental impact mitigation measures (see §§ 1.4.3, 1.4.4 and 1.4.6-1.4.8). Additionally, planning permission for VKE 40 was also modified after its first approval in 2012, but those modifications did not concern any noise measures (see § 1.4.10).

Findings on the EIB’s role in relation to noise requirements

- 4.1.38 The EIB’s appraisal noted noise impacts of the project and acknowledged the planned measures. The ESDS indicates the increased noise levels from heavy equipment and traffic during the construction phase and the project’s overall impact during the operational phase. The EIB services considered the promoter to be trustworthy and did not assign any safeguards for

¹⁶¹ ESDS.

¹⁶² Hegewald J., Schubert M., Lochmann M., and Seidler A., The Burden of Disease Due to Road Traffic Noise in Hessen, Germany, Int J Environ Res Public Health. 2021 Sep; 18(17): 9337, available [here](#), last accessed 17 June 2022.

¹⁶³ There are noise plans/maps prepared for Hessen and they show that there are areas in need of noise control. By taking some traffic from the streets the project is likely to help solve the problem; however, by bringing traffic to new areas, it will be propagated elsewhere; therefore, the noise control measures of the project itself were proposed. The coordination of the overall transport development policy and the noise management policy is a national task and cannot be the subject of this inquiry.

¹⁶⁴ Mitigation measures as proposed in the EIA are detailed in both planning permissions relevant to the project.

following up on the implementation of the noise mitigation measures, which is in line with regular due diligence (see § 3.2.1).

- 4.1.39 Evidence shows that the borrower regularly reports on the implementation of the measures taken to reduce noise¹⁶⁵, which is also required by the finance contract (see Section 3.3).

Conclusions regarding the project's compliance with applicable standards

- 4.1.40 The EIB-CM did not establish any non-compliance of the project with EIB environmental and social standards or EU law applicable at the time of the procedure. The project, consisting of two sections, received the relevant permission according to the procedures required by national law. The relevant FTIP approved in 2003 was not subject to the SEA procedure, but underwent consultations, and information was provided to the public based on applicable national law applicable at the time (see § 4.1.5). **The EIA and planning permission** (for both sections) also underwent public consultations and were challenged by private individuals and NGOs with national courts dismissing all appeals (see § 4.1.9). Therefore, the planning permissions are still valid under the national legislation. It is beyond the EIB-CM's remit to make any conclusions with regard to the findings related to the decision-making process before the approval of relevant regional plans and the issuance of the planning permissions.
- 4.1.41 The reviewed evidence shows that the project-applicable standards were respected in relation to the **project's compliance with the Water Framework Directive**. Although the project did not follow the procedure initially, as interpreted by the 2015 ruling of the Court of Justice of the European Union (see § 4.1.17), the independent technical experts subsequently delivered a report concluding that VKE 40, including the associated technical installations, will not lead to a deterioration of any of the elements of surface and groundwater bodies under the Water Framework Directive (see § 4.1.18).
- 4.1.42 The reviewed evidence shows that the project-applicable standards were respected when **carrying out due diligence regarding the Habitats Directive**. The EIA process included the appropriate assessment under the Habitats Directive (see § 4.1.24). Because the assessment showed significant impact on the Natura 2000 site, the German authorities requested the Commission's opinion, in line with the Habitats Directive. The Commission provided a positive opinion (with a corrigendum) based on data provided by German authorities, validated by a German court. The Commission made its positive opinion conditional on the proper implementation and monitoring of compensation measures and a detailed report to be submitted to the Commission (see §§ 4.1.25 – 4.1.27).
- 4.1.43 The reviewed evidence shows that the project applicable standards were respected when assessing **noise impacts** of the greenfield development. The project design includes noise protection measures, mostly along the existing structures, which is a standard in greenfield developments. The implementation of the noise measures is being monitored and the borrower is regularly reporting on the project progress in the construction progress reports provided to the EIB (see § 4.1.39).

Conclusions regarding the EIB's role

- 4.1.44 While the reviewed documentation shows that the EIB possessed all the information needed to carry out the Bank's due diligence, the EIB did not report on some key elements of the project's permit procedures. The ESDS referred to the FTIP 2030 (as approved in 2016), which is not the starting point for the project in question; this is also clearly demonstrated by the timing of its approval (after the planning permission). Planning permission issued in 2012 for both sections was appealed against, with two appeals pending against VKE 40 at the time of the Bank's appraisal. The ESDS provided information on the decision-making, **but it did not reflect public**

¹⁶⁵ Construction progress report of Q1 2021 noted that for section VKE 30 it is planned to build 2075 meters of noise/ irritation protection walls, mainly along the structures. For section VKE 40 the length of noise walls was reported as 8256 m.

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consultations, appeals and protests which had taken place before the appraisal (see § 4.1.14).

- 4.1.45 The reviewed evidence shows that the EIB fulfilled its role as required in carrying out due diligence regarding the Water Framework Directive. During its appraisal, the EIB learned about the ongoing court case. The EIB required the promoter to inform it of its outcome (see § 4.1.21). As part of its monitoring, the EIB received a report from the lenders' technical adviser on the project implementation, including the water protection activities (see § 4.1.22).
- 4.1.46 The reviewed evidence shows that the EIB appraised the project as required when carrying out due diligence regarding the Habitats Directive. The EIB obtained an opinion from the Commission as required (see § 4.1.30) and a proof of the appropriate assessment from the competent authority prior to the first disbursement (see § 4.1.32). **However, the EIB did not reflect well in its ESDS the outcome of the appropriate assessment for the Natura 2000 site crossed by the project.** The EIB stated that the "[t]he appropriate assessment concluded that the project, neither alone nor combined with other plans and projects, does not affect the preservation of the main elements of this Natura 2000 site" (see § 4.1.31). In reality, (i) the assessment concluded that the project will have a significant impact on the Natura 2000 site; (ii) the Commission considered the project to be of overriding public interest due to the reduction of (a) local air pollution by up to 75 %; (b) noise levels by almost 10 dB(A); (c) traffic by 100 000 journeys per day between individual districts; and (iii) the Commission prepared a positive opinion on the project conditional on the proper implementation and monitoring of the compensation measures.
- 4.1.47 The reviewed evidence shows that the EIB carried out its role as appropriate in reviewing the noise impacts of the project. The project documentation and the ESDS included information on the expected noise level increases during both the construction and operational phases and noted the planned mitigation measures. The EIB also monitors implementation of those measures via the borrower's regular reports (see § 4.1.39).

4.2 Allegation 2: The project and climate change

- 4.2.1 The second allegation concerns:
- The project's non-compliance with the Paris Agreement and the EIB's climate change commitments.

Findings on compliance with applicable standards related to climate change

- 4.2.2 The EIB-CM understood the allegation as referring to the EIB Group's decision to ensure its financing activities are aligned with the goals and principles of the Paris Agreement by the end of 2020¹⁶⁶, as presented in the Climate Bank Roadmap of November 2020¹⁶⁷. In line with the EIB's internal procedures and according to its roadmap, the project must meet "Paris alignment" requirements, if its preliminary information note is approved after 1 January 2021. The EIB-CM established that the preliminary information note of the project in question was approved before the above date (i.e. October 2018).
- 4.2.3 The EU EIA Directive 2011/92/EC does not explicitly refer to climate change nor does it refer to greenhouse gas emissions or have a requirement to ensure adaptation to climate change, unlike its amended version of 2014.

¹⁶⁶ The EIB Group committed that all new operations will be aligned with the principles and goals of the Paris Agreement by the start of 2021. This includes new, direct and intermediated financing operations from 1 January 2021 onwards.

¹⁶⁷ See more in the EIB Group Climate Bank Roadmap 2021-2025 (2020) [here](#).

Findings on the EIB's role in relation to climate change

- 4.2.4 As per the EIB's environmental and social standard on the climate (see § 2.2.26), the EIB services had a set of analyses to perform selectively. The EIB-CM established that the EIB had estimated the project's absolute and relative carbon emissions (see § 2.2.27). The project is expected to lead to a decrease of CO₂ emissions per operating year, mostly from the reduced travel distance. Its carbon footprint was found to be above the EIB project reporting threshold (see § 3.2.1). In line with its standards, the EIB took into account CO₂ emissions in calculating the economic and financial rates of return adjusted for carbon prices during the analysis period (see § 3.2.1). The estimated project's carbon footprint was reported in the ESDS.
- 4.2.5 Project' climate change adaptation review was not carried out due to a lack of information and no additional information was reported during the stage II appraisal, despite the commitment to request such information (see § 3.1.3). The EIB environmental and social standard on the climate invites promoters to identify and apply the necessary measures at the planning, design and implementation stages to reduce climate risks. Promoters are invited to establish appropriate monitoring systems to ensure the sustainability of the project (see § 2.2.28). The EIB-CM did not find any statement regarding possible significant climate change risks of the project. This can be linked with the requirements of the EIA Directive applicable at the time of the project's approval procedures (see § 4.2.3) or confirmation that the appropriate measures had been taken, which was, however, not recorded. However, not mentioning any measures is not a breach of the standard, as they are also hard to distinguish without a dedicated adaptation analysis.

Conclusion

- 4.2.6 The EIB-CM did not find the second allegation to be grounded in terms of the project's non-compliance with EIB commitments and environmental and social standards regarding climate change as applicable at the time of appraisal. The project became part of the EIB's portfolio before the EIB's commitment to climate action came into effect (see § 4.2.2). The EIB appraised the project as required by its standard on the climate at the time and provided information for the Bank's decision-making as well as to the public via the ESDS (see § 4.2.4).

5 OUTCOMES

5.1 The project's compliance with applicable standards

- 5.1.1 In relation to the allegations, the EIB-CM considers that the project complied with the national and EU legal standards applicable at the time. Reviewed documentation suggests that the project was prepared following the required procedures and was based on valid decisions. The reviewed documentation provided evidence that the project applicable standards were respected in relation to the project's compliance with the EIA, Water Framework Directive, the Habitats Directive and the Noise Directive. The plans and programmes linked to the project were subject to SEA procedures once the SEA Directive came into force. The EIA procedure for the two sections of the project were subject to public consultations, appeals and also public protests. The latter were linked with irreconcilable opinions between the decision making bodies and the public groups concerned. The issues may be linked to the fact that the project started before specifically defined public consultation requirements became applicable (only since the SEA Directive came into force. However, the EIB-CM is not in a position to question documents adopted within decision-making procedures, which were found to be in compliance with the law, even more so in the absence of an established infringement (see §§ 4.1.10, 4.1.11 and 4.1.15).

5.2 The EIB's role

- 5.2.1 The EIB-CM considers that the EIB fulfilled its role as required when carrying out due diligence during appraisal and monitoring. However, the EIB did not reflect well in its ESDS the outcome of the appropriate assessment for the Natura 2000 site crossed by the project, and did not provide comprehensive information about the project public consultation process (see § 4.1.14).
- 5.2.2 Therefore, the EIB-CM suggests to the EIB services to issue an addendum to the ESDS concerning the project's impact on the Natura 2000 site and information on public consultations, appeals and protests (see § 4.1.44 and 4.1.46). This suggestion for improvement is expected to be implemented within nine months from the publication of this report. This can be carried out within the context of the suggestion for improvement included in section 7.2, item 4 of the March 2020 Conclusions Report in case SG/E/2016/10¹⁶⁸.

Complaints Mechanism

Available remedy:

Complainants that are not satisfied with the conclusions report may file a complaint of maladministration against the EIB Group with the European Ombudsman¹⁶⁹.

¹⁶⁸ The EIB-CM suggests that the EIB revise its procedures in order to [...] [f]urther clarify the reasoning for preparing and publishing an addendum to the ESDS and its content (e.g. environmental information and conditions included in the finance contract and encompassed by the appraisal). The report available [here](#).

¹⁶⁹ Available at: <https://www.ombudsman.europa.eu/en/home>.

APPENDIX 1: LEGAL CHALLENGES OF THE PLANNING PERMISSION FOR VKE 40

| Year | Description |
|------|--|
| 2012 | Legal action against the planning permission decision by two individual property owners and two environmental NGOs (concerning compliance with the Habitats Directive). |
| 2013 | Following a compensation payment, one individual property owner withdrew the legal action |
| 2014 | On 23 April 2014, the Federal Administrative Court ¹⁷⁰ dismissed the action brought against Planfeststellungsbescheid by two environmental associations (BUND and NABU) in 2012. Two further lawsuits from private individuals were withdrawn following out-of-court agreements. |
| 2017 | Withdrawal of an appeal by a property owner following an out-of-court agreement. |
| 2020 | <p>In August and September 2019, the planning authority received an application from BUND to withdraw or revoke the planning permission of 30 May 2012 or at least to suspend it in order to carry out a supplementary procedure due to changes in legal assessments in the water regulation. The request was based on the fact that the examination of water law was inadequate with regard to the 2015 judgment of the Court of Justice of the European Union¹⁷¹. The planning authority rejected the requests in September 2019.</p> <p>In its decision of 23 June 2020, the Federal Administrative Court dismissed the lawsuit aimed at invalidating the planning permission¹⁷², but recognised a formal error in the water law review, taking into account the 2015 case law of the Court of Justice. However, the planning permission, which was legally binding and confirmed by the Federal Administrative Court in 2014, was not called into question. The formal error involved the fact that in procedures leading to the relevant water decisions of 2012, examinations did not include the formal criteria of the Water Framework Directive (WFD) in the absence of a necessary technical contribution regarding the ban on deterioration of water bodies protected under European law. It was not until 2015 that the judgment of the Court of Justice made it clear that such an examination of the prohibition on deterioration and the requirement for improvement is also necessary for water law decisions in connection with the project approval and according to which criteria this must be carried out.</p> <p>The Federal Administrative Court did not consider the formal error as grave. The Water Resources Act offers sufficient opportunities to adjust permissions, or to order protective measures retrospectively, if necessary. This trust was created in particular by the fact that the environmental association, aware of the new Court of Justice case-law, did not sue until four years later (i.e. in 2019). The court therefore confirmed the planning permission.</p> <p>At the instigation of the court, a technical paper on the WFD was requested in order to check possible adjustment needs in the light of the above mentioned case law. The technical paper confirmed that the project meets the requirements of the WFD both during the construction and the operation periods¹⁷³.</p> |
| 2020 | On 23 June 2020, the Federal Administrative Court negotiated a lawsuit brought in 2019 by three private individuals ¹⁷⁴ . The plaintiffs are owners of the land, which, although not intended to be used by the provisions of the planning permission, is located in the area of the corporate land consolidation ordered in 2017. They did not bring their action until April 2019. After the land consolidation decision in which the area affected by subsequent land deductions was determined, the plaintiffs could no longer appeal against the planning permission ¹⁷⁵ . |

¹⁷⁰ Judgment of 23 April 2014 (Az. 9 A 25.12) by the Supreme Administrative Court (in German Bundesverwaltungsgericht).

¹⁷¹ Judgement of the Court of Justice of European Union, C-461/13 of 1 July 2015, available [here](#).

¹⁷² Press release No. 37/20 of 23 June 2020 available [here](#)

¹⁷³ Following the publication of the experts' opinion (by ahu GmbH) another opinion was presented (RegioConsult GmbH), which pointed out an error, which has been corrected by ahu GmbH. Information is available [here](#).

¹⁷⁴ Appeal against the Planfeststellungsbeschluss of 2012 and against the changes introduced in 2019. Information available [here](#).

¹⁷⁵ [Pressemitteilung Nr. 40/2020 | Bundesverwaltungsgericht \(bverwg.de\)](#).