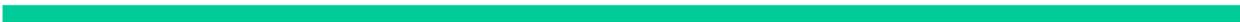


D4R7 Slovakia PPP
Complaint SG/E/2018/35
Slovakia

Complaints Mechanism - Complaints Mechanism - Complaints Mechanism - Complaints Mechanism

CONCLUSIONS REPORT

26 January 2021



Prepared by

EIB Complaints Mechanism

External Distribution

Complainants
Promoter

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EIB services concerned

Disclaimer

The conclusions presented in this report are based on information available to the EIB Group Complaints Mechanism up to, and including, July 2020. It should be noted that additional information was processed by the EIB Group Complaints Mechanism during its consultation with the EIB up to, and including, November 2020. Further information received by the EIB Group Complaints Mechanism subsequent to this date, and of material interest to the investigation, are included, but not assessed, in the report.

About EIB-CM

The European Investment Bank Group Complaints Mechanism is a tool enabling resolution of disputes in case any member of the public feels that the European Investment Bank and/or the European Investment Fund has done something wrong, i.e. if the European Investment Bank Group has committed an act of maladministration.

Maladministration means poor or failed administration. This occurs when the European Investment Bank Group fails to act in accordance with the applicable legislation and/or established policies, standards and procedures, fails to respect the principles of good administration or violates human rights. Some examples of failure to respect the principles of good administration are: administrative irregularities, unfairness, discrimination, abuse of power, failure to reply, refusal of information and unnecessary delay. Maladministration may also relate to the environmental and social impacts of the European Investment Bank Group's activities and to the implementation of project cycle-related policies and other applicable policies of the European Investment Bank Group. Decisions, actions or omissions by the European Investment Bank Group which fail to give due consideration to legitimate concerns of stakeholders may also be considered as maladministration.

For more information on the European Investment Bank Group Complaints Mechanism, please visit:
<http://www.eib.org/en/about/accountability/complaints/index.htm>

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Executive Summary

This EIB-CM inquiry responds to a complaint in relation to the environmental and social impacts of the D4R7 Slovakia public-private partnership (PPP) project ("the Project"). The Project submitted for financing by the EIB in October 2015 consists of the design and construction of 27 km of the D4 motorway around Bratislava. The D4 motorway component, as part of the D4/R7 PPP, will be delivered by a concessionaire ("the Borrower") under the terms of a project agreement with the Slovak Republic, represented by the Ministry of Transport, Construction and Regional Development ("the Promoter").

The complaint primarily concerns the construction of a new bridge crossing of the Danube River located within a Natura 2000 site. The Complainants allege inadequate assessment and monitoring of environmental and social impacts of the Project on a number of overlapping grounds, consolidated below for purposes of this compliance investigation. In summary, the Complainants allege:

- 1 That the bridge at issue does not comply with international agreements defining the navigable height of 10m above the highest navigable water level
- 2 That there has been widespread degradation of habitat in Natura 2000 protected bird areas
- 3 That the Project does not comply with European Union (EU)/national law on environmental impact assessment (EIA) on the following four grounds: (1) salami-slicing, (2) absence of meaningful public consultation, (3) failure to assess significant environmental impacts, including increased public safety risk for kayaking or other recreational water sports resulting from the modification of the bridge design and (4) failure to provide access to justice
- 4 That the Project does not comply with national law, particularly that (1) illegally extracted materials have been used for the Project's construction works and (2) the Project lacks valid building permits (BP) given the deviations from approved plans and given the fact that the EIA screening process, which is a condition for the issuing of BPs, is still in progress

The EIB-CM's Initial Assessment Report, dated 28 February 2019, concluded that issues raised by the Complainants warranted a compliance review into the allegations.

The compliance review process included a review of relevant documentation; discussions with the (i) EIB, (ii) Complainants, (iii) Promoter, (iv) Borrower and (v) European Commission (EC) officials; and a site visit by EIB-CM. In accordance with EIB-CM's Principles, Terms of Reference and Rules of Procedure, this report documents EIB-CM findings considering sources of information available at the time.

The EIB-CM's analysis relative to the allegations has concluded that:

- 1 The Danube Commission Recommendations were adequately considered in design preparation; horizontal and vertical clearances are as per current international standards; and the design and construction works are monitored by both the Lenders' Technical Advisor and Independent Engineer.
- 2 The EIB disbursed funds on the basis of a preliminary notification of compensatory measures to the EC. The final notification of compensatory measures to the EC took place approximately (a) two years after the start of construction on said measures and (b) three years after the start of Project construction. Furthermore, the EIB failed to ensure the adequacy of delayed measures intended to compensate for adverse environmental impacts of the Project on protected habitats/species, prior to its disbursement of funds. Despite recent progress, Project impacts on the Natura 2000 sites remain at issue, are unlikely to be completed by the end of 2020 as required at time of inquiry and lack present and planned effectivity monitoring.
- 3.1 Regarding alleged salami-slicing - judicial and administrative decisions at national level suggest that the splitting up of changes to the Project into five separate screening procedures is not in line with the requirements of the EU and national law. On the basis of the information processed as part of the appraisal and monitoring of the contested Project, the EIB had reasons to heighten the monitoring of this operation.

Monitoring activities carried out by the EIB considered the judicial proceedings at national level to be a continuing risk to the Project; however, there is no evidentiary documentation concerning the EIB monitoring of the developments following the Ministry of Environment's decisions to revoke its screening decisions for Notification of Changes 3 and 4.

- 3.2 Regarding alleged absence of meaningful consultation - while technical changes to the bridge design resulting from economic optimisation have not been assessed through a full EIA process, they were the subject of a screening procedure, which was in turn subject to public information/consultation, as required by the applicable regulatory framework.
- 3.3 Regarding alleged failure to assess significant environmental impacts - while judicial and administrative decisions at national level indicate shortcomings with regard to the compliance of the contested Project with the applicable regulatory framework, a judgement on the assessment of significant environmental impacts, including the safety of the new bridge design, cannot be drawn until the pending judicial and administrative proceedings are completed. With regard to the safety of activities such as kayaking and swimming, given the seriousness of the allegations submitted as part of a formal complaint to the Bank, the EIB-CM considers that the EIB should have actively collected and reviewed relevant documentation upon notification of the Complaint, rather than performing these actions during the consultation of the EIB-CM Conclusions Report. The EIB-CM notes that the collection of documentation remains incomplete.
- 3.4 Regarding alleged failure to provide access to justice - the inquiry shows that the Complainant had access to judicial proceedings concerning the validity of screening decisions.
- 4 Regarding the alleged illegal extraction of materials - EIB operational services have followed-up on developments related to ongoing criminal proceedings concerning the alleged illegal extraction of materials and related contamination; while not in a position to form a reasoned opinion at this stage, the EIB-CM highlights the importance of continued monitoring of developments related to the above-mentioned proceedings. Regarding the alleged lack of valid BPs — the inquiry did not lead to conclude that the judicial and administrative decisions concerning the validity of the screening decisions directly affect the BPs' validity.

Based on the above findings, the Conclusions Report contains a number of recommendations in order to address underlying weaknesses, as follows:

- The EIB should receive from the Promoter and/or the Borrower:
 - satisfactory explanations on the feasibility of the timetable for the implementation of compensatory measures within the timeframe established by the finance contract as well as on the coordination of implementation works on compensatory measures with construction activities for the Project;
 - satisfactory evidence that compensatory measures whose implementation is required and feasible in the short/medium term are effectively fast-tracked; and
 - satisfactory evidence of adequate additional compensatory measures (including approval and necessary permits) due to the delay in the implementation of the compensatory measures notified to the EC, in the event that implementation exceeds the deadline established by the Finance Contract.
- The EIB should use appropriate measures to ensure the above actions are satisfactorily implemented, including reassurance that compensatory measures will be implemented within the deadline established by the Finance Contract or that the Borrower commits to put in place additional compensatory measures due to the delay in its implementation. The appropriate measures may include, but are not limited to, withholding disbursements.

- For future operations, where disbursements are conditioned to notification of compensatory measures by a member state to the EC, and without prejudice to the Bank's legally binding obligations, where areas of attention are identified as in the present case (e.g. first notification to the EC, conditional notification, incomplete notification), it would be considered good practice to establish contact with the EC prior to disbursing funds in order to gather information in view of supporting the Bank's decision that the condition attached to the EIB's financial assistance has been satisfied.
- In light of information duties of the Borrower under the Finance Contract, the EIB will continue to closely follow-up on ongoing judicial and administrative proceedings.
- The EIB should ensure, when notified of a decision granted by the competent authorities being legally challenged in court by third parties or annulled by a competent authority, that the implications of the legal proceedings are followed up by the EIB's relevant services with relevant expertise as required (e.g. environmental experts). Internal awareness should be raised by the EIB competent services on the importance to trigger the involvement of these resources in similar situations.
- The EIB services' assessment of the Complainant's public health and safety concerns should be complemented by a review of the missing floaters tracking test documentation in order to provide assurance of substantial compliance with Standard 9 so far as the Danube Bridge is concerned.

The EIB-CM has made further suggestions for improvement related to ongoing legal proceedings/criminal investigations and public consultation on notification of changes.

The EIB competent services should report on the implementation of the above actions to the EIB Management Committee by Q4 2021.

The EIB-CM will monitor the implementation of its recommendations no later than one year after publication of this report.

Allegation	Outcome
1. Non-compliance of the project's technical design with international agreements	No Grounds
2. Negative impact of the project on a Natura 2000 site	Recommendation
3. Non-compliance of the project with EU/national law on EIA	Recommendation
4. Non-compliance of the project with national law	No Grounds

SG/E/2018/35 — D4R7 Slovakia PPP

Complainants: Slovak non-governmental organisations

Date received: 31 August 2018

Confidentiality: Non-confidential

1. The Complaint

1.1 On 31 August 2018, the European Investment Bank Complaints Mechanism (EIB-CM) received a complaint ("the complaint") from Slovak non-governmental organisations (jointly referred to as "the Complainants") primarily concerning the construction of a new bridge crossing of the Danube River in the vicinity of D4 Jarovce-Ivanka Sever.

1.2 In brief, the Complainants allege that significant modifications in project design, which were not subject to an Environmental and Social Impact Assessment (ESIA), are likely to result in adverse environmental and social (E&S) impacts. The paragraphs below outline the allegations submitted by the Complainants.

1.3 According to the Complainants, the new bridge does not comply with international agreements defining the navigable height of 10 m above the highest navigable water level.

1.4 The Complainants allege that there has been widespread degradation of habitat in Natura 2000 protected bird areas¹ and that construction waste has been dumped into embankment structures, causing the death of fish.

1.5 The Complainants challenge the compliance of the Project with European Union (EU)/national law on environmental impact assessment (EIA). They allege (i) salami-slicing², (ii) absence of meaningful public consultation³, (iii) failure to assess significant environmental impacts⁴ and (iv) failure to provide access to justice⁵. Furthermore, the Complainants allege that the modification of the bridge on the D4 motorway over the Danube (from a suspension steel bridge to a concrete bridge with two pillars in the navigation channel of the riverbed⁶) significantly increases the public safety risk for individuals kayaking or performing other recreational water sports, traditionally pursued in the area.

1.6 Finally, the Complainants challenge the compliance of the Project with national law. In particular, they allege that (i) illegally extracted materials⁷ have been used for the project's construction works and that (ii) the project lacks valid building permits (BPs) given the deviations from approved plans and the fact the EIA screening process, which is a condition for the issuing of BPs, is still in progress. In October 2018, the EIB-CM informed the

¹ "[...] an embankment has cut off a portion of the river, which is now "dying", as the water has warmed as a result of its insufficient connection to the rest of the waterway [...]"

² "The consortium is making drastic changes to the project and yet they have been divided up into 30 new EIA proceedings. The public has no way of determining what is going on, and up to 3 EIA processes are being conducted in parallel on some sections and separately for each individual change. This renders environmental impact assessment meaningless, as the changes are not assessed on a cumulative basis."

³ "Residents only learned that a 400 m-long bridge from the original project had changed to an embankment once construction started. People are drawing information from the noise, including, for instance, word-of-mouth information that the new bridge over the Danube has been completely changed and optimised with respect to cycling equipment. People are not being informed."

⁴ "Once the building permits were issued, the consortium made the decision to drastically change the project to achieve lower investment costs. The design speed was reduced from 120 km/h to 100 km/h, the motorway was narrowed by 1 m, the expressway by 7 m, the planned 400 m-long bridge in Jarovce was changed to an embankment structure, the lengths of noise barriers were optimised, the design and position of the pillars installed in the Danube were changed and hundreds of other important changes were made. No environmental impacts were assessed for the new project (only screening was performed) [...] The change in the project is drastic and requires a new EIA. The new project has radically changed the conditions for wildlife migration."

⁵ "A lawsuit was filed in 2016 against the Ministry of the Environment's decision that the change in the design of the D4 Jarovce - Ivanka sever motorway segment was not subject to assessment, but no hearing has been set on this matter as of yet."

⁶ "The consortium altered the bridge on the D4 motorway over the Danube, as it is now lower and has more pillars. The span of the original pillars was 222 m, and is now only 170 m. The width of the navigable channel in the Danube based on international treaties is a minimum of 150 m, and the narrowing of the pillar span to 170 m only allows for 10 m of buffer space on each side[...]"

⁷ Contaminated soil from the landfills in the Nivy district of Bratislava and illegal gravel mining in the "Zitny Ostrov" area, which is also a source of drinking water. The Complainants referenced media reports about criminal investigations by the national police authorities on the alleged illegal management of hazardous waste without the necessary permits as well as alleged damages to the environment.

EIB Fraud Investigation Division of the allegation concerning illegal extractions during the construction works of the project as well as of the ongoing criminal investigation by Slovak authorities.

1.7 On 24 September 2018, the Complainants informed the EIB-CM of their intention to waive the confidentiality of the case.

Summary of Allegations

- 1. Non-compliance of the Project's technical design with international agreements**
- 2. Negative impact of the Project on a Natura 2000 site**
- 3. Non-compliance of the Project with EU/national law on EIA**
 - a. Salami-slicing*
 - b. Absence of meaningful public consultation*
 - c. Failure to assess significant environmental impacts, including safety of the new design of the bridge.*
 - d. Failure to provide access to justice.*
- 4. Non-compliance of the Project with national law**
 - a. Illegal extraction of materials*
 - b. Absence of valid building permits*

2. Background Information

2.1 The Project

2.1.1 On 21 October 2015, the European Investment Bank (EIB) approved financing of the D4R7 Slovakia public-private partnership (PPP) project, providing a loan of up to EUR 426.92 million for the construction of the two sections ("Jarovce-Ivanka Sever" and "Ivanka Sever-Rača") of the D4 motorway around Bratislava ("the Project"). The loan is guaranteed under the European Fund for Strategic Investments and part of a larger financing package with support of the European Bank for Reconstruction and Development (EBRD). The loan was signed by EIB and the Borrower in June 2016.

2.1.2 The Project forms part of the comprehensive road trans-European transport network (TEN-T). The D4 motorway will be constructed to at least dual two-lane carriageways (2x2) standard with some sections to dual three-lanes (2x3). The Project includes 9 interchanges and 60 bridges, including a bridge crossing of the Danube River. The Project aims at providing a new high capacity bypass and strategic route around the capital and relieving the existing network - in particular the D1 - through and within Bratislava.

2.1.3 The promoter and contracting authority is the Ministry of Transport, Construction and Regional Development ("the Promoter") representing the Slovak Republic. The EIB has an established relationship with the Promoter, having participated in previous transport projects involving both road and rail. The Concessionaire and EIB Borrower is Zero Bypass Limited, a special purpose company (SPC) established for the Project⁸. The Borrower has entered into a principal design and build contract for the Project with D4R7 Construction s.r.o (hereinafter EPC Contractor), an incorporated construction joint venture composed of two subsidiaries of the parent companies of the SPC. Operation and maintenance will be under the direct responsibility of the Borrower.

⁸ A Concession Agreement between the Promoter and the Borrower was signed in May 2016.

2.1.4 A Lenders' Technical Adviser ("LTA") monitors, *inter alia*, the technical, environmental, and health and safety aspects of Project implementation, on behalf of the Lenders. Separately, the Independent Engineer (IE), as defined in the Agreement between the IE, the Promoter and the Borrower, confirms the contractually requested quality and progress and monthly reporting. The IE issues opinions and reports on, among others, (i) the changes to the design of the project and (ii) ecological and biodiversity measures to be implemented as part of the works. These reports are made available to the lenders.

2.1.5 The Project falls under Annex I of the EIA Directive as well as under Annex A of the EIA Act (see ¶13.3.4 of this Report). Initially, the Project was prepared in four sections with respective EIAs completed between 2007 and 2011 – including assessments of alternative options. EIA Decisions were issued by the Ministry of Environment (MoE) between 2010 and 2012, following consultation with authorities and the public, for each Project section⁹. The Project was accepted for implementation subject to conditions, including those related to mitigating and compensating for expected impacts. For the section D4 Jarovce – Ivanka Sever, given the expected significant negative impacts on nature conservation areas, further appropriate assessment and authorisation was required.

2.1.6 In the period 2012-2013, changes were made to the proposed alignments and project specification. The Project was redefined into five sections: D4 Jarovce – Ivanka Sever, D4 Ivanka Sever – Rača, R7 Prievoz-Ketelec,



R7 Ketelec – Dunajská Lužná and R7 Dunajská Lužná – Holic. The MoE was notified of the changes and, following consultations, issued Screening Decisions between 2013 and 2014 for the five sections. The Project changes were not expected to have a significant adverse impact on the environment and therefore were not subject to a full EIA. Zoning permits were issued between 2013 and 2014.

Picture 1: Sections of D4 Highway and R7 Expressway

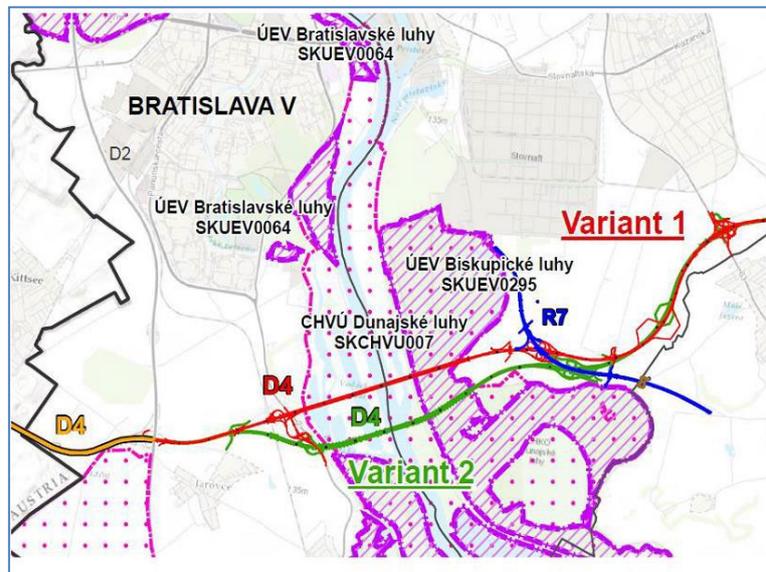
2.1.7 The Project directly crosses or encroaches on Natura 2000, Ramsar Convention and nationally designated sites at the D4 Jarovce – Ivanka Sever section. Following an appropriate assessment, pursuant to Article 6 of the Habitats Directive, that was concluded in 2014, the Project in the vicinity of D4 Jarovce – Ivanka Sever was found to adversely affect the integrity of the Birds Directive Special Protection Area (SPA): SKCHUU007 "Dunajské Luhy" and Habitats Directive Site of Community Importance (SCI): SKUEV0295 "Biskupické Luhy". The sites include areas along the River Danube representing freshwater natural wetland. Particularly affected are nesting areas of three European level protected birds: black stork (*Ciconia nigra*), black kite (*Milvus migrans*) and the white-tailed eagle (*Haliaeetus albicilla*). Alluvial forests and specific beetle habitats are also directly affected. The appropriate assessment did not find that the Project adversely affects the integrity of other nearby sites¹⁰.

2.1.8 In the absence of alternatives, the project was authorised on the grounds of imperative reasons of overriding public interest by the Slovak Government in 2014. Expected direct destruction of habitats were to be compensated through offsetting measures including reforestation of agricultural land, revitalisation of adjacent grasslands and alluvial wetlands, changing the status of existing forests, and transferring farming/economic land to new alluvial forests. Legally required mitigation and compensations measures were stipulated in the environmental decision and planning permits. Construction works started in 2016.

⁹ D4 Jarovce – Ivanka Sever, D4 Ivanka Sever – Záhorská Bystrica, R7 Bratislava – Dunajská Lužná and R7 Dunajská Lužná – Holic

¹⁰ SPA site SKCHVU 029 "Sýsľovské polia", SCI site SKUEV 0269 "Ostrovne Lúčky" and near the D4 Ivanka Sever – Rača section, the SCI site SKUEV0279 "Šúr".

Picture 2: D4 Highway crossing the Natura 2000 area



2.2 Infringement proceedings

2.2.1 During the environmental assessment of the project (2005-2014), the European Commission (EC) processed two infringement proceedings.

2.2.2 Case 2010/4193 concerned the poor application of the Strategic Environmental Assessment (SEA) Directive to the "Programme of Preparation and Construction of Motorways and Highways in 2007-2010" of the Slovak Republic. The D4 Highway was newly defined under the Programme and was not subject to a SEA assessment. The competent national authorities carried out the SEA assessment of the Programme including the D4 Highway in 2012, which resulted in the closing of the infringement proceeding.

2.2.3 In case 2013/2034, the EC considered that the national law did not adequately implement the EIA Directive because it created insufficient ties between the process of assessing proposed activities and the follow-up permit proceedings. The EC considered that this created space for disregarding the outcome of the impact assessment procedure and failed to guarantee full exercise of the rights of the concerned members of the public who are parties to the proceedings or who wish to become parties of the proceedings affecting the environment. The infringement proceeding was closed after modifications of the EIA Act came into force in 2015 and 2017.

2.3 Judicial proceedings at national level

2.3.1 The 2016 decision of the MoE, according to which the notified change to the Project (including bridge structures) was not expected to have a significant negative environmental impact and therefore would not be subject to a full EIA was repealed by the Regional Court of Bratislava in its ruling of 22 November 2018¹¹. In its decision, the Regional Court concluded that the competent national authority should have proceeded to a full EIA under the EIA Act and remanded the matter to the MoE for further proceedings. According to the decision, the MoE is bound to the legal conclusions expressed by the Regional Court and has the obligation to determine the factual state of affairs in the corresponding scope and in detail with respect to the proposed change to the activity and assessment of its environmental impacts.

2.3.2 The MoE filed an appeal against this decision before the Supreme Court. From the information provided by the EIB services to the EIB-CM in November 2020, the Supreme Court has returned the case to the Regional Court of Bratislava for new proceedings. A national judicial proceeding concerning the assessment of environmental impacts remains ongoing¹².

¹¹ Case No: 6S/347/2016 – 121

¹² From the information provided by the EIB services to the EIB-CM on 17 November 2020, the Supreme Court has returned the case to the Regional Court of Bratislava for new proceedings.

3. Applicable Regulatory Framework

3.1 EIB-CM policies and procedures

3.1.1 The 2012 EIB Complaints Mechanism Principles, Terms of Reference and Rules of Procedure (EIB-CM Policy) task the EIB-CM with addressing complaints concerning alleged maladministration by the EIB¹³. Maladministration means poor or failed administration. This occurs when the EIB fails to act in accordance with the applicable legislation and/or established policies, standards and procedures¹⁴. Maladministration may also relate to the environmental or social impacts of EIB's activities¹⁵.

3.1.2 The EIB-CM is not competent to investigate complaints concerning international organisations, Community institutions and bodies, national, regional or local authorities¹⁶.

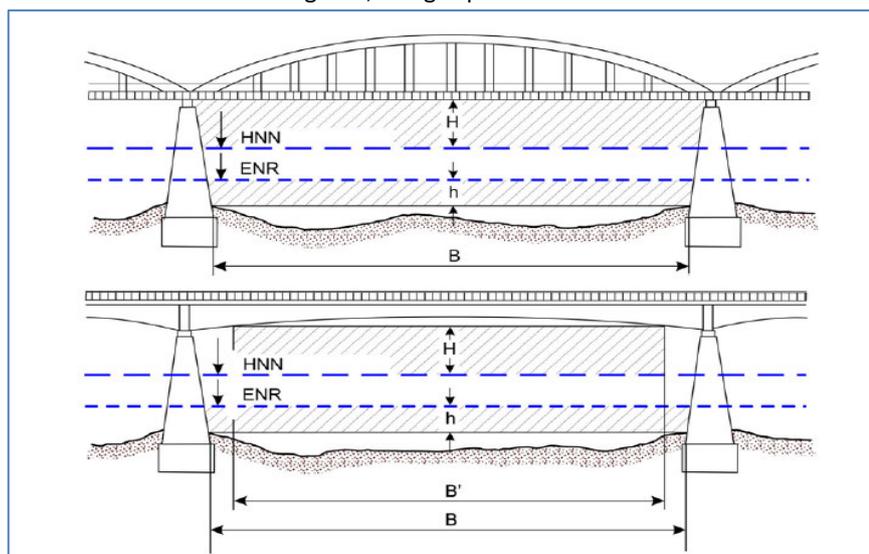
3.2 International Law and Standards

3.2.1 The Belgrade Convention¹⁷ confers an obligation on state parties to maintain a "Good Navigation Status" ("GNS") for the Danube. The Danube Commission, established under the Belgrade Convention, has issued recommendations defining the requirements of physical infrastructure (including bridges) from the perspective of GNS.¹⁸

3.2.2 Regarding navigability on the Danube River, the Danube Commission recommendations¹⁹ divides the river in sections. For the Slovak Republic and the section to Belgrade, bridge span recommendations are 120-150 m.

The Danube Commission gives recommendations for newly constructed bridges, as there are existing bridges with parameters, below these recommendations. The new design covers the min. requirement for horizontal (B) and vertical (H) bridge clearance min. B = 150 m; min. H = 10 m.²⁰

Picture 3: Bridge design clearance



3.2.3 From health & safety perspective and to avoid collision with bridge piers, the International Commission for the Protection of the Danube River²¹ and its Expert Groups deal with Danube river water issues.

¹³ EIB Complaints Mechanism Principles, Terms of Reference and Rules of Procedure (2012), § II ¶ 3 & 4 and § III ¶ 1.4

¹⁴ *Ibid.*, § II ¶ 1.2

¹⁵ *Ibid.*, § II ¶ 1.2

¹⁶ *Ibid.*, § IV ¶ 2.3

¹⁷ Convention regarding the Regime of Navigation on the Danube, Belgrade, 1948. It is noted that a similar obligation is established in the TEN-T Regulation. See: 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, Article 15(3)(b).

¹⁸ See for example: Danube Commission Recommendations on minimum requirements for standard fairway parameters, hydrotechnical and other improvements on the Danube (2012).

¹⁹ http://www.danubecommission.org/uploads/doc/publication/Gabaritov_farvatera/Recommandations%20gabarits%202013.pdf

²⁰ Source Recommendations by Danube Commission – Budapest, 2013. For reference also, bridge clearance of all bridges in the Slovak section of the river (source: <http://www.viadonau.org/home/>).

²¹ www.icpdr.org

3.3 EIA Law at EU and national level

3.3.1 The EU has adopted directives concerning environmental assessment, as follows²²:

- Directive of the European Parliament and of the Council 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment (“SEA Directive”);
- Directive 2011/92/EU of the European Parliament and of the Council on the assessment of the effects of certain public and private projects on the environment (codification) (“EIA Directive”), as amended by Directive 2014/52/EU of the European Parliament and of the Council.

3.3.2 Furthermore, it is worth noting that the Slovak Republic is a Party to the Convention on Access to Information, Public Participation in Decision-making Process and Access to Justice in Environmental Matters (Aarhus Convention).

3.3.3 The applicable national law is Act No. 24/2006 Coll. on environmental impact assessment and on amendments and supplements to certain acts (the EIA Act). The EIA Act has been amended several times. For instance, in 2009 amendments clarified the screening procedures for activities below thresholds and revised the procedures for authorization of activities subject to EIA, while in 2010 a new definition of ‘public concerned’²³ was adopted. This amendment allow persons fulfilling the conditions to become parties to the relevant decision-making procedures, and to have access to related court proceedings.

3.3.4 The EIA Act distinguishes two categories of projects to be assessed on their potential impact on the environment. Category A projects are subject to an EIA by default while category B projects undergo a screening process to determine whether or not an EIA is mandated.

3.3.5 Screening procedure commences with the presentation of a preliminary environmental study of the proposed activity, which is subject of screening. The screening procedure ends when the competent authority decides whether the proposed activity is to be assessed under the EIA Act. If it is decided that the proposed activity is not to be assessed under the EIA Act, the authorization process under special regulations follows. If it is decided that the proposed activity is to be assessed under the EIA Act, the process moves to the step of mandatory assessment.

3.3.6 The process of assessing the impact of the proposed activity consists of the following basic steps:

- Preliminary environmental study and commenting on it,
- Scoping of assessment and time schedule determination,
- EIA report and commenting on it including public consultation (public hearing),
- Expert review,
- Final statement.

3.3.7 Pursuant to the EIA Act, the EIA report is elaborated and submitted by a project developer to a competent authority, which formally delivers it to respective authorities and bodies for review. The EIA Act determines the process of EIA report review by stakeholders, including public hearing and an expert review of the EIA report. At the end of this process, the Final Statement is issued by the competent authority. The Final Statement is legally binding; it must state whether the implementation of the proposed activity is recommended, under what conditions, as well as the required scope of its post-project monitoring and evaluation. The Final Statement is binding for further authorization procedure, and it is valid for seven years from the date of its entry into force.

3.3.8 The EIA Act stipulates that *“If there are several subsequent changes in the same activity that do not individually reach the thresholds set out in Annex no. 8, but they reach or exceed them in total, these changes in activity are considered as one activity.”* Other provisions of the EIA Act confirm this when requiring cumulative impacts are included in the assessment. In this regard, it is worth noting that, in its publication *“Environmental assessment of projects and Plans and Programmes, Rulings of the Court of Justice of the European Union”*²⁴, the EC refers to the jurisprudence of the European Court of Justice (ECJ) confirming the importance of taking account

²² An overview of the applicable regulatory framework concerning biodiversity impact is provided in ¶3.4 of this Report.

²³ Including environmental non-governmental organisations that actively participate in EIA procedure and individuals who actively participate in EIA procedure and can prove their interest in the activity concerned.

²⁴ https://ec.europa.eu/environment/eia/pdf/EIA_rulings_web.pdf

of cumulative impacts²⁵ as well as the possibility of regularisation through an ex-post assessments of the environmental impact and its conditions²⁶.

3.3.9 Finally, the EIA Act ensures participation of/information to the public in the EIA framework. In particular, with regard to the issues raised in the present complaint, the EIA Act stipulates that the competent authority shall, without delay, inform the public on its website and, where appropriate, on its official notice board that a proposed activity or its change is subject to screening procedure and that information on the subject of the proceedings can be obtained from the authorizing authority and the competent authority. The competent authority shall also inform the public about the time, place and manner in which the relevant information is made publicly available as well as details of ensuring public participation in the proceedings, including information on the authorizing authority to which comments or questions may be sent, and the time limit for submitting comments or questions. Pursuant to the EIA Act, the public expresses interest in the proposed activity or its change and in the proceedings for its authorization by submission of reasoned written opinions on the NoC. The public has the right to appeal against a decision issued in the screening procedure even if it was not a party to the screening procedure.

3.4 Nature conservation at EU and national level

3.4.1 Natura 2000 is a network of protected sites of the EU Member States. By means of the NATURA 2000 network, the protection of the most rare and endangered wild flora, wild fauna species and natural habitats within the EU should be provided. Through the protection of the species and habitats of European importance, EU biodiversity should be maintained. The legal basis for establishment of NATURA 2000 network is:

- Council Directive 79/409/EEC on the conservation of wild birds (Birds Directive).
- Council Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora (Habitats Directive).

3.4.2 NATURA 2000 network consists of two types of sites:

- SPAs designed in accordance with the Birds Directive;

²⁵ "The purpose of the EIA Directive cannot be circumvented by the splitting of projects and the failure to take account of the cumulative effect of several projects must not mean in practice that they all escape the obligation to carry out an assessment when, taken together, they are likely to have significant effects on the environment within the meaning of Article 2(1) of the EIA Directive. (C-392/96, *Commission v. Ireland*, paragraphs 76, 82; C-142/07, *Ecologistas en Acción-CODA*, paragraph 44 ; C-205/08, *Umweltanwalt von Kärnten*, paragraph 53; *Abraham and Others*, paragraph 27; C-275/09, *Brussels Hoofdstedelijk Gewest and Others*, paragraph 36)".

²⁶ "[...]Member States are [...]required to nullify the unlawful consequences of that breach of EU law. The competent national authorities are therefore under an obligation to take all measures necessary, within the sphere of their competence, to remedy the failure to carry out an environmental impact assessment, for example by revoking or suspending consent already granted in order to carry out such an assessment (see, to that effect, judgments of 7 January 2004, *Wells*, C-201/02, EU:C:2004:12, paragraphs 64 and 65; of 3 July 2008, *Commission v Ireland*, C-215/06, EU:C:2008:380, paragraph 59; and of 28 February 2012, *Inter-Environnement Wallonie and Terre wallonne*, C-41/11, EU:C:2012:103, paragraphs 42, 43 and 46). The Member State concerned is likewise required to make good any harm caused by the failure to carry out an environmental impact assessment (judgment of 7 January 2004, *Wells*, C-201/02, EU:C:2004:12, paragraph 66).

The Court has, however, held that EU law does not preclude national rules which, in certain cases, permit the regularisation of operations or measures which are unlawful in the light of EU law (judgments of 3 July 2008, *Commission v Ireland*, C-215/06, EU:C:2008:380, paragraph 57; of 15 January 2013, *Križan and Others*, C-416/10, EU:C:2013:8, paragraph 87; and of 17 November 2016, *Stadt Wiener Neustadt*, C-348/15, EU:C:2016:882, paragraph 36). The Court has made it clear that such a possible regularisation would have to be subject to the condition that it does not offer the persons concerned the opportunity to circumvent the rules of EU law or to dispense with their application, and that it should remain the exception (judgments of 3 July 2008, *Commission v Ireland*, C-215/06, EU:C:2008:380, paragraph 57; of 15 January 2013, *Križan and Others*, C-416/10, EU:C:2013:8, paragraph 87; and of 17 November 2016, *Stadt WienerNeustadt*, C-348/15, EU:C:2016:882, paragraph 36). Consequently, the Court has held that legislation which attaches the same effects to regularization permission, which can be issued even where no exceptional circumstances are proved, as those attached to prior planning consent fails to have regard for the requirements of Directive 85/337 (see, to that effect, judgments of 3 July 2008, *Commission v Ireland*, C-215/06, EU:C:2008:380, paragraph 61, and of 17 November 2016, *Stadt Wiener Neustadt*, C-348/15, EU:C:2016:882, paragraph 37).

[...] Furthermore, an assessment carried out after a plant has been constructed and has entered into operation cannot be confined to its future impact on the environment but must also take into account its environmental impact from the time of its completion. [...] in the event of failure to carry out an environmental impact assessment required under Directive 85/337, EU law, on the one hand, requires Member States to nullify the unlawful consequences of that failure and, on the other hand, does not preclude regularisation through the conducting of an impact assessment, after the plant concerned has been constructed and has entered into operation, on condition that:

- national rules allowing for that regularisation do not provide the parties concerned with an opportunity to circumvent the rules of EU law or to dispense with applying them, and
- an assessment carried out for regularisation purposes is not conducted solely in respect of the plant's future environmental impact but must also take into account its environmental impact from the time of its completion. (C-196/16 and C-197/16, *Comune di Corridonia*, paragraphs 35-41 and 43."

- Special Areas of Conservation (SACs) designed in accordance with the Habitats Directive. In the first phase, the SCIs are identified and sent to the EC for approval to be designed as SACs.

3.4.3 The Directives stress that the selection of NATURA 2000 sites is carried out on the basis of scientific criteria (i.e. comprehensive data on distribution and status of particular flora and fauna species populations and particular habitats). The final NATURA 2000 network should cover the most valuable areas irrespective of ownership conditions and current management utilization. Wild flora, wild fauna species and natural habitats considered as important for the EU are listed in the annexes of the Directives. Natura 2000 should ensure the maintenance of the favourable conservation status of selected flora and fauna species populations and selected habitats.

3.4.4 The assessment of plans and projects' impact to Natura 2000 sites results from articles 6(3) and 6(4) of Habitats Directive. Article 6(3) stipulates that *"Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public."*

3.4.5 Article 6(4) establishes that *"If, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, the Member State shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected. It shall inform the Commission of the compensatory measures adopted. Where the site concerned hosts a priority natural habitat type and/or a priority species, the only considerations which may be raised are those relating to human health or public safety, to beneficial consequences of primary importance for the environment or, further to an opinion from the Commission, to other imperative reasons of overriding public interest."* In 2012, the EC approved a new (more detailed) format for submission of the compensation measures report under Article 6.4 of the Habitats Directive.

3.4.6 Guidance on the interpretation of the Habitats Directive can be found in EC documents such as the 2012 *Guidance document on Article 6(4) of the Habitats Directive 92/43/EEC* (the 2012 EC Guidance Note) and 2018 *Managing Natura 2000 sites, The provisions of Article 6 of the 'Habitats' Directive 92/43/EEC* (the 2018 EC Guidance Note)²⁷. Concerning information to the EC about compensatory measures, paragraph 1.2.1 of the 2012 EC Guidance Note stipulates that *"the compensatory measures adopted must **always** be communicated to the Commission"*. Paragraph 1.7 confirms that the notification shall cover adopted measures and enable the EC *"to appreciate the manner in which the conservation objectives of the site in question are pursued in the particular case. [...] In order to allow the Commission to request additional information on the measures taken or to take actions in case it considers that the legal requirements of the directive were not correctly applied, compensatory measures should be submitted to the Commission **before** they are implemented and indeed before the realisation of the plan or project concerned but after its authorisation. It is therefore advised that compensatory measures should be submitted to the Commission as soon as they have been adopted in the planning process in order to allow the Commission, within its competence of guardian of the treaty, to assess whether the provisions of the Directive are being correctly applied."*

3.4.7 As to the completeness and comprehensiveness of compensatory measures, paragraph 1.4.4 of the 2012 EC Guidance Note stipulates that they *"[...] must address all issues, whether technical and/or legal or financial, necessary to accomplish the objective of offsetting the negatives effects of a plan or project and preserving the*

²⁷ Guidance document on Article 6(4) of the Habitats Directive 92/43/EEC, 2012 —

https://ec.europa.eu/environment/nature/natura2000/management/docs/art6/new_guidance_art6_4_en.pdf

Managing Natura 2000 sites, The provisions of Article 6 of the 'Habitats' Directive 92/43/EEC, November 2018 —

https://ec.europa.eu/environment/nature/natura2000/management/docs/art6/Provisions_Art_nov_2018_endocx.pdf

The EC has issued two explanatory guides to the provisions of Article 6 of the Habitats Directive: (i) [Managing Natura 2000 sites](#), and (ii) [Assessment of plans and projects significantly affecting Natura 2000 sites](#), as a tools for EU Member States to manage Natura 2000 sites.

overall coherence of the Natura 2000 network.” In that regard, it is worth noting also paragraph 1.5.2 (Effectiveness of compensation), pursuant to which “Measures for which there is no reasonable guarantee of success should not be considered under Article 6(4 [...]” as well as paragraph 1.5.6 (Timing of Compensation) establishing that “All necessary provisions, technical, legal or financial, necessary to implement the compensatory measures must be completed before the plan or project implementation starts, so as to prevent any unforeseen delays that may hinder the effectiveness of the measures.”

3.4.8 Pursuant to paragraph 1.4.3 of the 2012 EC Guidance Note, “[...] as a general principle, a site should not be irreversibly affected by a project before the compensation is indeed in place. However, there may be situations where it will not be possible to fill this condition. For example, the recreation of a forest habitat would take many years to ensure the same functions as an original one negatively affected by a project. Therefore, best efforts should be made to assure compensation is in place beforehand and in the case this is not fully achievable, the competent authorities should consider extra compensation for the interim losses that would occur in the meantime. [...] Member States should pay particular attention when the negative effects of a plan or project are produced in rare natural habitats types or in natural habitats that need a long period of time to provide the same ecological functionality. Under these circumstances, the zero option should be seriously considered [...] **In principle, the result of implementing compensation has normally to be operational at the time when the damage is effective on the site concerned. Under certain circumstances where this can not be fully fulfilled, overcompensation would be required for the interim losses.**” In that regard, see Paragraph 5.4.3 of the 2018 EC Guidance Note.

3.4.9 Regarding the timing of compensatory measures, the EC guidance documents call for a case-by-case approach: “The schedule adopted must provide continuity in the ecological processes essential for maintaining the structure and functions that contribute to the overall coherence of the Natura 2000 network. This requires a tight coordination between the implementation of the plan or project and the implementation of the compensatory measures and relies on issues such as the time required for habitats to develop and/or for species populations to recover or establish in a given area.” The EC guidance documents elaborate on other factors and processes which must also be considered:

- *A site must not be irreversibly affected before compensation is in place. The result of compensation should be operational at the time the damage occurs on the site concerned. Under certain circumstances where this cannot be fully achieved, overcompensation would be required for the interim losses.*
- *Time lags might only be admissible when it is ascertained that they would not compromise the objective of ‘no net losses’ to the overall coherence of the Natura 2000 network. Time lags must not be permitted, for example, if they lead to population losses for any species protected on the site under Annex II to the Habitats Directive or Annex I to the Birds Directive; priority species listed in Annex II to the Habitats Directive merit special attention.²⁸*

According to the EC guidance documents, it may be possible to scale down in time compensatory measures, depending whether the significant negative effects are expected to arise in the short, medium or long term. Finally, the EC Guidance Note stresses that all technical, legal or financial provisions needed to implement the compensatory measures must be completed before the plan or project implementation starts, so as to prevent any unforeseen delays that may hinder the effectiveness of the measures.

3.4.10 Act no. 543/2002 Coll. on Nature and Landscape Protection (the NLP Act) transposes the Habitats and Birds Directives and is the legislative instrument for evaluating plans and projects for Natura 2000 sites together with the EIA Act.

3.4.11 In 2014, the State Nature Conservancy of the Slovak Republic (SNC) prepared the Methodology for Evaluating the Significance of Plans and Projects' Impacts on Natura 2000 Networks in the Slovak Republic, which contains the structure and basic principles for the so-called "appropriate assessment" of the effects of plans and projects on Natura 2000 sites.

²⁸ Paragraphs 1.5.6 and 3.7.15 of 2012 *Guidance document on Article 6(4) of the Habitats Directive 92/43/EEC and 2018 Managing Natura 2000 sites, The provisions of Article 6 of the 'Habitats' Directive 92/43/EEC, respectively.*

3.4.12 The NLP Act stipulates that “*Details of compensatory measures shall be laid down by a generally binding legal regulation issued by the Ministry.*” The Decree of the MoE no. 24/2003 Coll. stipulates that compensatory measures must, to a comparable extent, be directed to the adversely affected habitats of European importance and species of European importance and to birds and their habitats (hereinafter habitats and species) and must provide functions comparable to those carried out by the plan or project so as to ensure that the overall coherence of European waters is protected. In particular, compensatory measures shall be improving the conservation status of habitats and species affected by a plan or project in the affected area of the protected area or its immediate vicinity as well as by a plan or project in another territory of the system protected areas. Finally, the compensatory measures may include the reintroduction of species, the restoration or strengthening of species populations, the purchase of land, the limitation of activity negatively affecting the state of habitats and species adversely affected by the plan or project or the promotion of activities favouring them. Pursuant to the NLP Act, “...*the proposer is obliged to carry out compensatory measures at its own expense before carrying out the activity.*” [emphasis added]

3.5 Permitting of investment projects in Slovakia

3.5.1 The permitting process is regulated by the Act No. 50/1976 Coll. on spatial planning and building regulations (Building Act). Following the issuance of the Final Statement by the competent authority, the process of permitting has three stages:

1. Land use proceedings, completed by the issuance of land use decisions.
2. Formal application for a BP.
3. Occupancy permit proceedings. The purpose of this phase is to approve an exploitation of a building/technology by issuing occupancy decision to the developer.

3.5.2 The competent authority shall indicate, in its binding opinion, whether a proposal for the commencement of authorization procedure for the proposed activity is consistent with the decisions issued under the EIA Act and the respective conditions. The competent authority shall issue a binding opinion particularly in relation to the proceedings on location of construction, on land use proceedings, on building proceedings and occupancy permit proceedings.

3.5.3 The Building Act establishes a procedure for (new) ex—post BPs. Pursuant to the Building Act, if a building is built without a BP or in contradiction with it, the Building Authority will initiate (*ex officio*) proceedings: if the owner of the building fails to submit the required documents within the specified time limit, or if the construction contradicts public interest, the Building Authority shall order the removal of the construction.

3.6 Waste management national law

3.6.1 Unauthorized waste management as well as threat and damage to the environment are punished under the Slovak Criminal Act. The national waste legislation includes Act No. 79/2015 on waste and on amendments and supplements to certain acts (Waste Act)²⁹ and the Decree no. 371/2015 Coll. of the MoE implementing certain provisions of the Waste Act³⁰.

3.6.2 Operation of a waste recovery facility is regulated by the Waste Act and needs a permit for operation. Waste recovery activities are defined by classes in Annex 1 of the Waste Act.

3.7 EIB policies, procedures and standards

3.7.1 As the long-term financing body of the EU, the EIB promotes EU policies through its financial support to sustainable investment projects. The EIB has adopted E&S standards that are derived from EU policy and law and supplemented by other examples of international good practice. The standards applying to the Project are provided in the 2009 Statement of Environmental and Social Principles and Standards (the Statement)³¹ and the 2013 Environmental and Social Practices Handbook (the Handbook).

²⁹ <https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/2015/79/20190701>

³⁰ <https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/2015/371/20190101>

³¹ https://www.eib.org/attachments/strategies/eib_statement_esps_en.pdf

The Statement

3.7.2 According to the Statement, the EIB monitors the E&S performance of the projects it is financing, especially the fulfilment of any specific obligations described in the finance contract.³²

3.7.3 All projects financed by EIB must at least comply with:

- Applicable national environmental law;
- Applicable EU environmental law, notably the EIA Directive³³ and the nature conservation Directives³⁴, as well as sector-specific Directives and “cross-cutting” Directives; and
- The principles and standards of relevant international environmental conventions incorporated into EU law, such as the Convention on Biological Diversity and the Ramsar Convention.³⁵

3.7.4 The EIB assumes that, for projects in the EU, the EU E&S law has been correctly transposed into national law and that national law is being enforced by the responsible authorities. EIB’s due diligence therefore focuses particularly on countries and/or specific laws where there is evidence to suggest these assumptions may be false.³⁶ This may derive from, *inter alia*, administrative and judicial review procedures or an infringement proceeding opened by the EC.

3.7.5 The Statement requires transparency of information and involvement of public, especially concerned public. In particular, paragraph 63 stipulates that *“Stakeholder concerns should be considered as early as possible in the project assessment process in order to reduce risks and provide for timely resolution of conflicts. For all projects for which the EIB requires a formal EIA, the promoter should conduct a meaningful, transparent, and culturally appropriate public consultation of affected communities and provide for a timely disclosure of appropriate information in a suitable form [...].”*

The Handbook

3.7.6 The Handbook translates the E&S Principles and Standards described in the Statement into the operational practices applied by the staff of the EIB. The Handbook explains how EIB staff conduct their routine work on E&S matters throughout the project cycle, while also describing the roles and responsibilities of other parties - notably those of the promoters and competent national authorities - in the implementation of the EIB’s requirements.

3.7.7 In the overview of the applicable requirements of the EIB, it is appropriate to differentiate those governing the Bank’s internal processes vis-à-vis those applicable to projects.

³² The EIB Statement of Environmental and Social Principles and Standards (2009), page 11 ¶18.

³³ The EIB requires that the provisions of the EIA Directive are respected, in particular:

- An EIA should be carried out if a project is likely to have a significant impact on the environment;
- For an Annex II project, the decision not to carry out an EIA should be justified.
- The public concerned should be given early and effective opportunities to participate, to express comments on the project and to receive a response to those comments.
- Any residual impacts should be suitably mitigated, compensated and/or offset.

See the Statement, page 16 ¶37.

³⁴ The EIB does not finance projects located in protected sites unless they are consistent with the relevant legal requirements and site management plans. Regarding Natura 2000 sites, any project likely to have a significant effect, either individually or in combination with other projects, should be subject to the protection regime described in Article 6 of the Habitats Directive. Within that framework, the Bank requires that the borrowers/promoters conduct an appropriate assessment of the effects on protected species or the conservation values of the sites, identifying alternatives and mitigation measures. If, in the light of the assessment, a significant effect on a designated habitat type and/or species remains and/or the overall coherence of Natura 2000 is threatened, the Bank will only finance projects if there is an overriding public interest, according to the meaning in the Habitats Directive. In such cases, the Commission should be informed. Where the conservation site hosts priority features, an opinion from the Commission is necessary. See the Statement, page 22 ¶72-73.

³⁵ *Ibid.*, page 16, ¶136. See also the Handbook, page 12, ¶13 — *“The assessment of environmental and social impacts and risk, including their significance and materiality, as well as the development of adequate management plans and programmes, are key tools for achieving sound environmental and social performance. In this respect, all EIB-financed operations shall comply with national legislation and international conventions and agreements ratified by the host Country. In addition, operations within the EU [...] must comply with EU horizontal and/or applicable sectoral legislation [...].”*

³⁶ The EIB Statement of Environmental and Social Principles and Standards (2009), page 8 ¶20.

The EIB's role

3.7.8 The Bank's procedures are derived from the presumption that promoters are fully responsible for implementing projects financed by the Bank, including studies, the ESIA process, the implementation of mitigation and/or compensation measures and monitoring the success/effectiveness of these measures after implementation. The Bank limits itself to determining that the conditions attached to its financing are met.

3.7.9 The Handbook (¶37, Vol B) requires that, "*[b]efore the EIB proceeds with full due diligence, an E&S screening shall be carried out for all projects. The Project Team will establish the definition of the project including a description of the project assessment area, its ancillary/associated facilities/infrastructure as well as the project's area of influence. The Project Team, will then, to the extent possible, determine the potential E&S risks and impacts of concern, the nature and magnitude of the potential impacts and have a preliminary indication of the promoter's capacity to manage these issues.*"

3.7.10 With regard to screening for legislative compliance, paragraph 55 of the Handbook requires that all projects in the EU likely to have a significant effect on the environment, be subject to an EIA, according to the definitions and requirements of the EIA Directive. Paragraph 57 "*requires that a screening, according to the Habitats Directive Assessment, be carried out for all projects in the EU [...] likely to have an impact upon a European site or listed species, either alone or in combination with other plans and projects. If the project is likely to adversely affect a European Site or a species, which is of importance in Europe, then the EIB requires that an Appropriate Assessment [...] be carried out and concluded by the competent authorities.*"

3.7.11 At the appraisal stage, the Bank determines and recommends to the EIB Board of Directors (BoD) contractual conditions to ensure the E&S acceptability of the project during implementation and operation. These checks include, among others: (i) conditions for disbursement, and (ii) particular undertakings.³⁷

3.7.12 The Nature Conservation Forms A/B or equivalent, where applicable, should be received with a copy of the development consent and, at the latest, prior to Board approval. When adverse E&S impacts and risks are anticipated, the Environmental and Social Management Plan (ESMP) for mitigating and managing the E&S impacts shall be referred to by the finance contract.³⁸

3.7.13 EIB assigns to all projects a monitoring category (A or B) reflecting the level of risk of the project being realised in-line with assumptions made at appraisal and/or the expected level of effort required by the Bank to perform post signature due diligence.³⁹ Any project requiring reporting to the Bank on environmental, social and other matters on a regular basis during implementation will be given Category B.⁴⁰ *Normally the EIB will also expect to carry out physical monitoring of the project by one or more visits for Category B projects, and this may include on-site follow up of environmental and social impact management.*⁴¹

3.7.14 *Monitoring aims at ensuring compliance of the operation with the EIB's approval conditions and monitoring plan and verifying that the expected outputs and impacts are actually delivered throughout the project cycle, as required to fulfil the EIB's obligations and meet its objectives. In particular, physical monitoring aims at verifying the actual implementation and initial operation of the underlying project itself.*⁴² *On top of the general requirements, environmental and social requirements include evidence on:*

- *Compliance with applicable environmental and social legislation;*
- *Respect of contract conditions and undertakings related to the environment and social matters;*
- *Implementation of agreed impact management measures.*⁴³

³⁷ EIB Environmental and Social Handbook (2013), page 146 §B.2.11. It is worth noting that E&S conditions may be addressed to the promoter, borrower, environmental authority or ministry. In some cases, the E&S conditions will need to be in separate legal agreements in order to be applicable to the third party, which will fulfil the E&S condition. See *Ibid.*, ¶262-263.

³⁸ *Ibid.*, page 147 ¶261.

³⁹ *Ibid.*, page 144 ¶243.

⁴⁰ *Ibid.*, page 145 ¶248.

⁴¹ *Ibid.*, page 145 ¶245.

⁴² *Ibid.*, page 148 ¶270.

⁴³ *Ibid.*, page 148 ¶271.

3.7.15 Paragraph 272 emphasises that "[c]lose follow up of environmental and social actions that are required as part of the finance contract (in particular those related to disbursement conditions) is essential, since it is at this stage that the EIB can have most impact in ensuring that any outstanding environmental and social issues are thoroughly and correctly followed by the promoter, in compliance with the EIB's requirements. Where these issues are particularly sensitive, or where the [EIB operational] Team deems it requires specialist support, this can be provided by ENVAG and ECSO [additional in-house expert advice], such as a review of environmental or social impact studies or other specific documentation submitted by the promoter or borrower."⁴⁴ Furthermore, paragraph 70 establishes that, "[i]f a project activity is inconsistent with international or national conventions, policies and/or laws, and the residual impacts on critical habitat/ecosystems are significant, the [EIB operational] Team should consider not pursuing the project in its current design."⁴⁵

3.7.16 For all projects where an on-site EIB mission is performed, it shall include the collection wherever possible of evidence of compliance with E&S requirements from the promoter, project stakeholders, civil-society and relevant governmental authorities. Projects with significant implementation problems including non-compliance with the E&S requirements shall be included in the Project Watch List and reported to the Management Committee.

3.7.17 As part of their reporting, borrowers/promoters shall provide the EIB with:⁴⁶

- During project implementation, evidence that any specific E&S condition/undertaking has been fulfilled;
- Regular progress reports including general and specific information such as results of E&S monitoring (noise, dust, health, traffic etc.) and implementation of impact management measures and stakeholder engagement activities (monitoring category B projects);
- Information in case of any complaint or litigation about environmental and/or social issues; and
- At completion, a report on E&S compliance and implementation of impact management measures including the effectiveness of implementation of the ESMPs.

3.7.18 If a project includes the implementation of mitigation measures, it should not be considered complete until these measures are implemented, even if the remainder of the project is complete. The EIB's monitoring should continue until all mitigation and compensation measures, as detailed in the ESMP, are implemented. For instance, it may continue after the borrowers/promoters provide the project completion report. When appropriate, the reports provided by the borrowers/promoters should refer to evidence of compliance with post construction, completion, decommissioning and rehabilitation requirements.⁴⁷

Borrower's requirements

3.7.19 The present complaint relates to the implementation of the following EIB Standards: Standard 1 (Assessment and Management of Environmental and Social Impacts and Risks), Standard 3 (Biodiversity and Ecosystems), Standard 9 (Occupational and Public Health, Safety and Security) and Standard 10 (Stakeholder Engagement).

EIB Standard 1

3.7.20 The overall objective of Standard 1 is to outline the promoter's responsibilities in the process of assessing, managing and monitoring E&S impacts and risks associated with the EIB-financed operation. Standard 1 requires that all projects comply with national legislation and regulations as well as obligations and standards in the relevant international treaties, conventions and multilateral agreements, such as:

- UNECE Aarhus Convention concerning access to information, public participation in decision-making and access to justice in environmental matters;
- United Nations Convention on Biological Diversity.

⁴⁴ Ibid., page 149 ¶272.

⁴⁵ Ibid., page 112 ¶70.

⁴⁶ Ibid., page 149 ¶273.

⁴⁷ Ibid., page 149 ¶275.

All operations located in the EU, which are likely to have significant effects on the environment, human health and well-being and may interfere with human rights, will be subject to an assessment according to the EIA Directive. This assessment may be complemented by other assessments required by EU legislation, such as the Appropriate Assessment under the Habitats and Birds Directives and the assessment under the EU Water Framework Directive⁴⁸.

3.7.21 EIB Standard 1: Assessment and Management of Environmental and Social Impacts and Risks paragraph 59 establishes that "[t]he extent of monitoring will be commensurate with the project's environmental and social impacts and risks and with compliance requirements. For projects with significant impacts, the promoter might be required to retain qualified and experienced specialists to perform periodic monitoring functions/audits throughout the life of the EIB's involvement with the project."⁴⁹

3.7.22 EIB Standard 1 establishes that, considering the findings of the project E(S)IA, the promoter will develop and implement an ESMP. *The ESMP shall document key environmental and social impacts and risks, and the measures to be taken to address them adequately following the mitigation hierarchy. Thus, the ESMP is expected to:*

- *prevent the negative impacts that could be avoided;*
- *mitigate the negative impacts that could not be avoided but could be reduced;*
- *compensate/remedy the negative impacts that could neither be avoided nor reduced; and,*
- *enhance positive impacts.*

*All compensatory and remedial measures will be addressed in the ESMP.*⁵⁰

3.7.23 *The ESMP will include provisions for the involvement of impacted individuals, communities and other stakeholders as appropriate [...], as well as provisions for remedy (through an effective grievance mechanism), regular communications with impacted stakeholders on the content, implementation and effectiveness of impact management measures. It will also suggest improvements in project design, where appropriate, to fit the needs of the beneficiary groups [...] and promote transparency and accountability.*⁵¹

3.7.24 *In order to implement the ESMP, the promoter shall put in place an integrated environmental and social management system (ESMS). The ESMS will outline the set of management processes and procedures, such as human resources management, environmental management and occupational health and safety management, that allow the promoter to identify, avoid, minimise, mitigate and offset or remedy any environmental and social impacts of the operation.*⁵² *The promoter shall establish procedures to monitor and measure the timely implementation and effectiveness of the ESMP against the agreed indicators and benchmarks, as well as compliance with any environmental and social provisions included in relevant legal and/or contractual obligations and regulatory requirements.*⁵³ Finally, the promoter shall document monitoring results; the results of the monitoring should be used to correct and improve operational performance, and when relevant, disseminated to the stakeholders.

EIB Standard 3

3.7.25 EIB Standard 3 sets out further operational requirements, related to biodiversity and ecosystems. It indicates steps to be taken to achieve full compliance with relevant EU and international law, including scoping, impact assessment, monitoring and adaptive management.

⁴⁸ In this regard, see also ¶19 stipulating that "[t]he promoter shall carry out an environmental and social assessment for any project which is likely to have significant environmental and social impacts and risks. The promoter shall be responsible for putting in place its own systems that will allow for a comprehensive and rigorous environmental and social assessment of impacts and risks, using an integrated approach in order to achieve a high level of protection of the environment taken as a whole." Other relevant provisions of Standard 1 are contained in ¶20 requiring the promoter to apply the classification provided by the Annexes I and II of the EIA Directive or relevant EU legislation and ¶38 establishing that the assessment required under art. 6(3) and art. 6(4) of Habitats Directive will follow a stage-by-stage approach and will take into account the recommendations provided by relevant EC guidelines and international best practices, the information provided within Standard 3 – Biodiversity Impact Assessment being also relevant.

⁴⁹ Ibid., page 22 ¶159.

⁵⁰ Ibid., page 20 ¶143-44

⁵¹ Ibid., page 21 ¶147

⁵² Ibid., page 21 ¶149

⁵³ Ibid., page 22 ¶158

3.7.26 *Given the complexity in predicting project impacts on biodiversity and ecosystems over the long term, the promoter should adopt a practice of adaptive management in which mitigation measures are responsive to changing conditions and the results of monitoring throughout the project cycle [biodiversity management plan — BMP].*⁵⁴ The effectiveness of the BMP should be monitored during project operation.

3.7.27 *An offset implementation and management plan must be drawn to up to present:*⁵⁵

- a) The overall biodiversity value of the offset in comparison to the initial state of the site with a detailed description of the methodologies used.*
- b) A detailed budget and timeline of the measures envisaged. Costs associated with offsetting should be factored in the business feasibility analysis.*
- c) A presentation of all parties involved with their respective role, rights and responsibilities.*
- d) Clear indicators of success of the operation and directions for adapting and correcting measures should indicator targets not be met.*
- e) A presentation of reporting duties and timeline.*

In implementing biodiversity offsets, promoters are advised to collaborate with relevant organisations in the field, so as to meet internationally recognised best-practice.

EIB Standard 9

3.7.28 Standard 9 addresses occupational and public health, safety and security. One of its objectives is to "*[e]nsure that [borrowers/]promoters duly anticipate, avoid or minimise, and effectively mitigate risks and adverse impacts to the health and safety of host communities within the project's determined area of influence [...] as well as end users, during both construction and operation phases [...].*"⁵⁶ According to Standard 9, "*risks to public health and safety are normally expected to be identified at ESIA stage.*"⁵⁷

3.7.29 The public safety risks associated with a project may involve the following, among others:

- *When new building and structures will be accessed by members of the public, the promoter will consider incremental risks of the public's potential exposure to operational accidents and/or natural hazards and will ensure consistency with the principle of universal access;*
- *Structural components impacts (e.g. from failure of structures such as dams, faulty design [...]).*⁵⁸

3.7.30 In line with Standard 9, "*[...] the promoter will ensure that the affected stakeholders within the project's area of influence are properly identified, consulted and informed of their rights in terms of health, safety and security*" (see Standard 10). "*The promoter will further ensure that they can freely convene and express their views on project risks, impacts and the proposed health and safety management plans. This consultation shall take place as part of the assessment (e.g. as part of the EIA/ESIA process when applicable) and subsequently during the project life of the project when judged necessary and detailed in the management plans.*"⁵⁹

EIB Standard 10

3.7.31 Standard 10 deals with stakeholder management in EIB-financed projects. As a public institution, the EIB requires promoters *to build and maintain a constructive relationship with relevant stakeholders*. As such the EIB promotes the right to timely access to information, public consultation and stakeholder participation as well as the right to access to remedy, including through grievance resolution. *Standard 10 affirms the EIB's expectation that promoters uphold an open, transparent and accountable dialogue with all relevant stakeholders at the local level targeted by its EIB operations. A meaningful engagement process allows for the efficient implementation of a financed operation and, in particular, the early and effective identification, assessment, and management of any environmental and social risks, impacts, and opportunities. The views, interests, and concerns of project affected communities and other interested stakeholders are heard, understood, and taken into account throughout the project lifecycle.*⁶⁰

⁵⁴ *ibid.*, page 42 ¶79

⁵⁵ *ibid.*, page 43 ¶88-89.

⁵⁶ *ibid.*, page 77 ¶4

⁵⁷ *ibid.*, page 82 ¶39

⁵⁸ *ibid.*, page 82-83 ¶40

⁵⁹ *ibid.*, page 80 ¶25

⁶⁰ *ibid.*, page 85 et seqq.

4. EIB Project's Cycle

4.1 Project appraisal and approval

4.1.1 The EIB carried out a two-stage project appraisal process between 2015 and 2016⁶¹. The EIB appraisal confirmed that Slovakia had harmonised its environmental legislation with relevant EU Directives, including EIA Directive and it identified the EIA Act, as amended in 2015 following an infringement proceeding, as the applicable national legislation. The EIB appraisal noted that each project section was subject to mandatory EIA procedure and that all EIAs received a favourable opinion from the Slovak MoE subject to conditions, including those related to mitigating and compensating for expected impacts. It was also noted that the preparation of the EIAs included public consultation for each project section, as required by law, and that Project information was made publically available on government and agency websites and during information meetings and roadshows.

4.1.2 The EIB appraisal recognised the Project's expected impacts on areas protected under specific legislation, including Natura 2000 sites. In this regard, the EIB appraisal noted that the Project was subject to appropriate assessment in accordance with Article 6 of the Habitats Directive and that, following further study and establishment of compensation measures, the Slovak government had approved the Project on grounds of imperative reasons of overriding public interest in 2014. The compensation measures, stipulated in the environmental decision and planning permits, proposed to offset – in parts – significant negative environmental impacts, include reforestation of agricultural land, revitalization of adjacent grasslands and alluvial wetlands, changing the status of existing forests, transferring farming/economic land to new alluvial forests and installation of animal passages/crossings.

4.1.3 Form B – significant impact risk, dated August 2015, was completed by the competent national authority and provided to the EIB. According to Form B, new forest growth (compensatory measures 1 to 3 providing suitable conditions for nesting of the white-tailed eagle) is expected to fulfil its ecological function 40 years after its realisation; presumed duration of monitoring is estimated at 10 years.

4.1.4 The EIB appraisal noted that planning permits were issued by 2014, while BPs were to be obtained prior to construction. The Project was to be procured under the terms of a design, build, finance and operate contract; it was expected that the Borrower will have responsibility for a significant part of the risk related to design, construction, operation, maintenance and financing of the Project. The EIB appraisal further noted that the Project was to be designed to Slovakian road design standards and Eurocodes for civil structures and that the design configuration and number of lanes may be optimised during the competitive dialogue phase.

4.1.5 At the completion of stage I appraisal (September 2015), the EIB found that disbursement should be conditioned to, *inter alia*, the confirmation of receipt of valid BPs and/or evidence that the permitting procedures were in progress.

4.1.6 In October 2015, based on the outcome of the first stage of the Project's appraisal, the EIB's BoD approved a loan of up to EUR 500 m to support the design, construction and financing of the D4 highway. The EIB BoD confirmed the outcome of the stage I appraisal, including the above-mentioned conditions. At the time of Board approval, permits for the majority of the Project sections were confirmed as substantially complete and non-appealable.

4.1.7 After the Promoter selected the Concessionaire in November 2015, the EIB carried out stage II of the Project's appraisal. During stage II appraisal (May 2016), the EIB established a disbursement condition, relating to the notification of compensatory measures to the EC as well as an undertaking concerning the Borrower's obligation to procure that "the competent authority ensures the implementation of mitigation and compensation measures notified to the Commission have been complied with by no later than 31 December 2020" [sic]. Furthermore, the EIB decided that the confirmation of receipt of valid BPs and/or evidence that permitting procedures were in progress would not be anymore a condition for disbursement but rather a

⁶¹ Stage I normally takes place before information on the winning bidder and detailed risk allocation is known to the Bank. At this stage, a provisional offer of funding is subject to Board approval. Once the winning bidder is known and before signature of the finance contract, a second analysis is conducted (stage II).

Borrower's undertaking. The above condition and undertakings were confirmed by the EIB Management Committee when approving the final terms and conditions of the EIB participation in the financing of the Project in May 2016.

4.2 The Finance Contract

4.2.1 The finance contract was signed on 21 June 2016. In addition to the notification of the compensatory measures to the EC (see ¶4.1.7), evidence of the appointment of the LTA is another condition for first disbursement.

4.2.2 With regard to the Borrower's undertakings, the Finance Contract establishes that if any changes to the Works or the Project Road are implemented or are required to be implemented, which would result in the Technical Description becoming untrue or incorrect, the EIB shall agree with such changes. Furthermore, the Borrower shall:

- implement and operate the Project in compliance with Environmental Law;
- obtain and maintain requisite Environmental Approvals for the Project on or before the time they are required under the applicable Environmental Law;
- comply with any such Environmental Approvals;
- comply in all material respects with all other laws and regulations which it or the Project is subject;
- procure that the competent authority ensures the implementation of mitigation and compensation measures notified to the EC have been complied with by no later than 31 December 2020;
- comply in all material respects with, and carry out the Project in accordance with regulations, consents and health and safety requirements that constitute Good Industry Practice;
- take all reasonable action necessary to prevent Environmental Contamination originating at or from the Project Road or the Site and take reasonable steps to prevent Environmental Contamination that does not originate at or from the Project Road or the Site from affecting the Project Road or the Site;
- prepare an ESMP and an ESMS to be approved by the LTA before commencement of the Works.

4.2.3 The finance contract stipulates that the Borrower shall inform the EIB of:

- (a) any material action/protest initiated, any material objection raised by any third party, any genuine complaint received by the Borrower or any Environmental Claim that is to its knowledge commenced, pending or threatened against it with regard to environmental or other matters affecting the Project;
- (b) a genuine allegation, complaint or information with regard to Illegal Activities related to the Project;
- (c) any non-compliance by it with any applicable Environmental Law; and (d) any suspension, revocation or modification of any Environmental Approval; and
- any material litigation, arbitration, administrative proceedings or investigation carried out by a court, administration or similar public authority, which, to the best of its knowledge and belief, is current, imminent or pending against the Borrower or its controlling entities or members of the Borrower's management bodies in connection with Illegal Activities related to the Loan or the Project. In case of a genuine allegation, complaint or information with regard to Illegal Activities related to the Loan and/or the Project consult with the Bank in good faith regarding appropriate actions.

4.2.4 Finally, the Common Terms Agreement (CTA) establishes a positive undertaking to prepare an ESMP⁶² and an ESMS in respect of each phase of the Project to be submitted (including any revisions) for approval of the LTA at or about the same time of its submission for approval by the IE. Pursuant to the CTA, the Borrower shall not commence the works before the ESMP and the ESMS are approved by the LTA. The CTA also regulates the rectification of failures to implement the ESMP in accordance with Good Industry Practice.

4.2.5 *It should be noted that the EIB-CM received as notice, during late stages of report consultation with the EIB, that an amendment letter to the finance contract had been signed in December 2020. While not a part of the succeeding analysis, such amendment includes two select issues of relevance to the complaint:*

- ***With respect to Borrower undertakings concerning the Habitats Directive, implementation of mitigation and compensation measures are to be complied with prior to the project completion date (no longer specified as 31 December 2020) and, in any event, by the final lenders' completion date***

⁶² The CTA defines the ESMP as the assurance plan to be prepared by the Borrower in accordance with the Safety, Quality and Environment Documentation pursuant to the CA. The ESMP shall be compliant with Equator Principles III and Good Industry Practice.

- ***With respect to project related information required by the Borrower, evidence that compensatory measures whose implementation is required and feasible in the short/medium term are effectively fast tracked***

4.3 Project monitoring

4.3.1 EIB monitoring is in place since the signature of the finance contract. Furthermore, the LTA and the IE monitor the design-build progress and feed the EIB's monitoring of the operation.

4.3.2 From the information gathered as part of its inquiry, the EIB-CM could not identify documentary evidence relating to EIB monitoring of the aspects raised in the first allegation of this complaint, prior or after the submission of the complaint. The EIB concerned services explained that during monitoring the concerns presented in the first allegation were not raised by the LTA and were not considered to be a risk. The following paragraphs elaborate on the EIB monitoring activities concerning the three other allegations, namely the biodiversity impact of the Project, the assessment of the Project's significant environmental impact and the Project's compliance with national law (extraction of materials and permitting procedures).

Biodiversity impact

4.3.3 On 17 June 2016, the Borrower provided the EIB with a letter to the EC dated 11 March 2016 with "attached preliminary information pursuant to Article 6(4) of the Habitats Directive (92/443/EEC) on the compensation measures regarding the project of the Highway D4 Bratislava by-pass in order to facilitate further discussion on the subject" [emphasis added]. The letter also stresses that "the final version will be submitted after the process of settlement of property rights." On 24 November 2016, the Borrower requested the disbursement of the first and second tranche of the EIB funds. On 30 November 2016, the EIB disbursed its first tranche of funds.

4.3.4 A review of the LTA reporting shows that the issue of notification of compensatory measures to the EC was directly monitored by the EIB and not by the LTA, save for communication concerning update of compensatory measures. Subsequent to first disbursement, the LTA provided the EIB with information on the compensatory measures, their implementation status as well as the timeframe/delays to the EIB's attention.

4.3.5 Following significant changes to the compensatory measures in section 1 of the Project, on 28 April 2017 the MoE approved updated compensatory measures (Resolution no. 1094/2017-6.3). The Resolution included conditions under which activities on site should be carried out. From the information provided by the LTA, the update was required due to problems in expropriating a number of land plots originally intended for the compensatory measures.

4.3.6 Prior to the issuance of the consent with the new compensatory measures by the MoE, on 7 April 2017 a bilateral meeting took place between the representatives of MoE and NHC and the representatives of the EC, Directorate-General for Environment, in Brussels. The topic of the meeting was the clarification of the current situation in resolving the compensatory measures. The EC was informed about the changes in the original project of compensatory measures. The EC was assured that the new compensatory measures fulfil the required conditions in terms of food and nest biotopes of protected bird species. The EC appreciated the proactive approach of Slovakia. The EC considers the changes to be logical, whereby they should contribute to the speedy finalisation of the compensatory measures project and subsequent beginning of Works on Section 1. On 26 May 2017 the Promoter sent an e-mail to the EC, Directorate for Regional and Urban Policy, with the information on the approval of the new compensatory measures together with an explanation and current status.

4.3.7 In the third quarter of 2017, the IE reported that six ecological surveys carried out in the reported period concerned invasive alien plant species, and ornithological surveys. According to the IE, monitoring took place for groundwater, noise and habitats, and air quality. In the fourth quarter of 2017, the IE reported that compensatory measures for mitigation of impacts of construction on environment needed to be carried out at least with the beginning of field works and completed before handover.

4.3.8 On 31 October 2017, the Zoning Permit request for the compensatory measures objects was submitted by the Slovak National Highway Company (NDS). Construction works on compensatory measures began at the end of November 2017.

4.3.9 In January 2019, in the context of the EIB-CM's initial assessment, the EIB requested updated documentation related to the (a) Annual Environmental Report, (b) Biodiversity Report and (c) Environmental/Biodiversity Management Plan.⁶³ Relevant to the compensatory measures, the EIB requested (a) confirmation of current measures; (b) validity of the notification of measures to the EC and if/when further information would be provided on the changed locations, as necessary; (c) current status on the design and implementation of measures, including which (i) received relevant zoning/building permits, (ii) were implemented and (iii) remained outstanding, and an implementation timetable; (d) confirmation that construction commenced subsequent to the implementation of measures; (e) explanation on how measures are linked to the construction progress and any reasons for delay; and (f) information on the monitoring and/or planned monitoring of measures. In its response, the Borrower provided a list of manuals/plans as made available to the LTA for review. These included, inter alia, the ESMS, ESMP, Environmental Monitoring Plan and BMP. Concerning compensatory measures, the Borrower (a) indicated that measures matched those specified in the MoE's Decision of 28 April 2017 and the associated Program of Works (PoW) had been approved by the Promoter on 21 May 2018; (b) could not confirm validity of notification of measures and its changes as this concerned the Promoter; (c) provided updates on the implementation of measures, noting that the Promoter had not provided status of zoning permit procedures on five measures, despite the Borrower's requests; (d) stated that construction had commenced following implementation of relevant measures, and for those with ongoing zoning permit procedures, the Promoter deemed that the application was sufficient to trigger construction works; (e) expected no delay in construction progress due to measure implementation; and (f) clarified that PoW is subject to monthly monitoring as described in both the monthly works reports and ecological supervision reports.

4.3.10 In 2019 the LTA reported that the presence of white-tailed eagles was monitored and that tree cutting in certain subsections of Section 1 was allowed only when no specific protected species (including, the white-tailed eagle) were nested in the vicinity of the area. From the information provided by the LTA, it results that the SNC was monitoring the nests and was in contact with the EPC Contractor in order to inform of occupied and active nests in the affected area and to specify the conditions under which the construction works may be carried out.

4.3.11 On 6 March 2019 the Promoter expressed satisfaction with the progress of works on compensatory measures 4, 5 and 6, and requested the Borrower to start with the realization of compensatory measures 2, 3 and 9 without any delay, stating that works on compensatory measures 3 and 9 could commence prior to the issuance of the related Zoning Permit.

4.3.12 From a review of the work of the IE, it appears that the latter regularly checked the works progress on compensatory measures (e.g. in the monthly reports of April- May 2019, stating that works are ongoing on object No. 076, part of the compensatory measure No. 6 - Renewal of the Biskupice branch/Biskupické rameno, and on object 072 - afforestation). In particular, in its report of May 2019, the IE states that the nest of the white-tailed eagle (*Haliaeetus albicilla*) near Section 1 km 4,5-5,5 of the D4 Highway is still active and occupied by a pair of white-tailed eagles. The IE confirms that the EPC Contractor is in regular contact with the SNC monitoring the nest.

⁶³ The EPC Contractor has elaborated a BMP for the Project on 13 September 2016. The Plan was subject of revision in December 2016, March 2017 and April 2017; the latest version dated 5 September 2017 and refers to the MoE's Decision dating 28 April 2017 and approving new compensatory measures. The scope of monitoring stated in the BMP is the following:

1. Monitoring of the impact of plan during the highway operation on the population of birds in the Birds Protection Area of Dunajské luhy – monitoring of the bird population density of occurrence, within 500 m from both sides of the highway. Estimated to start one year before the start of the construction, the monitoring should be performed on a yearly basis for a period of five years.
2. Monitoring of the compensatory measures state and their development in a certain time period - record of the development of the biotopes and their functionality. Monitoring should start right after realisation of the compensatory measures. The estimated monitoring period is 3 years for grasslands and 5 years for monitoring of the functionality of the flow-capacity of the Biskupice branch. The estimated monitoring period is 10 years for newly founded forest areas and 20 years for already existing forest areas.
3. Monitoring of compensatory measures area and its use by specific bird species – i.e. monitoring of the population density of the species, which are subject to protection and use the specific area. Monitoring is necessary every year during the first five years from the realisation and afterwards every five years for a period of 20 years.

The monitoring referred to point 1 shall be performed during construction once per year after the cutting of woody plants in the protected area, while the monitoring referred to point 2 and 3 will start after the realisation of the compensatory measures. The monitoring will be performed by a technically competent person and its results will be consulted with the SNC, which will, in case it is necessary, propose corrective measures.

An inspection of the compensatory measures will be performed by the construction's ecologist. During their execution, the ecologist shall observe the area, where the compensatory measures shall take place, at least once per week. The results of the inspection, including photo documentation, will be recorded.

4.3.13 According to the IE, the success rate monitoring plan of the compensatory measures had not been elaborated yet and the monitoring did not take place. According to the decision of the MoE approving the updated compensatory measures, the EPC Contractor “will secure execution of the compensatory measures including monitoring and the subsequent care of the executed compensatory measures according to the submitted proposal of the compensatory measures and the detailed execution project of the compensatory measures”. The monitoring of the success (operability) of the compensatory measures shall be the subject of the activity of the SNC as the national institute responsible for nature conservation. The IE called on the Construction Subcontractor to contact the SNC and to secure the monitoring of the compensatory measures through this institution.

4.3.14 In May 2019 the LTA reported that the construction works on compensatory measures were behind the submitted programme, but the delay had no impact on construction works on D4. The LTA did not refer to any negative impact of construction works on the environment. The LTA added that “*the ecological supervision done by independent experts during construction was restarted on 15th March 2019 (after winter break) and to date the IE registers 3 reports with recommendation of activities to be carried out.*” In June 2019, the LTA reported that the detailed design of compensatory measures 2, 4, 5 and 6 had been approved by the IE. The works for compensatory measure 2 had commenced in May 2019, while, in June 2019, a Zoning Permit for compensatory measures 3 and 8 had been issued and its validity was pending.

4.3.15 According the LTA, the PoW for the compensatory measures had been approved in 2018. The Borrower submitted an updated PoW in September 2019. In December 2019, the IE requested to submit its update. Some of the treatment works of the forest area (CM 9) were extended beyond the Completion Date and should be assigned to the operational phase of the Project.

4.3.16 Meanwhile, on 10 July 2019, the EC sent a letter to the Directorate for Nature, Biodiversity and Landscape Protection of the Slovak Republic. In the letter, the EC notes that in March 2016, Slovakia had submitted to the EC preliminary information on compensation measures pursuant to article 6.4 of the Habitats Directive related to the construction of the Bratislava bypass of the D4 motorway; in its communication to the EC, Slovakia had indicated that it would submit the final version after the settlement of property rights. Since the EC had not received any further information since 2016, the EC asked the Slovak authorities what compensation measures had finally been decided upon and on what basis (appropriate assessment decision and underlying report), what was the state of play of their implementation and by when Slovakia envisaged to complete their implementation.

4.3.17 On 28 November 2019, the Permanent Representative of the Slovak Republic to the EU provided the Directorate-General for Environment of the EC with a Notification of adopted compensatory measures for the Project. From the information provided by the LTA, a meeting between the EC and the Borrower took place on 3 December 2019. In the meeting, the Commission services underlined that the realisation of the compensation measures needed to start as soon as possible since they should have been carried out before the construction started. The EC stressed that, if the road is about to be in operation in 2020, the compensation measures needed to be taken without further delay in January 2020 at the latest.

4.3.18 Based on the information provided by the LTA in March 2020, valid Zoning Permit for compensatory measures 1, 3, 8 and 9 were missing and therefore, the works had not started yet. The Zoning Permit procedure⁶⁴, as well as the issues arising from the inclusion of additional plots of land in the compensatory measures, is managed by the Promoter and NDS. The IE approved all detail design documentation. During the reported period, the works on compensatory measure 6 (flowing of Biskupice channel) consisted mainly of concrete works. The EPC Contractor reported no other works on the compensatory measures.

4.3.19 On 14 February 2020 the regional court in Bratislava issued a resolution regarding the use of land for compensatory measure 9. Despite the missing Zoning Permit for compensation measures 3 and 9 the Promoter requested to start the realization of compensatory measures 2, 3 and 9 without any undue delay. At the same time, the Promoter approved the related change of the PoW for the realization of the compensatory measures (Remedial Plan).

⁶⁴ For the execution of compensatory measures, a BP is not required and the permit procedure is finalised at the stage of Zoning Permit.

4.3.20 According to the information provided by the LTA in April 2020, the last planned completion date is December 2020. The last section of the road is expected to open in December 2020.

Table 1: Compensatory measures and status as of April 2020

Compensatory measure	Status
KO 1 (071) Rusovce – forestation to improve the conditions for the night roosting of the White-tailed Eagle	Awaiting zoning permit Completion expected by 19 December 2020
KO 2 (072) Čunovo – forestation	Works ongoing (First phase of afforestation in December 2019. 2nd phase of afforestation foreseen in November 2020) Completion expected by 8 June 2020
KO 3 (073-1, 073-2) Velké Kosihy – forestation and grassing	Awaiting zoning permit Works ongoing 073-01 – afforestation First phase of afforestation in March 2020. 073-02 – grassing done in March 2020. Completion expected by 17 September 2020
KO 4 (074) Podunajské Biskupice – grassing	Completed in December 2019
KO 5 (075) Kalinkovo – grassing	Completed in December 2019
KO 6 (076, 077) – multiple incl river channel: increasing the water flow in and revitalizing the Biskupické arm of the Danube.	Works ongoing Object 100 – missing the cutting trees permit. Object 200 – Concrete works expected to finish in May 2020. Object 300 – Concrete works finished. Backfilling and finishing works ongoing. Object 400 –85% of the works completed - missing the connection with the Danube and with the object 500. Object 500 – Concrete works, backfilling works and flood gates installation completed. Missing connection with existing channel and with object 400. Object 600 – missing the cutting trees permit. Object 700 – 90% of the culvert is completed - missing only the top layer. Object 800 - missing the cutting trees permit. Object 900 – completed in September 2019. Bridge 077 Abutment no.1 is concreted. Backfilling and Abutment no.2 are ongoing. Completion expected for 076 by 30 September 2020 and 077 by 23 May 2020
KO 7 - Increasing of legislative protection of forest biotopes	Works ongoing – expected to finish at the end of 2020
KO 8 (079) Kameničná – forestation	Awaiting zoning permit Works ongoing - Installation of fence was finished in April 2020. 1st phase of afforestation ongoing. Completion expected by 1 October 2020
KO 9 (078) Rusovce - conversion to grassland	Awaiting zoning permit Awaiting land access – Expected to start in July 2020 Completion expected by 6 November 2020

Assessment of Project's significant environmental impact and BPs

4.3.21 From the information provided by the LTA, the environmental inspections by the IE are being carried out twice a week. A protocol is established to close-out environmental issues discovered on site through the use of the inspection checklists and referrals of defects to the EPC Contractor for action and close-out⁶⁵. From the information provided by the LTA in 2020, the IE reports open environmental Non-Conformities, including:

- Construction waste mixed with soil and placed under the BO 206;
- Cement milk spilled into the Danube river;
- Storage of construction materials and soil in the protected area around the site;
- Washing the machinery outside the washing pits.

4.3.22 As part of its monitoring, the LTA informed the EIB of the court case referred to in paragraph 2.3.1 of this Report. The LTA stressed that the EPC Contractor was working according to a valid BP and it was unclear if the judgement would affect its validity. On 21 February 2019 the MoE informed the Borrower that the judgement has been challenged before the Supreme Court. The Borrower has not received a notice to stop any works in relation to this ruling.

4.3.23 In February 2019, the EIB sought clarifications from the Lenders' Legal Advisor (LLA) on the effects of the court decision concerning the screening decision on the validity of the BPs. In its response, the LLA clarified that the Court Decision cancels the MoE Decision issued prior to the original BP. Its effect is limited "inter partes" and does not affect other authorisations relating to the same Section.

4.3.24 A review of the monitoring activities carried out by the EIB in 2019 shows that the EIB considered the court judgement referred to in paragraph 2.3 of this Report to be a continuing risk on the Project. However, when listing significant problems in the Project, the EIB services did not highlight any significant environmental problem connected with the Project until January 2020. Since then, the EIB's monitoring refers to the above-mentioned court judgement as well as the Police investigations on alleged illegal mining and use of hazardous waste in construction as raising a significant environmental problem. From a review of the EIB's monitoring performed under the Remedy & Resolution Mechanism in June 2020, the EIB operational services considered that the Project had followed lawful procedures.

Illegal Extraction of Materials and contamination

4.3.25 The EIB was informed of a criminal investigation on illegal mining and usage of hazardous waste material in the embankments. Based on the information from the media, the EIB stopped the April 2019 disbursement and requested the Borrower to submit a Remediation Plan. The Remediation Plan was submitted in May 2019.

4.3.26 From the information available to the EIB during its monitoring, samples of material used for the construction of the embankments were collected in March and April 2019 in all sections. In May 2019 the Promoter provided a report with the results for Section 1 and 2 and stated that:

- one third of the conditions imposed in the EIA had not been fulfilled,
- the EIA Act had been breached due to the use of recycled waste into the embankments without specific assessment and verification in the EIA procedure,
- there was no permit for the use of waste material for the construction of the embankments,
- the Concession Agreement (CA) had been breached due to all of the findings listed above.

In its reply the Borrower stated that (i) no breach of the EIA conditions were detected, (ii) no contaminated material was incorporated into the Works and no environmental damage had been caused, and (iii) the EIA had been incorrectly interpreted by suggesting the prohibition of recycled materials in the Project Works. The Borrower expressed preparedness to perform any corrective actions if these are proved as required.

4.3.27 On 13 June 2019, the Regional directorate of the police force in Bratislava, Division of criminal police ordered a search warrant on premises and lands in relation to the crimes of unauthorised waste handling and threat and damage to the environment⁶⁶.

⁶⁵ For instance, the IE reports that in April 2019 monitoring of noise, habitats and migration was performed while in May 2019 monitoring of air quality, surface water and ground water was ongoing.

⁶⁶ "The suspicion that on the above stated lots the handling of dangerous waste should occur, is supported also by the results of the measurement of the occurrence of asbestos in the area of the waste hill by the accredited laboratory of the Public Health Institute Ostrava,

4.3.28 From the information provided by the LTA, in July 2019 the Promoter informed the Borrower and the IE about the test results of samples collected in June 2019 in Section 1, on a test area covering a 500m length area near Jarovce. Asbestos, which is classified as a hazardous waste according to the Waste Act, was detected in the samples. However, the LTA referred to an environmental expert's view that the level of asbestos was at a low level and therefore not harmful.

4.3.29 The LTA informed the EIB that the police had raided the EPC Contractor premises under a search warrant, that an employee of the EPC Contractor had been arrested and that the warrant mentioned mining permits and material contamination. The police presented criminal charges for damaging the environment by mining gravel in two land plots in the Jánošíková area. According to the LTA, there was a possibility that charges could be brought for contamination related issues. As of July 2020, there is no new information concerning the above-mentioned police investigations at EPC Contractor level.

4.3.30 From the EIB monitoring performed in November 2019, the Special Building Office ("SBO") had acknowledged that the amount of asbestos detected in the D4 embankment was below any applicable "hazardous" thresholds. On 30 September 2019, the EPC Contractor submitted a remedial plan requested by the SBO, focusing on additional structural testing of the embankment in question to establish whether the recycled material used is suitable for the intended use. SBO ordered in its letter dated 25 October 2019 suspension of the works in the respective section. The works on the disputed part of the D4 embankment were stopped until a final agreement with the SBO is found.

4.3.31 On 8 November 2019, the local press published an opinion presented by NDS that the whole embankment in question would need to be fully replaced due to unsatisfactory results of static stress tests of that part of the project. A decision of the SBO, as the supervising authority making the final decision on the remedial plan, was expected by 6 December 2019. As a result of several exchanges and meetings, on 9 January 2020 the SBO sent a letter to the Borrower, stating that the latter had failed to prove the suitability of the material used for the embankments in Section 1 and notified the Borrower about the commencement of the proceedings on the additional permit of the construction project pursuant to the Building Act. The Borrower was requested to provide documents proving that the additional permit is not in conflict with public interests, zoning permit and special regulations by early April 2020. Failure to fulfil the conditions of the SBO's resolution could result in an order of the SBO to remove the construction. From the information provided by the EIB competent services, on 3 June 2020, the SBO confirmed that the embankment is statically sound and acceptable from a technical point of view. An additional 90 days were granted in order for the Borrower to procure the necessary clearance from the MoE which, as of August 2020, had not been received.

5. Methodology of the inquiry

5.1 In accordance with the EIB-CM Operating Procedures (2012), the EIB-CM launched an inquiry into the issues as circumscribed in the complaint and as part of its preliminary phase, conducted an initial assessment. The EIB-CM's Initial Assessment Report, dated 28 February 2019, concluded that issues raised by the Complainants warranted a compliance review into the allegations set forth above.

5.2 As part of its compliance review, the EIB-CM, inter alia, gathered and reviewed existing information on the subject under complaint, conducted appropriate inquiries with a view to assess whether the EIB Group's policies and procedures have been followed and fosters adherence to the EIB Group's policies.

where the concentrations of asbestos fibres up to 200 fibres/m³ were confirmed. By the protocol on the test of the National Reference Centre for the health issue of fibre dusts of the RPHA (Regional Public Health Authority) seated in Nitra dated 07.11.2018, in the artificial hill the occurrence of building material was found out – 1 piece of slab, 2 pieces of pipelines with the content of asbestos fibres. The occurrence of asbestos in the air is confirmed also by the measurements of the accredited laboratory ALS Czech Republic, s.r.o., up to 500-590 fibres/m³, which the civic association "Institute for the development of Bratislava region" had taken at its own costs from the surroundings of the construction site of the "waste hill", during full operation activity of its elimination. The stated represents a reasonable suspicion that during this elimination the manipulation with asbestos or materials and soil with asbestos content by the activity of mechanisms is taking place. This can cause disruption of their surfaces, while loosening into the air together with the dust, which is not acceptable from the point of view of the health protection and that is why such activity is prohibited. The Regional Public Health Authority Bratislava referring to the stated, concludes itself in its notification, that in the given case of the "waste hill", the asbestos dump is not concerned, but the waste dump with dispersed occurrence of asbestos-cement materials from demolitions is concerned."

5.3 During an onsite mission in June 2019, the EIB-CM held meetings with the (i) Complainants, (ii) Promoter, (iii) MoE, (iv) Borrower and (v) EC's Representation in the Slovak Republic. The EIB-CM liaised with the Complainants up to June 2020.

6. Findings and Conclusions

6.1 Non-compliance of the Project's technical design with international agreements

6.1.1 In design-build EPC contracts, the Borrower delegates responsibility to the EPC contractor to deliver the project as “turn-key”. The scope of work should be clearly defined in the contract documents and it is a fixed price contract. The EPC Contractor prepares the designs, seeks approval from local authorities (BPs) and submits the working designs to the IE to go ahead with construction. In this type of contract, the EPC Contractor may modify the preliminary concept ideas to suit its best in choosing structural system, distance between piers, number of spans and the overall appearance of the bridge⁶⁷.

6.1.2 Although the Project is sub-divided into sections, the Danube Bridge crossing has not been defined as a separate section. The bridge design has not followed a cable-stayed structural system, initially envisaged in the EIA. With the signature of the CA, the EPC Contractor was given the freedom to develop “cost-effective own design” for the Danube Bridge crossing. The new design was prepared on grounds of “significant reduction of project costs”.

Conclusions

6.1.6 With regard to the consistency of the new design of the Danube Bridge with the Danube Commission Recommendations and the relevant technical standards, the inquiry shows that the Danube Commission Recommendations are taken into consideration by the new design and overall horizontal and vertical clearances are kept. The designs and the construction works are monitored on a regular basis by the LTA and IE. Whereas the EIB-CM could not detect evidence of non-compliance of the operation with international conventions, **the EIB-CM concludes that the allegation is ungrounded.**

6.2 Negative impact of the Project on a Natura 2000 site

6.2.1 The D4 Jarovce – Ivanka Sever section involves the construction of a new bridge over the River Danube which is located within a Natura 2000 site. The Project was subject to an appropriate assessment in accordance with Article 6 of the Habitats Directive. It was found to have a significant negative impact on protected habitats and species. Following further studies, the Slovak government approved the Project on grounds of imperative reasons of overriding public interest in 2014. During the EIB-CM's onsite mission of June 2019, the MoE explained that the Project is the first Slovak project adopting compensatory measures under the Habitats Directive.

6.2.2 It is worth noting that the obligation to implement the compensatory measures is included among the construction conditions in the BP for D4 Highway section Jarovce – Ivanka north. Compensatory measures have to be implemented as one of the conditions for issuing the final occupation permit for the relevant section of the highway.

6.2.3 As referred to in ¶4.3, the MoE provided preliminary information to the EC in 2016, clearly specifying that the final version of the notification would have been submitted after property rights would be settled. The MoE modified the compensatory measures in 2017. The final notification of the compensatory measures was sent to the EC on 28 November 2019.

6.2.4 A package of nine compensatory measures (KO1-KO9) to be put in place by the time the damage occurred (i.e., the destruction of sizeable forest areas) was identified. The measures were agreed as a package to compensate for the damage caused by the Project.

⁶⁷ If the Promoter wants to retain ownership on the concept design, then the roles are changed. An EPCM contractor will focus on the Construction Management and will have the duty to ensure that the engineering and design of the project are in compliance with the projects technical and functional specifications. It is a fee-based contract with various contractual relationships for the construction related works. The EPCM model is structured on basis of a cost-reimbursable fee structure or a unit rate fee structure.

6.2.5 As referred to in ¶2.1.8, construction works for the Project started in 2016, while the construction works on compensatory measures started in November 2017. By the first half of 2019 it was already clear that, while some progress had been made on a number of compensatory measures, the Borrower had not yet started to implement all of them. This was also confirmed during the EIB-CM onsite mission in June 2019 where the Borrower informed the EIB-CM that the designs of some compensatory measures as well as zoning permits had not yet been provided by the Promoter. The EIB-CM onsite visit of June 2019 confirmed that the compensatory measures are delayed and that it is unlikely that the original time schedule (end of 2020) can be complied with. From the information gathered as part of the inquiry, it results that there is a considerable hiatus between the construction of the Project and the implementation of the compensatory measures.

Timely notification of compensatory measures to EC

6.2.6 The purpose of the notification of the compensatory measures to the EC is to allow the latter to request additional information on the compensatory measures notified or to take actions in case it considers that EU law was not correctly applied. For this reason and with a view to avoiding negative impacts on protected habitats, the notification should be timely and compensatory measures should be notified before they are implemented and the Project is realized. In its liaison with the EIB-CM, the EC confirmed that the formal notification must be made prior to the commencement of the works.

Conclusion

6.2.7 From the above, it results that **a final notification of compensatory measures to the EC was sent in November 2019, i.e. after construction works had commenced.**

Timely and adequate implementation of compensatory measures

6.2.8 From a review of the applicable regulatory framework (¶ 3.4.7 and 3.4.10), it results that construction works should commence after the adoption of compensatory measures. Failure to timely (i.e. according to schedule) implement compensatory measures could constitute a serious impact on the affected habitats/species. The schedule for implementation of compensatory measures established by the competent national authority (the MoE) is based on scientific and expert evaluation. If this schedule is not respected, which from the information gathered as part of the inquiry seems to be the case, negative impacts affecting protected habitats/species will materialise. As part of its inquiry, the EIB-CM took into account the IE's opinion (¶4.3.6) as well as the EC's view (¶4.3.15) on the timing of compensation measures.

6.2.9 While the impact of compensation measures must be achieved at the time when the damage occurs on the site concerned, under certain circumstances, if the above cannot be fully achieved, overcompensation would be required for the interim losses (see ¶3.4.6 of this Report). In the present case, a number of factors (such as the time needed for forestation, the unavailability of land, the length of expropriation procedures, the unavailability of zoning permits etc.) affect the ability to achieve the impact of compensation measures. When reviewing the factors at stake, it appears that they are either under the responsibility of the Promoter or had to be considered by the Promoter and the competent national authorities when identifying the compensatory measures package, in order to ensure it could be operationalised.

6.2.10 The EIB-CM notes that, in accordance with the EC Guidance Note (see ¶3.4.7), compliance with the EU acquis could be achieved by speeding up the implementation of the notified compensatory measures and, at the same time, considering additional compensatory measures due to the delay in the implementation of the notified compensatory measures.

6.2.11 The applicable regulatory framework allows exceptional time lags in the implementation of compensatory measures if they do not lead to population losses for any species protected on the site under Annex II to the Habitats Directive or Annex I to the Birds Directive. The White-tailed Eagle is listed under Annex I to the Birds Directive. Hence, a time lag in the implementation of compensatory measures for this protected species is not permitted. This type of compensatory measures (forestation of an area with sufficiently tall trees) needs to be effective before the negative impacts occur. The assumed negative impact of construction activities on white-tailed eagles cannot be compensated at all in the short/medium term; the EIB-CM is not aware of additional compensatory measures put in place due to the delay in the implementation of the forestation.

6.2.12 On the other hand, from the information gathered as part of the inquiry, the status of implementation of compensatory measures as of April 2020 shows progressive developments, with seven compensatory measures actually ongoing and two compensatory measures (KO 1 and 9) whose implementation has not yet started and in some case has been extended to 2021, i.e. beyond Project's completion date as well as the deadline established in the EIB Finance Contract (see ¶4.3.14). The EIB-CM takes note that, in response to construction delays, the EIB concerned services foresee to modify the completion date stipulated in the finance contract by the fourth quarter of 2020.

6.2.13 Monitoring the success rate of compensatory measures is part of the work required to ensure the adequacy of the Project and its compliance with the applicable regulatory framework. From the information gathered as part of the inquiry, it appears that the Borrower/EPC Contractor and the competent national authority are monitoring the impact in the protected sites, although, given the implementation status of compensatory measures, the EIB-CM could not detect any documentary evidence of the monitoring of their success rate, let alone of the systematisation of such monitoring activity (¶4.3.12)..

6.2.14 Finally, on the specific issue of insufficient connection of water bodies on both sides of the embankment, during the site visit in June 2019, the EIB-CM was informed that several culverts had been constructed and there was connection between water bodies on both sides of embankment. The Borrower took the view that by these measures the problem of insufficient connection of water bodies was resolved. The EIB-CM did not observe a different water colour as presented on the photos submitted by the Complainant. As a result, it appears that this aspect does not raise concerns.

Conclusion

6.2.15 The review of the information gathered as part of the inquiry shows that the Project's impacts on the Natura 2000 sites are ongoing and remain uncompensated. While some progress has been made with the implementation of compensatory measures, for two of them works have not started despite the advancement of the Project's construction works. The postponement of the completion of one compensatory measure to 2021 does not comply with the contractual undertaking attached to EIB's financial assistance. Furthermore, the EIB-CM could not detect any documentary evidence of the monitoring of the success rate of compensatory measures already implemented nor of a plan for the monitoring of compensatory measures success rate.

6.2.16 Based on the above, **the EIB-CM concludes that the Project does not appear to be supported by timely and adequate compensation of its biodiversity impact. As such, it appears to be inconsistent with the applicable regulatory framework, including EIB standards and the Finance Contract, at the time of inquiry.**

EIB's role

6.2.17 The EIB has been aware of the issues concerning the Biodiversity impact of the Project at an early stage as shown by the information reported in paragraphs 4.1 and 4.2 of this Report. It is worth noting that the Finance Contract takes the issue of timely notification (see condition for first disbursement referred to in ¶4.1.7 and 4.2.1) and implementation of compensatory measures (see undertaking referred to in ¶4.1.7 and 4.2.2) into account.

Monitoring of the fulfilment of CP1

6.2.18 From the information gathered as part of the inquiry, the competent national authority provided only preliminary information to the EC before the disbursement of EIB funds, subject to the settlement of property rights. The preliminary nature of the information stems from the below condition, which is essential with a view to presenting a sustainable program of compensatory measures to the EC.

6.2.19 Despite the fact that the EC had only received preliminary information on the compensatory measures envisaged for the Project, the EIB proceeded to disburse the first tranche of its funds, in breach of the condition precedent, de facto financing construction activities before the developer had conceived a sustainable program of compensatory measures.

Conclusions

6.2.20 A review of the EIB standards (¶3.7.2 and 3.7.16) shows the importance of monitoring fulfilment of conditions included in the Finance Contract. Based on the above, **the EIB-CM concludes that the EIB disbursed funds on the basis of a preliminary notification of compensatory measures to the EC.**

Monitoring of the undertaking on the timing of the implementation of compensatory measures

6.2.21 The Finance Contract establishes an undertaking on the timing of the implementation of compensatory measures (31 December 2020)⁶⁸. This clause is based on the assessment performed by the EIB as part of the second stage of its appraisal of the Project.

6.2.22 A review of the EIB Project Cycle for the contested operation (§4 of this Report) shows that the EIB was aware of the presence of the white-tailed eagle and of the fact that any adverse impact on its habitat had to be compensated before the impact occurs, with no time lag permitted. Any commencement prior to afforestation can cause irredeemable population losses. The EIB was also aware that the needed compensatory measures (afforestation of tall trees) were expected to fulfil their ecological function 40 years after its realisation (see ¶4.1.3). A number of reasons – (i) the fact that the appropriate assessment was not carried out as part of the initial EIA procedure, (ii) the fact that this was the first Slovak Project where compensatory measures were notified to the EC and more in general (iii) the information collected in ¶4.3) would have justified the enhanced monitoring referred to in paragraph 3.7.4 of this Report,

6.2.23 When reviewing the EIB monitoring activities, the EIB-CM could not identify documented evidence of the EIB verification, prior to disbursement of its financial assistance, of the adequacy of the delayed measures in order to compensate the adverse environmental impacts of the Project on protected habitats/species i.e. of the compliance of the Project with the EU biodiversity acquis. On the contrary, as referred to in ¶4.3.22, the EIB services, when listing significant problems in the Project as part of their monitoring, did not highlight any significant environmental problem connected with the Project until January 2020 and maintained that the Project had followed lawful procedures, as confirmed by the Lenders' Legal Adviser.

6.2.24 The EIB, as the EU Bank, shall ensure that the Project it finances within the EU comply with EU law and EIB standards. This includes the EIB's responsibility to finance Projects with adverse environmental impact on protected habitats/species only when compensatory measures are in place before the concerned habitat/species is affected. Therefore, the EIB is expected to ensure that its financial assistance is provided to Projects which, when affecting protected habitats/species, are supported by adequate and timely compensatory measures. Given the sensitivity of the non-compliance as well as its protracted nature, the EIB could have considered withholding disbursements until a satisfactory timetable of urgent compensatory measures had been presented to it.

Conclusions

6.2.5 Based on its findings, **the EIB-CM considers that the Bank's monitoring of the timely and adequate implementation of compensatory measures requires strengthening.**

6.3 Non-compliance of the Project with EU/national law on EIA

6.3.1 During the development of the Project, several EIA proceedings took place. The technical development of the Project was undertaken in sections between 2005 and 2011. The studies included EIA scoping and full EIA studies including examination of alternatives. The construction "Highway D4 Bratislava, Jarovce - Ivanka sever" was assessed according to the EIA Act. The final opinion on the Environmental report for the construction of the "D4 highway Bratislava, Jarovce - Ivanka north" was issued by the MoE on 28 September 2011 (no. 318/2010-4.3/ml).

⁶⁸ From information provided by the EIB services to the EIB-CM on 7 January 2021, this undertaking is no longer tied to 31 December 2020, but to the project's completion date.

6.3.2 Between 2014 and 2018, the MoE approved five NoCs:

- **NoC 1:**

The total number of changes proposed in this NoC was 341. On 2 July 2014 the MoE issued a statement establishing that the changes envisaged were not expected to have substantial impact on the environment and were therefore not subject to mandatory assessment.

The NoC was sent to state administration stakeholders in writing with request to respective municipalities (Jarovce, Rusovce, Podunajské Biskupice, Vajnory, Most pri Bratislave, Ivanka pri Dunaji, Kalinkovo, Čuňovo) to make it public, including non-technical summary and appropriate assessment, and published it on the information portal of the MoE (Enviroportal). The public did not comment on the NoC during the period dedicated to the consultation.

- **NoC 2**

The NoC contained changes to the original documentation for the zoning permit due to the incorporation of territorial requirements decisions as well as of results from updated surveys (transport and civil engineering basic documents, detailed engineering-geological and hydrogeological survey, noise study, emission study, woody plant inventory, biotope inventory, etc.), additional requirements of engineering network administrators, affected bodies and organizations, refinement and optimizing solutions in documentations for BPs.

On 11 July 2016 the MoE decided that changes resulting from cancellation or creation of new objects were not expected to have significant adverse impact on the environment and therefore were not subject to mandatory assessment pursuant to the EIA Act.

- **NoC 3**

The NoC related to individual sections of the Danube Bridge and main road; it contained changes to the original documentation for BP in order to incorporate the economic optimization of construction. On 20 October 2017, the MoE decided that the activities envisaged were not subject to mandatory assessment pursuant to EIA Act on condition of implementation of compensatory measures (including KO6 object 076 - Biskupické rameno).

The NoC was published on the website of the MoE. The MoE also notified known parties that they had the possibility, before a decision was taken, of commenting on the basis of that decision or, if appropriate, to propose that it be supplemented with additional information at the MoE.

- **NoC 4**

The NoC concerned changes to the original documentation for BP permit due to incorporation of requirements for economic optimization of construction. The NoC was published on the website of the MoE. On 25 October 2017, the MoE issued a decision stating that based on screening the proposed changes could be considered acceptable as they did not constitute a significant adverse effect to environment and public health and that therefore they were not be subject of mandatory EIA on condition of implementation of specified compensatory measures and a technical condition.

- **NoC 5**

The MoE informed the public on 18 December 2017 that NoC 5 was subject to the screening procedure pursuant to the EIA Act. The MoE also asked the affected municipalities and cities to make this information public and informed on deadlines for the public to comment the notification. On 7 March 2018, the MoE issued its decision in the screening process that the proposed activity would not be assessed pursuant to the EIA Act under the condition that the developer submits documentation developed in the next stage of project preparation to the SNC for opinion.

6.3.3 As referred to in paragraph 2.3 of this Report, in 2018 the Regional Court of Bratislava annulled the 2016 screening decision of the MoE concerning NoC 2. The MoE appealed the decision of the Regional Court of Bratislava before the Supreme Court, which, from the information provided by the EIB services in November 2020, has returned the case to the Regional Court of Bratislava for new proceedings. A national judicial proceeding remains ongoing.

6.3.4 In March 2019, the MoE reviewed its decisions on the screening procedures relating to NoCs 3 and 4. As a result, the MoE concluded that it had not identified and evaluated the link with other activities considering the nature and scope of the Project. The screening procedures at stake started on 22 August 2017, following the notification of the proposed changes by the developer. The latter, as a party to the proceedings, must be aware of the purpose of the EIA Directive and the EIA Act, in which the deliberate splitting up of changes to a particular proposed activity into several separate administrative procedures (so-called “salami slicing”) is a circumvention of the purpose of the legislation in question. In view of the foregoing, the developer could not acquire the right to proceed in a bona fide manner by deliberately dividing the proposed activity into multiple parts in contravention of the purpose of the EIA Act and the EIA Directive. The MoE, as the administrative authority responsible for examining the decision, concluded that, in view of the above, the decisions at stake were issued in violation of the law and revoked them. The MoE's revoking decisions were appealed; in March 2020, the MoE concluded that the reasoning of the revoking decisions was inadequate. Therefore, the administrative proceedings will have to start anew.

a. Salami-slicing

6.3.5 A review of the information gathered as part of the inquiry shows that in total 573 changes were made (NoC 1 alone: 341 changes) and that five screening procedures took place in addition to the EIA procedure on the old design (NoCs 1 to 5), of which two (NoCs 3 and 4) were submitted on the same date but dealt with separately.

6.3.6 The assessment of the environmental impact of a Project requires a holistic approach, comprehensively assessing all impacts on the environment at the same time and in the same context, considering also accumulated and interrelated impacts.

Conclusions

6.3.7 The decisions of the Regional Court of Bratislava and of the MoE suggest that splitting up 573 changes to the Project into 5 separate screening procedure was not in line with the requirements of the EU and national law. **While the allegation that the assessment of the environmental impact of changes proposed following the EIA procedure was fragmented is confirmed by the decision of the Regional Court, the EIB-CM notes that this issue is currently being addressed by the competent national authorities as part of the ongoing judicial and administrative proceedings.**

b. Absence of meaningful public consultation

6.3.8 The Complainants argue that residents learned that a 400 m-long bridge from the original project had changed to an embankment once construction had started.

6.3.9 A review of the applicable regulatory framework (International, EU and national law as well as EIB Statement and Handbook) shows that the Project shall be subject to a meaningful public consultation.

6.3.10 A full EIA was carried out on to the old design of the Project, including the bridge design as its integral part, resulting in the elaboration of the Environmental Report with assessment of all the relevant environmental impacts of the Project. This EIA procedure involved public participation.

6.3.11 Although the technical changes caused by the economic optimisation of the bridge design have not been assessed through a full EIA process, they were the subject of a screening procedure, which the applicable regulatory framework (¶3.3.9) requires to be subject to public information/consultation.

Conclusions

6.3.12 Based on the above findings, it cannot be stated that the public was prevented from public consultation. **Therefore, the EIB-CM concludes that the allegation is ungrounded.**

6.3.13 The EIB-CM further notes that the decision of the Regional Court of Bratislava referred to in paragraph 2.3 of this Report requires that a full EIA is carried out. If the appeal before the Supreme Court confirms the decision of the Regional Court of Bratislava, this will lead to consultation of the concerned party as part of the new EIA procedure. In this regard, it is therefore, important to follow-up on the developments of the pending appeal with a view to establishing whether the contested component of the Project will be subject to further consultation, including a public hearing as part of a new EIA procedure, or not. The same is valid for the administrative procedures referred to in paragraph 6.3.4. In this context, it is worth noting that the EIB-CM could not detect any evidence of EIB's monitoring of the administrative processes following the above-mentioned revoking decisions.

c. Failure to assess significant environmental impacts, including safety of the new design of the bridge

6.3.14 The decision of the Regional Court of Bratislava referred to in paragraph 2.3 of this Report establishes that a full EIA was needed under national law for the significant design changes proposed by NoC 2. The MoE has decided that separate screenings regarding NoC 3 and 4 were not in compliance with the applicable regulatory framework. The EIB does not have information on the actions taken by the MoE following such decision and, until completion of the pending appeal before the Supreme Court, it is not possible to establish whether the rationale behind the court's decision on NoC 2 apply also to the other NoCs.

6.3.15 Taking a decision on the environmental impact of the Project after its commencement may violate the EIA directive whose ratio is to ex-ante assess impacts. Under certain conditions, non-compliance with EU law could be regularized. The ECJ has held that EU law does not preclude national rules which, in certain cases, permit the regularization of operations or measures which are unlawful in the light of EU law. In particular, an assessment carried out for regularization purposes should not be conducted solely in respect of the future environmental impact but must also take into account the Project's environmental impact from the time of its completion. Therefore, it must be ensured that ex-post assessments will consider also all environmental impacts from the time of completion of the works or possibly earlier during the ongoing works.

6.3.16 It is worth noting that in the present case, construction works are not yet finalized and therefore, an ex-post assessment would not only consider future impacts upon completion (as highlighted in the ECJ jurisprudence) but also earlier impacts during the construction phase.

Conclusions

6.3.17 While the decisions of the Regional Court of Bratislava as well as of the MoE draw the attention on shortcomings with regard to the compliance of the contested Project with the applicable regulatory framework, a final conclusion on this allegation cannot be drawn until the pending judicial and administrative proceedings are completed. As such, the EIB-CM is not in a position to clearly establish whether the allegation is grounded or not.

Safety of the new design

6.3.18 With regard to the public health and safety concerns (e.g. collision of boats/kayaks with the bridge pillars) raised with regard to the fact that, in the new design, two piers fall in the riverbed, it is worth noting that, within design-build contracts health, safety and environment (HSE) issues are handled as follows:

- During design phase, respective standards and Eurocodes are followed, with checking and approving institutions verifying the documents.
- During construction phase, respective HSE Department for the project monitors the implementation of the approved designs.

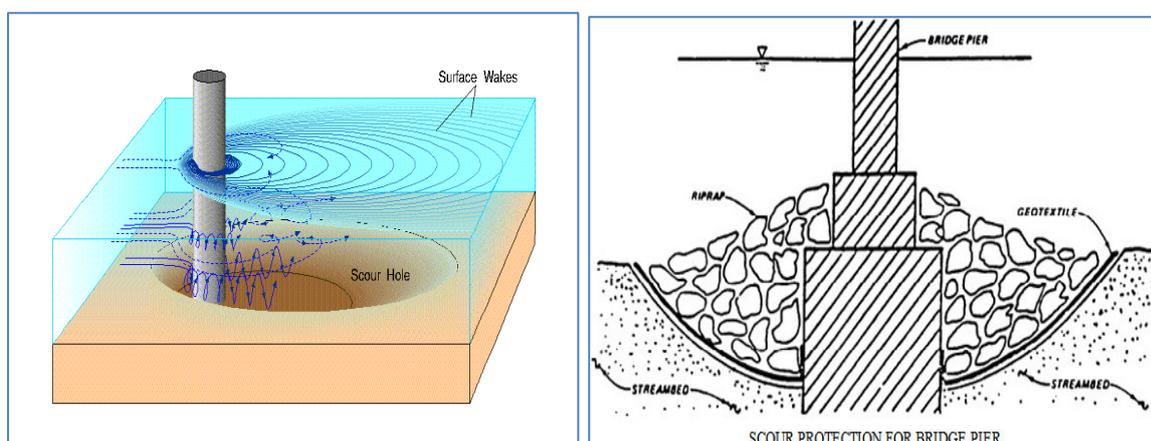
6.3.19 Standard international safety practice is to protect bridge-supporting pillars from boat collision by introducing buffer barriers/zones around each pillar (see picture 4). This is executed at a later stage of the bridge construction, bearing in mind possible icing and floating ice blocks that may damage bridge structure.



Picture 4: Fenders for collision protection

6.3.20 Additional studies, including hydraulic modelling and computational fluid dynamics, can be performed to reassure public concerns about health and safety on bridge piers in the riverbed. Specialised Institutes can perform the modelling, conduct the study and obtain results according to international standards.

Picture 5: Scour and scour protection



6.3.21 In September 2018, the Complainant submitted a remonstrance to the decision on the revised building permit on the basis of public health and safety concerns, not dissimilar to those presented to the EIB-CM. Furthermore, the organisation Kanu-Tour International Danubien e.V. raised similar concerns in a letter to the Promotor dated October 2018. In the context of this letter, the EPC Contractor provided a response to the Borrower in November 2018, confirming

[...] all the necessary and required studies (in an extensive form) for assessment of the Danube bridge foundations have been executed, and that the results of those studies and modelling have proven the correctness, reliability, and safety of the technical proposal for the design of Danube bridge foundations, that are in additional fully compliant with the Standards and Good Engineering Practice.

6.3.22 The studies referred to by the EPC Contractor include: (i) a 2D mathematical model, (ii) physical model tests, (iii) 3D mathematical models and simulations and (iv) 3D mathematical models on the detailed flow analysis around the pile cap and the piles. According to the response, all studies were provided to the SBO during the building permit proceedings. Of particular relevance to the issues raised in the complaint, the response states

The conclusions of the detailed study of water flows in the surrounding of the piers proved that there is no evidence which would prove the occurrence of an adverse suction effect on floating elements around the pile caps of the bridge, and so-called 'siphon effect' [...] On the contrary, the conclusions obtained show the evidence which disproves the existence of any phenomena that would imply the possible 'life threatening' features that may be the concern of kayakers.

6.3.23 None of the studies listed in paragraph 6.3.22 were held by the EIB at the time of the EIB-CM inquiry. Upon request of the EIB-CM, the EIB services obtained and provided

- a 2D numerical study dated August 2017 conducted by DHI Slovakia, which is listed as study (i) above. The focus of the study is to evaluate the influence of the bridge foundations in the Danube River bed and floodplains, flood water levels as well as estimation of scour depths in bridge piers.
- a 3D physical scale model study carried out by the Environmental Hydraulics Institute of Cantabria ("IH Cantabria") with the aim of evaluating the flow variation and scour over a moveable bed and providing real physical flow and bed geometry data for Delft3D numerical model calibration.
- 3D numerical model and simulations carried out by IH Cantabria using the Delft3D model for calibrating the physical tests in two sequential phases, hydrodynamic and morphodynamic.

The 'floaters tracking test' documentation has not been received.

6.3.24 During the consultation on the EIB-CM Conclusions Report in August 2020, the EIB requested the LTA's opinion on the matters raised in the complaint, which confirms satisfaction with the assessments performed⁶⁹. It is worth noting that, when reviewing the EIB's monitoring of this issue, the documentation at stake, including the information referred to in paragraph 6.3.21 and following, was archived by the EIB competent services in early August 2020 onwards.

6.3.25 In October 2020, given the lack of evidence-based documentation, the EIB-CM requested the LTA's opinion on the suitability and adequacy of hydraulic studies conducted, with particular emphasis on those studies which examine the potential occurrence of an adverse suction effect on floating elements ('siphon effect') and methodology by which this was evaluated ('model similarity').

6.3.26 The LTA expressed satisfaction with the suitability and adequacy of the hydraulic studies for the purpose in which they were carried out, i.e. to investigate the flow of the river at the piers and the adequacy of the scour protection for the piles. In the opinion of the LTA, any attempt to model the scenarios proposed by the complainant, i.e. bodies being drawn under the pilecap and risks due to floating objects being stuck in the piles, could not be carried out to a sufficiently high confidence level to be of value. According to the LTA, evidence was provided that an appropriate and legal process was followed when undertaking the studies, design, design checking and design approval of the Danube Bridge, in strict adherence with the Slovak guideline and regulations. This opinion is based on a review of studies, design, checks and approvals from a procedural point of view and the compliance of the studies and design with the appropriate norms and Eurocodes.

6.3.27 The LTA confirmed that 2D and 3D models and simulations were carried out to assess scouring and potential suction effects around the pile caps. In the LTA's opinion, sufficient evidence has not been provided to support the scenarios raised by the Complainant yet evidence has been provided which shows these risks do not

⁶⁹ In particular, the LTA explained that:

- The scouring and hydraulic actions on the bridge foundations have been assessed by Instituto Cantabria in Spain, an internationally recognised research institution associated to the Santander Civil Engineering School. Both numerical assessment and 3D physical modelling testing have been carried out to outline the rip rap protection for the bridge foundations. The LTA is satisfied with this assessment.
- The accidental load caused by a potential ship collision event has been considered by the Danube Bridge designer in their calculations. The boat typology and subsequently the quantified load applied to the bridge support has been chosen based on the permitted use of the river for freight transportation. This is common good practice for bridges found on the river.
- The environmental impact minimisation actions to be demonstrated by the EPC Contractor and SPV comply with the recommendations issued on the EIA, and the subsequent coordination with the Slovak Water Management Company. The Slovak Republic's change of building permit process found that an update to the EIA report was not required as part of the environmental and technical approval of the proposed changes in Section 1 including the Danube Bridge.
- Further to the hydrological studies carried out by the Instituto Cantabria - where water flow velocity and flux has been assessed - and the additional floaters tracking tests carried out, these have confirmed that the water flow disruption caused by the bridge foundations will not present a hazard for human water activities. Furthermore, the solution has been reviewed and accepted by the Slovak Water Management Company.

occur. From the LTA's perspective, the Complainant has not provided any evidence to support their claim nor the unsuitability of the form and shape of the piers. No alternative technical process has been outlined or detailed by the Complainant to verify the suitability of the Danube Bridge foundations.

6.3.28 It is important to note that during the course of investigation, the Complainant drew particular attention to additional hydraulic studies conducted in the context of the D4R7 motorway which allege to contradict findings of those commissioned by the Project. The EIB-CM was unable to gain access to these studies, and therefore cannot determine the veracity of this claim.

6.3.29 The EIB services maintain that the safety of kayak sports or swimming activities under the new design were assessed through the Notification of Change and Change of Building Permit procedure including approval by the competent authority. According to the EIB services, the Bank received assurances by the Borrower, the Promoter and independent expert assessments that the Danube bridge design and construction have followed procedures in line with approvals and permits and also industry good practice.

6.3.30 When it comes to the impact of the new design of the Danube Bridge on public safety, the EIB-CM notes that there are no indications of non-compliance of the new design with the applicable international standards, Eurocodes and the minimum requirements for navigability in the Danube presented in the Danube Commission Recommendations (see ¶6.1 of this Report). As there is a tradition of fishery and boat traffic in the affected area, it is important that the navigability on the Danube River, at D4R7 Bridge crossing location, is not obstructed, as per the regulatory framework and that design-build international standards are respected.

6.3.31 While the 2008 EIA had assessed the public safety risk of the old design of the Danube Bridge, the EIB-CM notes that the new design was not subject to a full EIA and that the decision not to carry it out was successfully challenged before the national court. However, insofar as the decision of the national court has been appealed before the Supreme Court and the latter has returned the case to the national court, it is not yet clear whether the new design will ultimately have to undergo a full EIA assessing the public safety risks connected with the new pillar structure or not.

Conclusions

6.3.32 The EIB-CM stresses that EIB Standard 9 requires EIB to monitor public safety risks connected with the operations it finances and that the safety of kayak sports or swimming activities under the new design has not been assessed as part of the EIA procedure. The EIB-CM did not detect sufficient evidence-based documentation at the start of the inquiry and by its end, remains incomplete by virtue of missing information mentioned in paragraph 6.3.23. However, following a review of studies and opinions of the LTA obtained by the EIB during consultation of the EIB-CM Conclusions Report, it is not possible to make a definitive finding of non-compliance in respect of the Project. This necessarily follows from the fact that clear evidence to the contrary was not provided by the Complainant nor was it available elsewhere.

6.3.33 As relates to the EIB's monitoring obligations in respect of the Project's compliance with Standard 9, the EIB-CM did not find internal records showing that substantial compliance with this standard had been sufficiently considered following the submission of the Complaint. Given the seriousness of the allegations submitted as part of a formal complaint to the Bank, the EIB-CM considers that the EIB should have actively collected and reviewed relevant documentation upon notification of the Complaint, rather than performing these actions during the consultation of the EIB-CM Conclusions Report. The EIB-CM notes that the collection of documentation remains incomplete.

d. Failure to provide access to justice.

6.3.34 The Complainant argues that a lawsuit was filed in 2016 against the MoE's decision that the change in the design of the D4 Jarovce - Ivanka Sever motorway segment was not subject to a full EIA assessment, but no hearing has been set on this matter as of yet.

6.3.35 The EIB-CM notes that in November 2018 the Regional Court of Bratislava rendered a comprehensive judgement relating to the case.

Conclusions

6.3.36 Based on the above findings, **the EIB-CM considers that no further inquiries are justified into the matter** as it appears that the Complainants had access to justice. **The allegation is therefore filed as ungrounded.**

EIB's role

6.3.37 As referred to in paragraph 3.7.4 of this Report, within the EU, the EIB assumes that EU E&S law has been correctly transposed into national law and that national law is being enforced by the responsible authorities. EIB due diligence focuses particularly on countries and/or specific laws where there is evidence to suggest these assumptions may be false. Furthermore, EIB standards (¶3.7.29) require the Bank to get satisfactory evidence that the impact of the modification in the bridge design on the safety of kayaking and swimming activities in the Danube is adequately assessed and addressed.

6.3.38 On the basis of the information processed as part of the appraisal and monitoring of the contested Project, the EIB had reasons to heighten the monitoring of this operation (the unsatisfactory management of the biodiversity impact of the Project and the judicial/administrative proceedings concerning NoCs 2, 3 and 4).

6.3.39 The present inquiry (¶4.3.22) shows that the monitoring activities carried out by the EIB took into consideration the court judgement referred to in paragraph 2.3 of this Report to be a continuing risk on the Project. However, the EIB-CM could not detect any documentary evidence of the monitoring of the issues leading to the MoE's decisions to revoke its screening decisions for NoCs 3 and 4. The EIB-CM also notes that, when listing significant problems in the Project, the EIB services did not highlight any significant environment problem connected with the Project until January 2020.

Conclusions

6.3.40 Based on the above findings and considering the several areas of attention justifying enhanced monitoring of the contested operation, the EIB-CM concludes that the EIB monitoring identified that significant environmental problems were connected with the Project at a late stage of the EIB project cycle. With regard to the MoE revoking decisions and the new administrative procedures concerning NoCs 3 and 4, the EIB-CM did not find any evidence of adequate follow-up of this issue by the EIB competent services. Based on the above, **the EIB-CM makes corresponding recommendations and a suggestion for improvement.**

6.4 Non-compliance of the Project with national law

a. Illegal extraction of materials and contamination

6.4.1 The use of asbestos in the Slovak Republic is banned since December 2004. Disposal of asbestos and asbestos-containing products may be executed only by competent registered subjects. Hazardous waste containing asbestos shall be stored in special deposits.

6.4.2 During the site visit in June 2019, the MoE informed the EIB-CM that the EIA decisions related to the project (i.e. full EIA and subsequent screenings) assessed natural material to be used in the embankment. The documentation assessed by EIA in general referred to natural and potential recycled material use, from demolitions of constructions on the construction site but not imported recycled materials. However, the documentation subject to EIA is not as specific as the more advanced documentation developed for zoning or BP purposes, which includes also specification of material inputs for the proposed activities. The MoE highlighted that the Promoter - i.e. the authority issuing the BP - has to take enforcement action under the BP. In this regard, it is to be noted that the Final statement of the MoE dated 7 February 2012 establishes, among measures to be specified in the phase of selected variant development, an obligation to define new sources of embankment material.

6.4.3 On 17 July 2019 two press articles⁷⁰ highlighted that asbestos had been incorporated into the construction of embankments. Although to date there is no official proof of contaminated soil usage, an audit ordered by the

⁷⁰ <https://ekonomika.sme.sk/c/22169990/obchvat-bratislavy-a-azbest.html?ref=trz>

Promoter indicates improper material use where some substances were over the legal limits. Sampling took place at the construction sites performed by authorized bodies and assisted by the police. This was part of the police investigation where the police collected evidence for further investigation.

6.4.4 On 29 May 2020, the EIB-CM was informed that in addition to the accusation of the head of EPC Contractor, the second managing director and current Chief Executive Officer of D4R7 Construction had been arrested by the regional police of Bratislava. The spokesperson of the Bratislava police confirmed that the suspect was detained in connection with the crime of endangering and damaging the environment.

Conclusions

6.4.5 The EIB-CM takes note that there are ongoing investigations and criminal proceedings before the competent national authorities concerning the allegedly illegal extraction of materials and contamination. As such, the EIB-CM is not in a position to form a reasoned opinion at this stage. In this context, the EIB-CM highlights the importance that the EIB's operational services closely follow-up the developments of the above-mentioned proceedings.

EIB's role

6.4.6 From the information gathered by the inquiry, as part of its monitoring the EIB requested the Promoter to submit a Remediation Plan. The EIB-CM could not detect any documentary evidence of the Plan and of the EIB's monitoring of its satisfactory implementation.

6.4.7 As the criminal proceedings are still evolving, no further action could be implemented by the EIB at this stage, other than careful and proactive monitoring, considering the gravity of the criminal proceedings and the severe consequences of utilisation of hazardous construction materials on the environment and public health.

Conclusions

6.4.8 Based on its findings, the EIB-CM considers that the EIB operational services did follow-up on the developments of the ongoing criminal proceedings.

b. Absence of valid BPs

6.4.9 While an ex-officio proceeding is triggered in cases of constructions without a valid permit (see ¶13.5.3), in the present case the works were carried out on the basis of valid BPs. Hence, the Supreme Court's decision eventually upholding the Regional Court's decision on the one hand or the revoking decisions of the MoE on the other one, under national law, have no automatic effect on BPs, which remain valid until successfully challenged in court. When the EIB-CM liaised with the Promoter, the latter took the view that, if the Supreme Court confirms the decision of the Regional Court, the BPs may be modified.

6.4.10 It is also worth noting that the EIA is a condition for the issuance of the BPs and that article 2 of the EIA Directive ties the development consent with the assessment of the project's impact on the environment. The lack of automatic impact of the annulation/revoking of EIA screening decisions by the national judicial/administrative authorities may raise concerns about the compliance of the Project with the EIA Directive. However, under national law, the annulation/revoking of EIA does have an impact on the validity of the permit insofar, as the issue can be brought to the competent court by a claimant, requesting the permit to be annulled because of the annulation/revoking of a EIA screening.

Conclusions

6.4.11 Based on the information gathered as part of this inquiry, it appears that the EIB had no reason to doubt that the BPs are valid and in force, despite the Regional Court's and the MoE's decisions concerning NoC 2, 3 and 4. As such, **the EIB-CM concludes that this allegation is ungrounded.** Should the Complainants wish to

pursue the matter regarding the lack of automatic impact of the annulation/revoking of EIA screening decisions by the national judicial/administrative authorities, they may consider the opportunity to liaise with the EC.

7. Recommendations and suggestions for improvement

7.1 Recommendations

7.1.1 With a view to restoring the Project's compliance with EIB standards, the EIB should receive from the Promoter and/or the Borrower:

- satisfactory explanations on the feasibility of the timetable for the implementation of compensatory measures within the timeframe established by the finance contract as well as on the coordination of implementation works on compensatory measures with construction activities for the Project;
- satisfactory evidence that compensatory measures whose implementation is required and feasible in the short/medium term⁷¹ are effectively fast-tracked;
- satisfactory evidence of adequate additional compensatory measures (including approval and necessary permits) due to the delay in the implementation of the compensatory measures notified to the EC, in the event that implementation exceeds the deadline established by the Finance Contract.

The EIB should use appropriate measures to ensure the above actions are satisfactorily implemented, including reassurance that compensatory measures will be implemented within the deadline established by the Finance Contract or the Borrower commits to put in place additional compensatory measures due to the delay in its implementation. The appropriate measures may include, but are not limited to, withholding disbursements.

7.1.2 For future operations, where disbursements are conditioned to notification of compensatory measures by a member state to the EC, and without prejudice to the Bank's legally binding obligations, where areas of attention are identified as in the present case (e.g. first notification to the EC, conditional notification, incomplete notification), it would be considered good practice to establish contact with the EC prior to disbursing funds in order to gather information in view of supporting the Bank's decision that the condition attached to EIB's financial assistance has been satisfied.

7.1.3 In light of information duties of the Borrower under the Finance Contract, the EIB will continue to closely follow-up on ongoing judicial and administrative proceedings.

7.1.4 The EIB should ensure, when notified of a decision granted by the competent authorities being legally challenged in court by third parties or annulled by a competent authority, that the implications of the legal proceedings are followed up by the EIB's relevant services with relevant expertise as required (e.g. environmental experts). Internal awareness should be raised by the EIB competent services on the importance to trigger the involvement of these resources in similar situations.

7.1.5 The EIB services' assessment of the Complainant's public health and safety concerns should be complemented by a review of the missing information referred to in paragraph 6.3.23 in order to provide assurance of substantial compliance with Standard 9 so far as the Danube Bridge is concerned.

7.2 Suggestions for improvement

7.2.1 The EIB is monitoring the developments of the ongoing criminal investigations. In case the serious allegations regarding the use of hazardous substances during the construction are confirmed, the EIB should consider taking additional steps, including, but not limited to:

- (i) requiring the Borrower to ensure immediate and full implementation of the remedies identified by the competent national authorities and
- (ii) withholding disbursements or withdrawing its financial assistance to the Project, if the above remedies are not promptly and fully implemented to the satisfaction of the EIB.

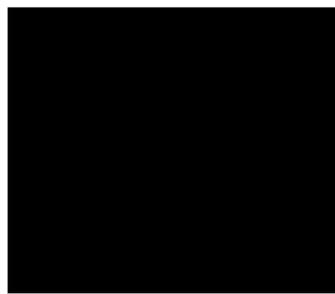
⁷¹ For KO3, KO6 and KO9 immediate action in the field with direct conservation benefits is possible and should be taken. For KO7 processes on paper without any field component must be promptly launched.

7.2.2 The EIB services should liaise with the Promoter and the relevant national/local authorities to ascertain whether the latter received and addressed comments from the public concerning the NoCs. Furthermore, depending on the outcome of the ongoing judicial and administrative proceedings concerning NoCs 2, 3 and 4, the EIB services should request further legal advice in order to determine the compliance of the operation with national law.

7.3 Implementation timeframe

7.3.1 The EIB competent services should report on the implementation of the above actions to the EIB Management Committee by Q4 2021.

7.3.2 The EIB-CM will monitor the implementation of its recommendations no later than one year after publication of this report.



26.01.2021



26.01.2021

Annex 1 Acronyms

BMP	Biodiversity Management Plan
BoD	Board of Directors
BP	Building Permit
CA	Concession Agreement
CTA	Common Terms Agreement of the Lenders
E&S	Environmental and Social
EBRD	European Bank for Reconstruction and Development
EC	European Commission
ECJ	European Court of Justice
EIA	Environmental Impact Assessment
EIB	European Investment Bank
EIB - CM	European Investment Bank – Complaints Mechanism
EPC	Engineering, Procurement and Construction
EPCM	Engineering, Procurement, Construction Management
ESIA	Environmental and Social Impact Assessment
ESMP	Environmental and Social Management Plan
ESMS	Environmental and Social Management System
EU	European Union
GNS	Good Navigation Status
HSE	Health, Safety and Environment
IE	Independent Engineer
KO	Compensatory Measure
LLA	Lenders' Legal Advisor
LTA	Lenders' Technical Adviser
MoE	Ministry of Environment of the Slovak Republic
NDS	National Highway Company
NoC	Notification of Change
PoW	Program of Works
PPP	Public-Private Partnership
SAC	Special Areas of Conservation
SBO	Special Building Office for Highways and Expressways of the Ministry of Transport
SCI	Site of Community Importance
SEA	Strategic Environmental Assessment
SNC	State Nature Conservancy of the Slovak Republic
SPA	Special Protection Area
SPC	Special Purpose Company
TEN-T	Trans-European Transport Networks