

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

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

## INITIAL ASSESSMENT REPORT

8 July 2021





# SG/E/2020/21 and SG/E/2021/02 Initial Assessment Report

08 July 2021

**Complaint confidential**

No

**External distribution**

Complainants

**Internal distribution**

Management Committee

Secretary General

Inspector General

Relevant EIB services

## THE EIB GROUP COMPLAINTS MECHANISM

The EIB Group Complaints Mechanism is a tool enabling resolution of disputes in case any member of the public feels that the European Investment Bank (EIB) 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 judgement 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, with applicable law, or with 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>.

# CONTENTS

The EIB Group Complaints Mechanism.....	ii
Contents .....	iii
GLOSSARY .....	iv
Executive summary .....	1
1 Background .....	2
2 Regulatory Framework .....	4
3 Work Performed by the EIB-CM.....	6
4 Way Forward .....	7

## GLOSSARY

A49	Federal Motorway (De. <i>Bundesautobahn</i> ) in the north of the State of Hesse (Germany)
AS	Connection point/area or junction (De. <i>Anschlussstelle</i> )
Borrower	A49 Autobahngesellschaft mbH & Co. KG (SPV)
DBFOM	Design, Build, Finance, Operate and Maintain
De.	German language
DEGES	Deutsche Einheit Fernstraßenplanungs- und –bau GmbH ( <i>German united motorway planning and construction company</i> )
EC	European Commission
EIA	Environmental Impact Assessment
EIB	European Investment Bank
EIB-CM	EIB Group Complaints Mechanism Division
ESDS	Environmental and Social Data Sheet
ESPS	Environmental and Social Principles and Standards
EU	European Union
La.	Latin language
NTS	Non-technical summary
PPP	Public Private Partnership
Promoter	Federal Republic of Germany, represented by the State of Hessen
SEA	Strategic Environmental Assessment
SPV	Special Purpose Vehicle
TEN-T	Trans-European transport network
WFD	Directive 2000/60/EC establishing a framework for Community action in the field of water policy (Water Framework Directive)

# 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 (2018-0385). The project consists of the design, construction, financing, operation and maintenance of a section of the A49 motorway in the German State of Hessen.

The project promoter is the DEGES (German united motorway planning and construction company), commissioned by the State of Hessen, on behalf of the Federal Republic of Germany. The borrower is “A49 Autobahngesellschaft mbH & Co. KG” (SPV), a limited partnership established under the laws of the Federal Republic of Germany.

The EIB services appraised the project between 2018 and 2019. The project was approved by the EIB’s Board of Directors in September 2019, while the finance contract was signed in August 2020.

Following the admissibility of the complaints, the EIB-CM carried out an initial assessment. The EIB-CM identified the following allegations, which appear in both complaints that will be subject to a compliance review:

1. 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:
  - 1.1 Issues with public access to information (i.e. concerning the EIA results);
  - 1.2 Non-compliance with the Water Framework Directive (e.g. failure to comply with the requirements on non-deterioration in an assessment of impacts relevant to the Water Framework Directive);
  - 1.3 Issues with compliance with the Habitats Directive (e.g. remaining significant negative impacts on protected habitats and species and inadequate compensation measures);
  - 1.4 Non-compliance with noise requirements (e.g. unassessed negative noise impacts).
2. The project’s non-compliance with the Paris Agreement and the EIB’s climate change commitments.

In light of the Initial Assessment, the EIB-CM will:

- Discard the possibility of a collaborative resolution process as it is not deemed suitable to address the concerns of the complainants;
- Proceed with a compliance review in line with Section 2.4 of the EIB-CM Procedures.

# 1 BACKGROUND

## 1.1 The Project

- 1.1.1 In September 2019, the EIB's Board of Directors approved financing of the "AUTOBAHN A49 FRITZLAR - OHMTAL DREIECK (PPP<sup>1</sup>)" project (2018-0385) in Germany, for an amount of up to €264 million<sup>2</sup>. The public-private partnership (PPP) project was developed and is being implemented by Deutsche Einheit Fernstraßenplanungs- und -bau GmbH (DEGES<sup>3</sup>), commissioned by the 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.

Figure 1: The map of the project



- 1.1.2 The project implemented as a PPP involves the design, building, financing, operation and maintenance (DBFOM) of the A49 motorway section linking the A49 to the A5, in the German

<sup>1</sup> PPP -Public Private Partnership

<sup>2</sup> The project's description on the EIB's website is available here <https://www.eib.org/en/projects/pipelines/all/20180385>

<sup>3</sup> More information can be found here: <https://www.deges.de/unternehmen>

State of Hessen. The PPP project includes construction of a 30.8 km long section of a greenfield 2x2 lane of A49 motorway between junctions AS Schwalmstadt and Ohmtal-Dreieck and 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 VK30 and VK40) of the total length of 30.8 km.

- 1.1.3 The project aims to contribute to the completion of the comprehensive Trans-European Transport network (TEN-T). It is expected to rationalise traffic flows and improve road safety on the existing A5 and A7 motorways and hence reduce congestion and road accidents on existing roads.
- 1.1.4 The project is a DBFOM availability-based PPP implemented under the German V-Modell (A-Model). The PPP concession is expected to run for 30 years, including an estimated four-year construction period.
- 1.1.5 The EIB signed the finance contract with the borrower in August 2020.

## 1.2 Overview of the complaints

- 1.2.1 On 15 December 2020, the EIB Group Complaints Mechanism Division (hereinafter: EIB-CM) received a complaint from an individual regarding the “AUTOBAHN A49 FRITZLAR-OHMTAL DREIECK (PPP) (hereinafter the project). The original letter concerned allegations of negative environmental impacts of the project, but was quite succinct. Therefore, the EIB-CM sought clarification on the complaint. After discussing with the complainant, the EIB-CM received additional information regarding the issues of concern related to the project. The complainant alleges that:
  - The promoter did not inform the public about the results of the EIA that took place in 1997. According to the complainant, the project approved in that EIA procedure will result in significant environmental problems;
  - *“The motorway cuts through a big water reserve with importance for a half million people. The judgement of the Administrative Court in Leipzig (2014) conceded that the European Water Framework [directive] was not observed”;*
  - *“The motorway encroaches in a flora [and] fauna habitat”. “Normally it is not allowed to build a motorway through such a conservation area”. “Only imperative reasons of overriding public interest allow to do this, if they are acknowledged by the EC”;*
  - *“The project will increase car traffic by 1 500 vehicles a day and encourage [a] shift from rail to road”;*
  - *“Significant noise issues of the motorway” have not been assessed. The complaint states that noise will increase because the “motorway itself [was] not taken into account” and the “number of persons involved [was] not calculated”. There is an alternative – building 9 km of federal road instead of building 30 km of motorway, which can solve most of car traffic problems.*
  - The complainant also referred to the opinion of the European Commission regarding the imperative reasons of overriding public interest for the implementation of the project. He pointed out: (i) issues seemingly stemming from incorrect translation of terms; and (ii) accuracy of information.



1.2.2 On 4 February 2021, the EIB-CM received a second complaint from another individual regarding the same project. The complainant alleges that:

- The project was approved in breach of the Water Framework Directive: the motorway cuts through a big water reserve with importance for a half million people, which *“would be seriously endangered by the construction of the bridge”*; the Directive requires that the status of bodies of water affected *“must not deteriorate”*;
- The project goes against the protection of species and thus the EU Biodiversity Strategy: protected species include *Triturus cristatus (la.)*, the *“compensatory measures such as planting of thousands of trees and rewetting of meadows do not constitute an adequate substitute for habitat”*, and the compensation measures proposed also require replacement, while the available space is limited;
- The project contradicts the Paris Agreement and the EIB’s own standard on climate change. As a result of the project, valuable forest stands have been destroyed, which cannot be replaced as *“old trees are known to store more CO<sub>2</sub> than young trees”*, *“the construction of the motorway section reduces the chances of achieving the climate objectives”*, and the argument of road transport electrification should not be used to justify new roads. The complainant claims that the extent of the motorway network in Germany is sufficient;
- An alternative exists such as an extension of *“B9 or P9 roads”*, which can *“solve most problems for people that suffer now from car traffic”*.

1.2.3 Both complainants request that the EIB stop providing its financial assistance and withdraw from the project.

## 2 REGULATORY FRAMEWORK

### 2.1 The EIB Group Complaints Mechanism

2.1.1 The EIB Group Complaints Mechanism Policy<sup>4</sup> tasks the EIB-CM with handling complaints concerning alleged maladministration by the EIB<sup>5</sup>. Maladministration means poor or failed administration<sup>6</sup>.

2.1.2 The Policy specifies that the EIB-CM reviews the EIB’s activities with a view to determining whether maladministration that is attributable to the Bank has taken place<sup>7</sup>.

2.1.3 The objective of the initial assessment is to clarify the complainant’s concerns, understand the complainant’s position and the validity of the concerns raised, and determine if further work by the EIB-CM is necessary and/or possible (compliance review or collaborative resolution process between the parties) to address the allegations or resolve the issues raised by the complainant.

### 2.2 Project applicable standards

2.2.1 The project must comply with the EIB’s applicable standards. The project applicable standards include, but are not limited to:

<sup>4</sup> Available at: [https://www.eib.org/attachments/strategies/complaints\\_mechanism\\_policy\\_en.pdf](https://www.eib.org/attachments/strategies/complaints_mechanism_policy_en.pdf).

<sup>5</sup> § 5.1.3 of the EIB Group Complaints Mechanism Policy.

<sup>6</sup> Section 3 of the EIB Group Complaints Mechanism Policy.

<sup>7</sup> § 5.3.3 of the EIB Group Complaints Mechanism Policy.

- Relevant national and EU environmental law such as the EIA Directive<sup>8</sup>, the Habitats Directive<sup>9</sup> and the Water Framework Directive<sup>10</sup>;
- The EIB Statement of Environmental and Social Principles and Standards (ESPS, 2009<sup>11</sup>) and Environmental and Social Standards (2018<sup>12</sup>), including:
  - Standard 1: Assessment and management of environmental and social impacts and risks.
  - Standard 3: EIB standards on Biodiversity and ecosystems.
  - Standard 4: EIB Climate-related standards.
  - Standard 10: Stakeholder engagement.
- The EIB's own policies, such as the Transport lending policy (2011<sup>13</sup>).

## 2.3 Responsibilities of the EIB

- 2.3.1 In line with the EIB Statement of ESPS<sup>14</sup>, the responsibility for compliance with the project applicable standards lies with the promoter and local authorities<sup>15</sup>. However, the EIB will not finance projects that do not meet project applicable standards<sup>16</sup>.
- 2.3.2 Article 4.3.14 of the EIB-CM Policy states: “*The EIB Group has a duty to verify compliance with its applicable policies, procedures or standards.*” Whether the projects meet the project applicable standards is established as part of the EIB's project appraisal and monitoring<sup>17</sup>.
- 2.3.3 The ESPS requires the EIB to appraise projects it finances<sup>18</sup>. The appraisal takes place prior to signature of the finance contract<sup>19</sup>. The appraisal aims at, inter alia, assessing the project's impact and whether the project complies with the project applicable standards. Sometimes, the appraisal results in conditions for disbursement. The promoter must complete these conditions to the satisfaction of the EIB prior to the disbursement of the EIB financing<sup>20</sup>.
- 2.3.4 Once the promoter and the EIB sign the finance contract, the EIB is required to monitor the project. The monitoring aims at ensuring compliance of the project with the EIB's approval conditions<sup>21</sup>. The EIB monitors projects on the basis of reports provided by the promoter, as well as EIB site visits, information provided by the local community, etc.<sup>22</sup>.

<sup>8</sup> EIA Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment (as amended by Directive 2014/52/EU).

<sup>9</sup> Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, as amended.

<sup>10</sup> 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.

<sup>11</sup> The EIB Statement of Environmental and Social Principles and Standards (2009) is available here (in English): [https://www.eib.org/attachments/strategies/eib\\_statement\\_esps\\_en.pdf](https://www.eib.org/attachments/strategies/eib_statement_esps_en.pdf)

<sup>12</sup> The EIB Environmental and Social Practices Standards (2018) is available [here](#) (in English).

<sup>13</sup> EIB's Transport lending policy (2011) is available here: [https://www.eib.org/attachments/strategies/transport\\_lending\\_policy\\_en.pdf](https://www.eib.org/attachments/strategies/transport_lending_policy_en.pdf) (in English)

<sup>14</sup> Available at: [https://www.eib.org/attachments/strategies/eib\\_statement\\_esps\\_en.pdf](https://www.eib.org/attachments/strategies/eib_statement_esps_en.pdf).

<sup>15</sup> Paragraph 2 of the ESPS Statement.

<sup>16</sup> Paragraph 6 of the ESPS Statement.

<sup>17</sup> Volume II, the Environmental and Social Handbook (2013) describes the responsibilities of the EIB project's team at appraisal stage

<sup>18</sup> Paragraph 17 of the ESPS Statement.

<sup>19</sup> <https://www.eib.org/en/projects/cycle/index.htm>

<sup>20</sup> Paragraph 256, indent 2, Volume II of the EIB's 2013 Environmental and Social Practices Handbook.

<sup>21</sup> Paragraph 270, Volume II of the EIB's 2013 Environmental and Social Practices Handbook.

<sup>22</sup> Paragraph 8 of the ESPS Statement.

## 3 WORK PERFORMED BY THE EIB-CM

### 3.1 Work performed

- 3.1.1 Following the admissibility of both complaints, the EIB-CM carried out an initial assessment of the concerns raised by the complainants.
- 3.1.2 As part of its initial assessment, the EIB-CM reviewed project documentation, including the Environmental and Social Data Sheet (ESDS<sup>23</sup>) summarising the EIB's environmental and social appraisal, and project information made available to the public on the EIB website<sup>24</sup>.
- 3.1.3 In January 2021, the EIB-CM liaised with the first complainant with a view to clarify his concerns. The EIB-CM reviewed the complaint and the further correspondence and additional documents provided by the complainant.
- 3.1.4 In January 2021, the EIB-CM had an initial meeting with the EIB services on the case No.SG/E/2020/21. The services shared information and further documentation following the meeting. In February 2021, the EIB-CM received the second complaint (case No.SG/E/2021/02). Having identified significant overlaps between the two complaints, the EIB-CM decided to carry out a joint initial assessment and investigation for both cases.
- 3.1.5 During the initial assessment, a collaborative resolution process was considered, but deemed not suitable to address the concerns of the complainants.
- 3.1.6 On the basis of the complaints, the EIB-CM prepared this Initial Assessment Report.

### 3.2 Project documentation reviewed to date

- 3.2.1 The project, as described in section 1.1, was appraised by the EIB services between 2018 and 2019. Appraisal documentation pointed out at the completed EIA procedure and public consultations. The EIA was carried out in two EIA procedures for the section between Schwalmstadt and Stadtallendorf (43 and 56.5 km, Section VK30) and for the section between Stadtallendorf and Gemünden (57 and 74.5 km, Section VK40). The two non-technical summaries (NTS) of the EIA provided on the EIB's website were prepared in 2011 and 2010 respectively. The decisions in the form of a planning approval (Planfeststellungsbeschluss) were issued by the competent authority (Hessisches Ministerium für Wirtschaft, Verkehr und Landesentwicklung) separately for Section VK30 and Section VK40.
- 3.2.2 The ESDS stated that the project was included in the EIB's carbon footprint exercise.
- 3.2.3 The EIB-CM also reviewed information provided by the complainants in their respective complaints and further information received in January 2021.

---

<sup>23</sup> The ESDS is available [here](#).

<sup>24</sup> EIB project summary sheet (online), which can be accessed [here](#).

## 4 WAY FORWARD

- 4.1 As a result of its initial assessment, the EIB-CM identified the following allegations, which will be subject to a compliance review:

**Table 1 – Allegations pertaining to cases SG/E/2020/21 and SG/E/2021/2 (subject to compliance review)**

<b>Allegation 1</b>	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
<b>Sub-allegation 1.1:</b>	Issues with public access to information (i.e. concerning the EIA results)
<b>Sub-allegation 1.2</b>	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)
<b>Sub-allegation 1.3</b>	Issues with compliance with the Habitats Directive (e.g. remaining significant negative impacts on protected habitats and species and inadequate compensation measures)
<b>Sub-allegation 1.4</b>	Non-compliance with noise requirements (e.g. unassessed negative noise impacts)
<b>Allegation 2</b>	The project's non-compliance with the Paris Agreement and the EIB's Climate Change commitments

- 4.2 The compliance review will assess the complainants' allegations in the context of potential Bank maladministration, including whether the Bank complied with the applicable regulatory framework and the EIB Group's own policies, procedures and standards (see section 2).

Complaints Mechanism  
08.07.2021

Complaints Handling & Reporting  
08.07.2021