

## **PROJECT COMPLAINT MECHANISM**

### **COMPLIANCE REVIEW REPORT**

#### **D1 Motorway, Phase 1, Slovak Republic**

##### **Executive Summary**

On 7 June 2010, the PCM received a Complaint relating to the above Project, which was approved by the Board of EBRD on 27 April 2010. The Complainant claims that the Project is likely to cause harm and that the EBRD has failed to comply with Relevant EBRD Policy on a total of three grounds. The Complaint was registered according to PCM Rules of Procedure on 11 June 2010 and on 18 August 2010 the Eligibility Assessment Report (EAR) was publicly released, declaring the Complaint eligible and warranting a Compliance Review.

The Complainant contends that the EBRD failed to ensure that the Client carried out an adequate appropriate assessment of the implications of the Project for Natura 2000 sites likely to be affected, as required under EU law, and thus under the EBRD Environmental Policy. While, on the basis of a detailed examination of the facts, the Compliance Review Expert identified significant deficiencies with the principal study purporting to satisfy the requirement for an appropriate assessment, he determined that subsequent studies undertaken at the behest of EBRD, the preparation of an Environmental and Social Action Plan (ESAP), and steps taken towards the preparation of a Biodiversity Management Plan (BMP), addressed these deficiencies sufficiently in order to ensure compliance with the EBRD Environmental Policy. This determination relied in large part on taking a broad and purposive approach to the interpretation and application of the EBRD Environmental Policy, which seeks to ensure the best possible environmental outcomes for the Project.

The Complainant also alleges that the inadequacy of the appropriate assessment resulted in the underestimation of the ecological risks of the Project and consequent stipulation of insufficient mitigation measures for the Project. Once again, the Compliance Review Expert has determined that subsequent studies undertaken at the behest of EBRD, the preparation of an Environmental and Social Action Plan (ESAP), and steps taken towards the preparation of a Biodiversity Management Plan (BMP), had resulted in the identification and stipulation of appropriate and adequate mitigation measures.

Finally, the Complainant contends that, due to the alleged non-availability of the construction permit, the EBRD failed to ensure that all national requirements on the disclosure of relevant environmental information were met. The Compliance Review Expert concluded that, in the circumstances, it was perfectly reasonable for the Bank to relay on assurances provided by the Client and/or the national competent authorities.

**Therefore, the Compliance Review Expert declined to make a finding of non-compliance in respect of any of the three grounds set out in the Complaint.**

## **I. Introduction**

### Factual Background

1. On 27 April 2010, the EBRD Board of Directors approved provision of a senior loan of up to EUR 250 million for the Project “D1 Motorway, Phase 1” in the Slovak Republic (EBRD Operation ID 39007). The EBRD is part of a financing consortium, which includes the European Investment Bank (EIB) and a range of other banks. The Project Sponsor / Client is a special purpose company (Slovenské dial’nice, a.s.). The Project involves the design, build, finance and operation of selected sections of the Slovak national D1 motorway network, comprising 75 km of dual carriageways within five stretches:

- Dubna Skala – Turany: 16.75 km;
- Turany – Hubova: 13.6 km;
- Hubova – Ivachnova: 15.3 km;
- Janovce – Jablonov: 18.54 km; and
- Fricove – Svinia: 11.2 km.

The Project is a complex one, involving also the construction 162 bridges (with a total length of 22.8 km) and 4 tunnels (with a total length of 7.3 km). The Project Sponsor / Client is responsible for the implementation of the Project, which is being carried out under a Public-Private Partnership (PPP) on a 30 year concession basis.

2. On 7 June 2010, the Project Complaint Mechanism (PCM) Officer of the European Bank for Reconstruction and Development (EBRD) received a Complaint regarding the Turany – Hubova Section of the Project. The Complaint was made by Friends of the Earth – CEPA and, in accordance with PCM RP 10, was registered by the PCM Officer on 11 June 2010. Pursuant to PCM RP 12, the PCM Officer informed all relevant parties of the registration of the Complaint and subsequently designated one of the PCM Experts, Dr. Walter Leal, to assist in the Eligibility Assessment of the Complaint. The Eligibility Assessment Report declared the Complaint eligible for a Compliance Review and, pursuant to PCM RP 35, the PCM Officer appointed another of the PCM Experts, Dr. Owen McIntyre, as the Compliance Review Expert to conduct this Compliance Review.
3. On 2 September 2010, the newly elected Government of the Slovak Republic announced that it would no longer be proceeding with the D1 Motorway, Phase 1 Project. However, the questions relating to EBRD compliance with its safeguard policies remained outstanding and so it was decided that the current Compliance Review should proceed.

## Summary of the Positions of the Relevant Parties

4. The Complainants allege non-compliance on the part of the EBRD on three grounds:
  - that the “appropriate assessment” of the implications of the Project for the Natura 2000 sites likely to be affected, as required under EU law, and thus under the EBRD Environmental Policy, was inadequate;
  - that the inadequacy of the “appropriate assessment” resulted in the underestimation of the ecological risks of the Project and consequent stipulation of insufficient mitigation measures for the Project; and
  - that the EBRD failed to ensure that all national requirements on the disclosure of relevant environmental information were met.

These allegations are vigorously contested both by the Bank<sup>1</sup> and by the Project Sponsor / Client.<sup>2</sup> In particular, the EBRD points to the fact that the Natura 2000 Declarations issued by the competent Slovak authorities were reviewed by independent consultants and that the Environmental and Social Action Plan for the Project agreed with the Concessionaire includes the requirement for a proactive and adaptive Biodiversity Management Plan which would effectively address any shortcomings in the “appropriate assessment” or the mitigation measures previously stipulated. The EBRD also highlights the extent of the effects on each protected site. In respect of the ÚEV Malá Fatra, the Project would negatively affect between 0.05% to 0.16% of the total area of the forest habitats, while 0.03% of the total area of habitat would be affected in ÚEV Velká Fatra. In the case of ÚEV River Váh, the Project would give rise to loss of protected habitats and effects on animals from fragmentation of the habitat by the introduction of three new river crossings, and in CHVÚ Malá Fatra, it would reduce the nesting opportunities for selected bird species in the vicinity of the route and increase disturbance on nesting birds.

## Steps Taken to Conduct the Compliance Review

5. In addition to a thorough review of all Project documentation and background studies, including internal and external Bank correspondence, the Compliance Review Expert held meetings in London with the Project Leader on 25 August 2010, with Environment and Social Department (ESD) staff on 26 August 2010, and a meeting in Budapest with representatives of the Complainant on 18 November 2010. He held an additional meeting with ESD staff on 1 February 2011, in order to clarify a number of issues before finalizing his conclusions. On a number of occasions during the conduct of this Compliance Review, the Compliance Review Expert requested additional information and documentation, notably a full English language translation of the seminal study by Petková and

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<sup>1</sup> Bank Response to the Complaint, 5 July 2010, reproduced as Annex 2 to the Eligibility Assessment Report: D1 Motorway Phase I, Slovak Republic.

<sup>2</sup> Client Response to the Complaint, 25 June 2010, reproduced as Annex 3 to the Eligibility Assessment Report: D1 Motorway Phase I, Slovak Republic.

Mika / Creative sro, in response to which Bank staff were very helpful and accommodating.

6. On a general point in relation to the conduct of this Compliance Review, it should be noted that the Compliance Review Expert has adopted as rigorous a standard of review as possible in seeking to identify instances of non-compliance with the relevant and applicable safeguard policies of the Bank. However, it is also important that the Compliance Review process should take a common sense approach to the interpretation and application of such policies, where appropriate, in order to ensure outcomes that serve to further the objectives and principles set out therein. In carrying out the present Compliance Review, therefore, the Compliance Review Expert, while subjecting the Bank's conduct of the stipulated environmental appraisal process to a rigorous examination for the purpose of identifying any actions or omissions which objectively would amount to 'non-compliance with a Relevant EBRD Policy',<sup>3</sup> has also found it pertinent to have regard to the key objectives and principles of the Bank's Environmental Policy 2003.

## **II. EBRD Policy Obligations**

7. This Compliance Review requires an examination of the core questions of compliance raised in the Complaint in order to assess whether the Bank has complied fully with all of the requirements arising under the EBRD Environment Policy 2003. Therefore, it is first of all necessary to identify every individual element of alleged non-compliance contained in the Complaint and to link each element to the corresponding requirement or requirements in the EBRD Environmental Policy 2003. This is particularly important for the clarity and coherence of this Compliance Review process as the Complainant had mistakenly assumed that the Environmental and Social Policy 2008 would apply and had purported to set out the relevant parts of this Policy which the Complainants believed to have been at issue. At this point, it is also helpful to outline the practical implications of each relevant requirement of the EBRD Environmental Policy 2003.

### Inadequate "Appropriate Assessment" under Article 6(3) of the Habitats Directive

8. Firstly, the Complaint appears to focus quite specifically on the alleged inadequacy of the assessment of the Project's potential impacts on protected Natura 2000 sites having regard to the requirements of Article 6(3) of the EU Habitats Directive. In setting out the compliance issues in question, the Complaint includes only one sub-heading referring to 'Inappropriate assessment of the project's impacts on protected areas of NATURA 2000', and then proceeds to outline alleged incidences of non-compliance with various aspects of Performance Requirement 6 of the EBRD Environmental and Social Policy 2008, which relates to 'Biodiversity Conservation and Sustainable Management of

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<sup>3</sup> PCM Rules of Procedure, para. 36.

Living Natural Resources’, and is very much concerned with the protection of habitats,<sup>4</sup> particularly habitats designated by governmental agencies for special protection.<sup>5</sup> Though not nearly as detailed on this issue as the 2008 Policy, Paragraph 21 of the EBRD Environment Policy 2003 nevertheless provides that ‘the EBRD will require that projects be structured so as to meet: (i) applicable national environmental law; and (ii) EU environmental standards, insofar as these can be applied to a specific project.’ As the Slovak Republic has been a Member State of the EU since 2004, there can be no doubt that the references in Paragraph 21, to ‘applicable national law’ and to ‘EU environmental standards’ can be taken to include the “appropriate assessment” of a proposed project’s impact on Natura 2000 sites required under Article 6(3).

9. Equally, it is self-evident that Article 6(3) ‘can be applied to a specific project’. Article 6(3) requires that:

‘Any plan or project ... 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 ... 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 ...’.

Considerable technical guidance exists to assist national authorities in ensuring correct implementation of the Article 6(3) appropriate assessment, setting out the specific steps and tests that need to be applied in sequential order.<sup>6</sup> Indeed, it is telling that the 2010 Summary Report prepared by the Ministry of Transport, Posts and Telecommunications of the Slovak Republic (MTPT SR) for EU Commission DG Environment expressly refers to the European Commission’s 2002 methodological guidance on Article 6(3).<sup>7</sup>

10. Therefore, the central task of this Compliance Review process is to examine the 2007 study by Petková and Mika<sup>8</sup> and to assess its adequacy against the EU Commission Guidance cited above, while having regard to the 2009 Topercer

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<sup>4</sup> EBRD Environmental and Social Policy 2008, paras. 13 and 14, cited in the Complaint.

<sup>5</sup> EBRD Environmental and Social Policy 2008, para. 15, cited in the Complaint.

<sup>6</sup> See European Commission, *Managing Natura 2000 Sites: The provisions of Article 6 of the ‘Habitats’ Directive 92/43/EEC*, (Luxembourg, 2000); European Commission, *Assessment of plans and projects affecting Natura 2000 sites: Methodological guidance on the provisions of Article 6(3) and (4) of the Habitats Directive 92/43/EEC* (Luxembourg, 2002). In addition, many EU Member States have produced detailed guidance for their national competent authorities, e.g. Irish Department of Environment, Heritage and Local Government, *Appropriate Assessment of Plans and Projects in Ireland: Guidance for Planning Authorities* (Dublin, 10 December 2009).

<sup>7</sup> Ministry of Transport, Posts and Telecommunications of the Slovak Republic, *Summary Report on Assessment of Impacts of the D1 Motorway in Section Turany – Hubová on the Conservation Subject, the Natura 2000 Sites* (July 2010), at 18, referring to European Commission, *Assessment of plans and projects affecting Natura 2000 sites: Methodological guidance on the provisions of Article 6(3) and (4) of the Habitats Directive 92/43/EEC* (Luxembourg, 2002).

<sup>8</sup> Creative s.r.o., *The assessment of the significance of any impact of the proposed D1 Turany – Hubová on the Natural 2000 sites*, (November 2007) (hereinafter Petková and Mika).

study<sup>9</sup> put forward in the Complaint as providing evidence that the Petková and Mika study ‘is not based on complete, methodically and clearly specified sources of information and thus, it should not be considered as an appropriate assessment under Article 6(3) of the Habitat Directive 92/43/EEC’. It must be noted that DG Environment of the EU Commission is in the process of completing a technical and compliance review of this Project following a complaint made by a number of Slovak NGOs regarding possible non-compliance with key provisions of the Habitats Directive, including the requirements of Article 6(3). Therefore, the outcome of the review process being conducted by DG Environment, the specialist branch of the EU institution officially mandated to monitor and enforce Member State compliance with the requirements of EU environmental law, is certain to be relevant to findings of this Compliance Review.

11. Though the Terms of Reference for this Compliance Review exercise, prepared by the Eligibility Assessors and included in the Eligibility Assessment Report, provide for the possibility that the adequacy of the overall environmental impact assessment process for the Project may have been called into question,<sup>10</sup> upon closer examination of the Complaint this does not appear to be the case. While Friends of the Earth – CEPA have elsewhere complained about a broader range of alleged deficiencies in respect of this Project, notably to the EIB Complaints Office,<sup>11</sup> none of these additional aspects are at issue in the current Complaint. Therefore the adequacy of the Final Environmental Impact Statement (FEIS) is not at issue.

### Insufficient Mitigation Measures

12. Secondly, following on from the alleged inadequacy of the Article 6(3) “appropriate assessment” of the Project’s potential impacts on protected Natura 2000 sites, the Complaint alleges that resulting underestimation of the ecological risks has led to the stipulation of insufficient mitigation measures, which are evidenced by the damage allegedly caused to Rojkovske Raselinisko Mire Nature Reserve by preparatory construction works. The EBRD Environmental Policy

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<sup>9</sup> J. Topercer, *et al*, *The importance of impacts of the proposed motorway D1 Turany – Hubová on species, habitats, Natura 2000 sites and landscape – Specialist Opinion*, (November 2009).

<sup>10</sup> Eligibility Assessment Report, at 10, (ToRs, para. 10(i)).

<sup>11</sup> The Complaint submitted to the EIB Complaints Office by Mr. Roman Havlicek on behalf of Juraj Zamkovsky, Executive Director, Friends of the Earth-CEPA on 5 May 2009 concerned:

- (i) Allegedly unlawful prolongation of the validity of the Final Environmental Impact Statement (FEIS);
- (ii) Alleged failure to follow the recommendations on variants laid down by the FEIS;
- (iii) Alleged failure to carry out an assessment of the biodiversity impact of the project (pursuant to Arts. 6.3 and 6.4 of the Habitats Directive 92/43/EEC; and
- (iv) Alleged breach of Article 8 of the EIA Directive 85/337 on EIA and Art. 38 of the new EIA Act (regarding taking account of consultations and information received in the development consent procedure).

See EIB Conclusions Report, *Alleged breaches of EU and national law concerning the environmental impact assessment of Turany-Hubova section of the project SLOVAK MOTORWAYS (PPP) D1 PHASE 1*, 13 November 2009.

2003 stipulates in respect of Category A projects such as this that an environmental impact assessment (EIA) is required to, *inter alia*, ‘recommend any measures needed to prevent, minimize and mitigate adverse impacts’.<sup>12</sup> Even at the screening stage, the first step in the EBRD’s environmental appraisal process under the Environmental Policy 2003, the Bank is required ‘to identify potential environmental benefits or enhancements which could be built into proposed projects’, including ‘opportunities for ... safeguarding and enhancing biodiversity’.<sup>13</sup> Indeed, in placing singular emphasis on the importance and the stringency of the duty placed upon the Bank to ensure the taking of adequate steps for the protection of natural habitats, the Environmental Policy 2003 further states that

‘The EBRD supports a precautionary approach to the management and sustainable use of natural biodiversity resources (such as wildlife, fisheries and forest products) and will seek to ensure that its operations include measures to safeguard and, where possible, enhance natural habitats and the biodiversity they support.’<sup>14</sup>

13. As a means of giving effect to such mitigation measures, the Environmental Policy 2003 requires the development of an Environmental Action Plan to ‘document key environmental issues, the actions to be taken to address them adequately ... [and] may also address opportunities to further improve the environmental performance of the project ...’.<sup>15</sup> The EAP, or ESAP as it is known in the case of the current Project,<sup>16</sup> is considered to be of such importance to the environmental due diligence process set out under the EBRD Environmental Policy 2003 that compliance with its terms is to be stipulated as a contractual condition in the legal documents concluded between the Bank and the Project Sponsor.<sup>17</sup> The ESAP, agreed between the Lenders and the Project Sponsor / Concessionaire includes a requirement for a Biodiversity Management Plan (BMP) for each section of the motorway, listing specific mitigation measures to be applied in addition to those specified in the various applicable permit requirements. Progress towards the development of the BMP appears to have been quite advanced, with detailed terms of reference for the BMP having been agreed between EBRD and the Project Sponsor / Concessionaire and the process of selecting a consultant ongoing until recently. Therefore, this aspect of the

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<sup>12</sup> EBRD Environmental Policy 2003, para. 16.

<sup>13</sup> EBRD Environmental Policy 2003, para. 15.

<sup>14</sup> EBRD Environmental Policy 2003, para. 6.

<sup>15</sup> EBRD Environmental Policy 2003, para. 17.

<sup>16</sup> A single ESAP was agreed between the Lenders, including EBRD and EIB, and the Project Sponsor / Concessionaire which, in the case of EBRD, is intended to satisfy the requirements of EBRD Environmental Policy 2003, para. 17.

<sup>17</sup> EBRD Environmental Policy 2003, para. 17 provides that

‘EAPs are agreed between the EBRD and the project sponsor and become part of the legal agreement with the Bank’

and EBRD Environmental Policy 2003, para. 25 further states that

‘Legal documents for the EBRD’s investment in a project will include specific provisions reflecting the EBRD’s environmental requirements resulting from the environmental appraisal process, such as compliance with the EAP’.

Compliance Review will involve an examination of the ESAP, including the detailed terms of reference for the BMP, to assess whether the mitigation measures specified would have been rationally identified and designed so as to ensure the overall integrity of the affected Natura 2000 sites, in accordance with Article 6(3) of the Habitats Directive. It will also be necessary to consider the significance of the alleged damage caused to the Rojkovske Raselinisko Mire Nature Reserve by preparatory construction works.

14. Once again, it is almost inevitable that the technical and compliance review of this Project currently being conducted by DG Environment will have implications for the outcome of this aspect of the PCM Compliance Review as it may reach conclusions on the adequacy of the mitigation measures which have been specified thus far for the Project, especially those relating to the Rojkovske Raselinisko Mire Nature Reserve and the River Váh SCI. In addition, it may specify further mitigation measures which would be required in order to ensure that the Project would meet all the substantive requirements of Article 6(3) of the Habitats Directive. Such conclusions would have a certain authority as regards the official and expert interpretation of EU environmental law in general and of the Habitats Directive in particular.

#### Non-availability of the Construction Permit

15. Third element of possible non-compliance raised by the Complaint concerns the alleged non-availability of the building / construction permit issued for the Project. The Complaint does not present this issue as a stand-alone breach of EBRD policy. Instead, it merely explains that the non-availability to the public of this official documentation frustrated civil society organizations trying to assure themselves of the legal status under the construction permit of the preparatory construction works allegedly impacting on the Rojkovske Raselinisko Mire Nature Reserve, consistent with the requirements of Paragraph 15 of Performance Standard 6 of the inapplicable EBRD Environmental and Social Policy 2008.<sup>18</sup>
16. Notwithstanding the non-applicability of the 2008 Policy, Paragraph 11 of the EBRD Environmental Policy 2003 commits the Bank, for the purposes of enabling dialogue with stakeholders, which includes ‘civil society at large’, to four basic principles regarding public information and consultation, the first of which is ‘transparency’. More specifically, Paragraph 11 states unequivocally that ‘the EBRD will also support the spirit, purpose and ultimate goals of the UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters’.<sup>19</sup>

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<sup>18</sup> Performance Standard 6, para. 15 provides in respect of designated protected areas, *inter alia*, that ‘the client will ... demonstrate that any proposed development in such areas is legally permitted and that due process leading to such permission has been complied with by the host country, if applicable, and the client’.

<sup>19</sup> 1998 UNECE (Aarhus) Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, 38 *International Law Materials* (1999) 517. Article 4 of the Aarhus Convention, to which the Slovak Republic acceded on 5 December 2005, and which is now also

17. In addition, Annex 2 to the 2003 Environmental Policy, dealing with public consultation, commits the Bank to increasing the amount of public information provided to interested parties during project implementation and monitoring<sup>20</sup> and to ensuring that all relevant national requirements are met.<sup>21</sup> Annex 2 further commits the Bank to be guided by the Aarhus Convention in ensuring public access to environmental information in respect of projects screened as Category A.<sup>22</sup> Also, as an EU Member State since 2004, the Slovak Republic is bound to transpose the EU Directive on Access to Environmental Information into its national law and to ensure its effective implementation.<sup>23</sup> The existence of such national measures or, failing that, of this EU law obligation of the Slovak Republic, may be relevant for the purposes of the Bank's duty to ensure that all relevant national requirements are met.<sup>24</sup> In addition, Section 3 of the EBRD 2008 Public Information Policy requires the Bank to inform the public of project development through Project Summary Documents (PSDs), though there is absolutely no suggestion in the Complaint that the Bank has failed to do so.
18. Therefore, this aspect of the Compliance review will involve an examination of both the factual veracity of the claim that the construction permit was unavailable to the public and the nature and possible breach of any EBRD obligation to ensure that it should be publicly available. Even though the Complaint does not appear to allege non-compliance on the part of the Bank on direct account of the alleged non-availability of the construction permit, given the central significance of public accessibility of project environmental information to EBRD environmental due diligence, and the importance of transparency for attaining good governance standards generally, it is important that this Compliance Review should examine and clarify the Bank's responsibilities in this area. Indeed, it is interesting to note that in its response to the Project Complaint Mechanism in respect of this Project, the EBRD Project Team have specifically addressed the issue of the public availability of the construction permit.<sup>25</sup>

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incorporated into the body of EU environmental law and standards by virtue of European Community approval of the Convention on 17 February 2005, requires States Party to ensure that

‘public authorities, in response to a request for environmental information, make such information available to be public, within the framework of national legislation, including, where requested ... copies of the actual documentation containing or comprising such information’.

<sup>20</sup> EBRD Environmental Policy 2003, Annex 2, I Introduction.

<sup>21</sup> EBRD Environmental Policy 2003, Annex 2, II General requirements, para. 1.

<sup>22</sup> EBRD Environmental Policy 2003, Annex 2, III “A” level project requirements, para. 10 provides: ‘For all projects involving Environmental Impact Assessments according to the Bank’s requirements, the Bank will take guidance from the principles of the UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental matters, as committed in the EBRD *Public Information Policy*.’

<sup>23</sup> Directive 2003/4/EC on public access to environmental information, repealing Council Directive 90/313/EEC, Art. 3(1) of which provides that:

‘Member States shall ensure that public authorities are required, in accordance with the provisions of this Directive, to make available environmental information held by or for them to any applicant at his request and without his having to state an interest.’

<sup>24</sup> EBRD Environmental Policy 2003, Annex 2, II General requirements, para. 1.

<sup>25</sup> Eligibility Assessment Report, Annex 2 – Bank Response, at 21.

### III Analysis

#### Inadequate “Appropriate Assessment” under Article 6(3) of the Habitats Directive

19. European Commission guidance on the steps required for the conduct of an appropriate assessment<sup>26</sup> sets out the precise nature of each step and the sequential order for their performance in considerable detail. In essence, it requires:
- Stage 1: Screening – to determine that there will be no significant effects on a Natura 2000 site; or
  - Stage 2: Appropriate assessment – to determine that there will be no adverse effects on the integrity of a Natura 2000 site; or
  - Stage 3: Assessment of alternative solutions – to determine that there are no alternatives to the project or plan that is likely to have adverse effects on the integrity of a Natura 2000 site; or
  - Stage 4: Assessment of compensatory measures – to determine that there are compensation measures which maintain or enhance the overall coherence of Natura 2000.<sup>27</sup>
20. Stage 1 requires a description of the project in question and of other projects that in combination have the potential for having significant effects on the Natura 2000 site, as well as identification of these potential effects and an assessment of their significance. The description of the project should correspond to a number of project parameters<sup>28</sup> and should include a cumulative assessment identifying, *inter alia*, all possible sources of effects from the project in question together with existing sources and other proposed projects and the boundaries for the examination of cumulative effects.<sup>29</sup> At the screening stage, potential impacts should be identified having regard to a range of sources, such as the Natura 2000 standard data form for the site in question, land-use and other relevant existing plans, existing data on key species, and environmental statements for similar projects elsewhere.<sup>30</sup> The significance of such impacts is to be assessed through the use of key significance indicators, including the percentage of loss of habitat area, the level, duration or permanence of habitat fragmentation, the duration or permanence of disturbance to habitats, and relative change in water resource and quality.<sup>31</sup>

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<sup>26</sup> European Commission, *Assessment of plans and projects affecting Natura 2000 sites: Methodological guidance on the provisions of Article 6(3) and (4) of the Habitats Directive 92/43/EEC* (Luxembourg, 2002).

<sup>27</sup> *Ibid.*, at 11-12.

<sup>28</sup> The 2002 Commission Guidance, *ibid.*, at 18, provides an illustrative list of such parameters, including: size, scale, area, land-take; resource requirements (water abstraction, etc.); emissions and waste (disposal to land, water or air); duration of construction, operation, decommissioning, etc.; distance from Natura 2000 site or key features of the site; etc.

<sup>29</sup> *Ibid.*, at 19.

<sup>30</sup> *Ibid.*, at 20.

<sup>31</sup> *Ibid.*

21. If the screening stage concludes that there will be significant effects on a Natura 2000 site, Stage 2 requires that an appropriate assessment be conducted which will involve 4 steps, including (i) the gathering of all relevant information, (ii) the prediction of likely impacts of the project, (iii) assessment of whether these impacts will have adverse effects on the integrity of the site having regard to its conservation objectives and status, and (iv) assessment of proposed mitigation measures against the adverse effects the project is likely to cause.<sup>32</sup> The information to be gathered and considered will involve a range of information about the project including, for example, the results of any EIA or SEA process, and a range of information about the site, such as the conservation objectives of the site, the conservation status of the site (favourable or otherwise), the key attributes of any Annex I habitats or Annex II species on the site, and the key structural and functional relationships that create and maintain the site's integrity.<sup>33</sup> Impact prediction may involve a range of methods, including direct measurements (*e.g.* of areas of habitat lost or affected), mathematical quantitative predictive models, geographical information systems, information from previous similar projects, and expert opinion and judgment.<sup>34</sup> Assessment of whether there will be adverse effects on the integrity of the site as defined by its conservation objectives and conservation status must apply the precautionary principle and involves completion of the 'integrity of site checklist'.<sup>35</sup> As regards the site's conservation objectives, the checklist asks whether the project delays or interrupts progress towards achieving the conservation objectives of the site, whether it disrupts key factors which help to maintain the favourable conditions of the site, and whether it interferes with the balance, distribution and density of key species that are indicators of the favourable condition of the site.<sup>36</sup> It also asks whether the project impacts upon a range of other indicators, including vital aspects of the structure and functioning of the site, the area of key habitats, the diversity of the site, the population of and balance between key species, habitat fragmentation, and loss or reduction of key ecological features.<sup>37</sup> The assessment of mitigation measures involves, initially, listing each of the measures to be introduced and explaining how they will avoid or reduce the adverse impacts on the site. Then, in respect of each mitigation measure, it is necessary to provide a timescale of when it will be implemented and to provide evidence of how it will be implemented and by whom, of the degree of confidence in its likely success, and

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<sup>32</sup> Commission Guidance, *supra*, n. 6, at 25-32. However, some commentators understand the Commission Guidance so as to require three key steps. First, the assessment must identify the conservation objectives of the site and those aspects of the project or plan which are likely to affect those objectives. Secondly, it must identify the likely impact of the project or plan on the site in terms of direct and indirect effects, short and long-term effects, construction, operational and decommissioning effects, and isolated, interactive and cumulative effects. Thirdly, the assessment must indicate whether there will be adverse effects on the integrity of the site as defined by the conservation objectives and status of the site. See G. Simons S.C., 'Habitats Directive and Appropriate Assessment', (2010) 17/1 *Irish Planning and Environmental Law Journal* 4, at 8.

<sup>33</sup> *Ibid.*, at 26.

<sup>34</sup> *Ibid.*, at 27.

<sup>35</sup> *Ibid.*, at 28.

<sup>36</sup> *Ibid.*

<sup>37</sup> *Ibid.*, at 29.

of how it will be monitored and rectified in the event of failure.<sup>38</sup> Mitigation measures should aim for the top of the mitigation hierarchy.<sup>39</sup>

22. The key issue in any Article 6(3) appropriate assessment, and the one most in need of further judicial clarification, is that of whether a project ‘adversely affects the integrity of the site concerned’. The findings of the appropriate assessment in relation to adverse effects on the integrity of the site are determinative in terms of the grant of authorization for the project, subject to the exceptional provisions of Article 6(4) of the Habitats Directive. In a recent decision, which has since been referred by the Irish Supreme Court to the European Court of Justice for a definitive ruling, the Irish High Court rejected the argument that the fact that a proposed project would have a “localised severe impact” on a Natura 2000 site prevented the permitting authority from nevertheless concluding that it would not adversely affect the integrity of the site.<sup>40</sup> In this case, concerning a proposed road project which would involve the loss of c. 1.47 hectares of Annex I priority habitat type (out of a total area of c. 86 hectares), the Court emphasized the distinction in the first sentence of Article 6(3) between (i) a likely significant impact (for the purposes of screening projects requiring an appropriate assessment), and (ii) an impact which adversely affects the integrity of the site concerned (for the purposes of determining whether authorization may be granted), and concluded that these two types of impact could not be equated. Therefore, the Court found that the concept of “integrity” under Article 6(3) permitted such a *de minimis* exception and required an approach which

‘sought to achieve not an absolutist position but one that was more subtle and more graduated and in the process, one that more truly reflected the principles of proportionality’.

23. It is only where the Stage 2 appropriate assessment concludes that the project will have adverse impacts on the integrity of the Natura 2000 site, that cannot be avoided or reduced through mitigation measures, that Stage 3 is required, involving an examination of alternative ways of implementing the project which would avoid such impacts.<sup>41</sup> Similarly, the Stage 4 assessment of compensatory measures is only required where Stage 3 concludes that no alternative solutions to the proposed project exist and that adverse impacts from the project remain.<sup>42</sup> In such cases it is necessary for the Member State authorities to establish that there are imperative reasons of overriding public importance for proceeding with the project. In the case of sites that host priority habitats and species, it is only possible to proceed on the basis of human health and safety considerations or environmental benefits flowing from the project. Stages 3 and 4 are not relevant

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<sup>38</sup> *Ibid.*, at 30-31.

<sup>39</sup> A hierarchy of preferred options for mitigation is provided in the Commission Guidance, *ibid.*, at 14, which lists the preferred approaches to mitigation in the following order:

1. Avoid impacts at source; 2. Reduce impacts at source; 3. Abate impacts on site; 4. Abate impacts at receptor.

<sup>40</sup> *Sweetman v. An Bord Pleanála* (Unreported, High Court, 9 October 2009).

<sup>41</sup> *Ibid.*, at 33-38.

<sup>42</sup> *Ibid.*, at 39-44.

to the current Compliance Review as it is quite clear that the Stage 2 “appropriate assessment”, conducted by the Slovak authorities on the basis of the November 2007 study by Petková and Mika<sup>43</sup> concluded that the impact of the D1 Motorway Project on Natura 2000 sites would not be sufficiently significant to adversely affect the integrity of these sites, provided the proposed mitigation measures are implemented effectively.

24. The European Commission guidance on the practical implementation of Article 6(3) of the Habitats Directive sets out a reporting format requiring that a report or ‘evidence of assessment matrix’ be produced for the final stage of assessment carried out in order to provide ‘a record of the information gathered and the judgments reached in the assessment process’.<sup>44</sup> In an attempt to balance transparency with manageability, it suggests that such matrices ‘are only required to be completed where no further assessment is required’. In addition, the guidance advises that, on completion of the Stage 2 appropriate assessment, ‘it should be considered best practice for the appropriate authority to produce an appropriate assessment report’, which identifies the adverse effects of the project on the Natura 2000 site and explains how those effects will be avoided through mitigation. This report should also be sent for consultation with the relevant nature conservation agencies and the public.<sup>45</sup>

*Findings on Compliance with respect to Adequacy of the “Appropriate Assessment” under Article 6(3) of the Habitats Directive*

25. The assessment contained in the Petková and Mika study of the Project’s implications for each Natura 2000 site is quite comprehensive, setting out Project data of relevance to the site, a description of the site and data on its key characteristics, a description of the habitats and species of flora and fauna likely to be affected, an appraisal of the impact of the Project on those habitats and species and an account of the proposed mitigating measures, and an appraisal of the impact of the Project on the overall integrity of the site. The four Natura 2000 sites<sup>46</sup> examined under the Petková and Mika appraisal as likely to be affected by the proposed D1 Turany-Hubova Motorway Project include:
- ÚEV (SAC) Malá Fatra;
  - ÚEV (SAC) Vel’ká Fatra;
  - ÚEV (SAC) River Váh; and
  - CHVÚ (SPA) Malá Fatra.

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<sup>43</sup> *Supra*, n. 8.

<sup>44</sup> European Commission, *Assessment of plans and projects affecting Natura 2000 sites: Methodological guidance on the provisions of Article 6(3) and (4) of the Habitats Directive 92/43/EEC* (Luxembourg, 2002), at 12 and 44-45.

<sup>45</sup> *Ibid.*, at 31-32.

<sup>46</sup> The Natura 2000 network of sites comprises special areas of conservation (SACs) designated under the Habitats Directive and special protection areas (SPAs) designated under the Wild Birds Directive, which are both protected under Article 6 of the habitats Directive.

*ÚEV Malá Fatra:*

26. In the case of the ÚEV Malá Fatra, the Petková and Mika appraisal concludes in respect of impacts on habitats that the loss of habitat is minor and can be mitigated, that the impact of habitat fragmentation is only moderately unfavourable due to the viable size of the fragment habitat to be created, and that the impacts of light penetration of woodland is minor and can be mitigated.<sup>47</sup> In respect of the impacts on fauna, it concludes that the impact of construction and road traffic on bat species is slight but cannot be mitigated, that direct destruction of habitats and of some less mobile protected animal species is not very significant, and that the risk of traffic to amphibians, reptiles and mammals is not very significant and can be mitigated by the building of a fence.<sup>48</sup> The one potentially significant impact identified for the ÚEV Malá Fatra site is that of fragmentation of animal habitats, especially for the nationally important populations of large ‘beasts of prey’ due to the separation from the ÚEV of the Kral’oviansky meander, an area of key importance for animal migration.<sup>49</sup> However, the appraisal concludes that, though the impact is significant, it can be mitigated by the construction of structures that enable the animals to cross the motorway, such as wildlife ecoducts and underpasses.<sup>50</sup>
27. The November 2009 specialist opinion produced by Torpercer *et al*, on which the current Complaint relies heavily in alleging the inadequacy of the Article 6(3) “appropriate assessment”, highlights a number of shortcomings in the Petková and Mika appraisal. In respect of the ÚEV Malá Fatra site, the specialist opinion points out that Petková and Mika ‘carried out only a short-term survey outside the vegetation and reproduction period that it not sufficient for the given purpose (as they have admitted themselves several times)’ and, further, that they excluded from the assessment three habitats of Community importance subject to conservation in the SAC (including two priority habitats) and one species of Community importance.<sup>51</sup> Topercer *et al* claim that the Petková and Mika study ‘underestimated the risk of significant changes in species composition and subsequent deterioration of habitats due to both extinction of sensitive native species and colonization of expansive and invasive species’ and, further, ‘underestimated the risk of significant losses and fragmentation of habitats ... as well as related risk of significant loss in population connectivity ... as a consequence of the barrier effect exerted by the construction, traffic and maintenance of the approved variant of the D1’.<sup>52</sup>
28. These concerns are all the more credible because the authors cite a number of published and unpublished studies in support of their position and clearly outline

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<sup>47</sup> Petková and Mika, *supra*, n. 8, at 20.

<sup>48</sup> *Ibid.*, at 20-21.

<sup>49</sup> *Ibid.*

<sup>50</sup> *Ibid.*, at 21 and 47.

<sup>51</sup> Topercer *et al*, *supra*, n. 9, at 4.

<sup>52</sup> *Ibid.*, at 4-5.

what they consider to be the key shortcomings in the predictive models used by Petková and Mika.<sup>53</sup> Topercer *et al* also express concern about the likely effectiveness of the proposed mitigation measures, stating that ‘the position of the proposed ecoduct in the Kral’oviansky meander does not correspond with the importance of migration routes according to the available knowledge’, and further point out that ‘[t]he authors have not assessed the important and persistent impacts of the approved variant on the structure and appearance of the Upper Váh River valley landscape’.<sup>54</sup>

#### *ÚEV Vel’ká Fatra:*

29. In the case of the ÚEV Vel’ká Fatra, the appraisal concludes that the impacts from loss of habitat and from light penetration of the woodland is only moderately unfavourable and can be mitigated using compensatory measures,<sup>55</sup> but is less certain about the impacts on certain protected habitats, stating ‘[i]n view of the fact that it is now not the growing season it is impossible to evaluate the condition of the habitat’.<sup>56</sup> As regards the impact on the Rojkovske peat marsh, the Petková and Mika appraisal relies on the hydrogeological appraisal conducted in respect of the Project’s impact on this important natural feature<sup>57</sup> to conclude that the Project would not have a significant impact on the protected habitats represented by the marsh ‘provided all proposed technological measures are observed both in the course of construction work and during its operation’.<sup>58</sup> The Petková and Mika appraisal also concluded that the impacts from air pollution, exhaust fumes, dust, salt from winter road maintenance, and invasive species could all be reduced to insignificant or moderately unfavourable if the proposed mitigating measures are undertaken.<sup>59</sup> The proposed measures include the building of a protective wall between the motorway and its surrounding environment and inspection for and removal of invasive species. Regarding impacts on fauna, the appraisal concludes that disruption of the water regime at the Rojkovske peat marsh would be moderately unfavourable and that adverse impacts on bats and large birds and mortality of amphibians, reptiles, mammals and bats would be moderately unfavourable and can be mitigated by the use of appropriately designed barriers and fencing.<sup>60</sup> It concludes that the fragmentation of animal habitats due to the barrier effect of the motorway would have a significant adverse impact, especially

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<sup>53</sup> *Ibid.*, at 5. In relation to animal migration and dispersal routes, for example, the authors point out that ‘Apparently these routes are fixed not only ecologically, but also behaviourally and genetically, as indicated by the distinct zones of highest transport mortality of large mammals on the existing roads.’

<sup>54</sup> *Ibid.*

<sup>55</sup> Petková and Mika, *supra*, n. 8, at 26.

<sup>56</sup> *Ibid.*, at 26-27, in respect of the assessment of the Project impacts on hydrophilous tall herb fringe communities and on alkaline fens in the ÚEV Vel’ká Fatra.

<sup>57</sup> *Hydrogeological appraisal of the impact of construction work and of traffic using the proposed motorway Turany – Hubová on the PR (Natural Reservation Rojkovské peat marsh, Aquatest P&R Ltd., November 2007 (Mgr. Olga Pospiechová).*

<sup>58</sup> Petková and Mika, *supra*, n. 8, at 27, quoting from the conclusion of the *hydrogeological appraisal*, *ibid.*

<sup>59</sup> *Ibid.*, at 27-29.

<sup>60</sup> *Ibid.*, at 29-30.

- on large mammals and ‘beasts of pray’, but also that this impact could be mitigated to become moderately unfavourable by means of alterations to a particular bridge (structure no. 2007-00) in order to provide animals with access to the River Váh underneath the motorway.<sup>61</sup> Generally, though somewhat ambiguous about the significance of the impacts on the protected habitats dependent upon the Rojkovske peat marsh,<sup>62</sup> the Petková and Mika appraisal appears to conclude, on the basis of the hydrogeological appraisal,<sup>63</sup> that the overall integrity of the site would be maintained.<sup>64</sup>
30. The deficiencies set out in the 2009 specialist opinion by Topercer *et al* regarding the appraisal of the ÚEV Vel’ká Fatra site echo those already expressed about the ÚEV Malá Fatra site. The authors point out that Petková and Mika only conducted a short-term survey outside the vegetation and reproduction period and excluded two habitats of Community importance, including one priority habitat, and three species of Community importance protected within the SAC.<sup>65</sup> In addition, they claim that the appraisal seriously underestimated the risk of significant changes in species composition and subsequent deterioration of habitats due to decline of sensitive native species, spread of expansive and invasive species and the risk of significant losses and fragmentation of habitats.<sup>66</sup> They also assert that it failed to assess the likelihood of severe interference with undisturbed parts of the home ranges of certain protected species and impacts on the structure and appearance of the Upper Váh River valley landscape.<sup>67</sup>
31. Topercer *et al* also criticize the Petková and Mika appraisal for assessing the impacts on the Rojkovské Rašelinisko Mire together with the impacts on the ÚEV Vel’ká Fatra. Though the mire is managed as part of the greater SAC, they stress that it is isolated and ‘highly specific or unique in terms of evolution, biogeography and ecology, with its own risks as well conservation and management needs.’<sup>68</sup> In addition to familiar concerns about the short-term nature of the survey and the inconsistency of the appraisal’s conclusions, Topercer *et al* point out that, though listed in the appraisal’s description of ÚEV Vel’ká Fatra,<sup>69</sup> Petková and Mika ‘plainly ignored’ both Habitat 3160 (natural dystrophic lakes and ponds) and Habitat 7140 (transition mires and quaking bogs),<sup>70</sup> while neither listing nor considering Habitat 91D0 (bog woodland and birch), ‘the very rare priority habitat of Community importance ... representing the only segment of this endangered habitat in SAC Vel’ká Fatra and one of the

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<sup>61</sup> *Ibid.*, at 29.

<sup>62</sup> See the apparently conflicting conclusions reached by Petková and Mika, *ibid.*, at 30 and 48.

<sup>63</sup> *Supra*, n. 57.

<sup>64</sup> Petková and Mika, *supra*, n. 8, at 48.

<sup>65</sup> Topercer *et al*, *supra*, n. 9, at 6.

<sup>66</sup> *Ibid.*, at 6-7.

<sup>67</sup> *Ibid.*, at 7.

<sup>68</sup> *Ibid.*, at 9.

<sup>69</sup> Petková and Mika, *supra*, n. 8, at 23-24.

<sup>70</sup> Topercer *et al*, *supra*, n. 9, at 9. The authors of the specialist opinion also cite existing studies on Habitat 3160.

few in the Slovak Republic'.<sup>71</sup> As regards species threatened by the impact of the motorway on the mire, Topercer *et al* record the viable population of *vertigo angustior*, in respect of which 'the lack of data for the assessment of its conservation status is admitted',<sup>72</sup> which calls into question the reliability of the 2007 appraisal's conclusions, especially having regard to the requirements of the precautionary principle as set out in the Environmental Policy 2003<sup>73</sup> and the EU Commission Guidance on Article 6(3).<sup>74</sup> Further questioning the scientific rigour and accuracy of the Petková and Mika study, Topercer *et al* point out that it records the presence of the species *vertigo geyeri*, even though it was not found in the area by a number of earlier detailed studies.<sup>75</sup>

32. Probably of greatest concern, Topercer *et al* cast doubt on the quality and reliability of the hydrogeological assessment by Pospiechová,<sup>76</sup> which provides the sole basis for the 2007 appraisal's conclusion that the impacts of the construction of the D1 motorway on the water and nutrient regimes of the site will not be significant. They suggest that the hydrogeological assessment 'does not meet the necessary criteria: it provides no information on methods and material (whether published and/or unpublished sources were used, or author's own sampling) on results of analysis or modeling etc. Instead it provides several unsupported conclusions ...'.<sup>77</sup> Topercer *et al* also criticize the appraisal's 'inconsistent or even contradictory' conclusions, pointing out, for example, that Petková and Mika admit the existence of a critical threat to the site due to changes in the water regime, as well as their own inability to predict these changes, but that this 'does not prevent them from concluding that the impacts of these changes will not be significant'.<sup>78</sup>

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<sup>71</sup> *Ibid.*

<sup>72</sup> *Ibid.*, at 9-10.

<sup>73</sup> Paragraph 6 of the EBRD Environmental Policy stipulates that

'The EBRD supports a precautionary approach to the management and sustainable use of natural biodiversity resources (such as wildlife, fisheries and forest products)'.

<sup>74</sup> See European Commission, *Assessment of plans and projects affecting Natura 2000 sites: Methodological guidance on the provisions of Article 6(3) and (4) of the Habitats Directive 92/43/EEC*

(Luxembourg, 2002), at 24 and 28. The central importance of the precautionary principle for the effective conduct of the "appropriate assessment" under Article 6(3) was also confirmed by the European Court of Justice in Case-127/02 *Waddenzee* [2004] ECR I-7405, para. 44, where the Court stated that this approach '(which implies that in case of doubt as to the absence of significant effects such as an assessment must be carried out) makes it possible to ensure effectively that plans or projects which adversely affect the integrity of the site concerned are not authorised'.

This position has been followed by the Court in Case C-98/03 *Commission v. Germany* ECR I-53 and Case C-6/04 *Commission v. United Kingdom* [2005] ECR I-9017.

<sup>75</sup> Topercer *et al*, *supra*, n. 9, at 10.

<sup>76</sup> *Supra*, n. 57.

<sup>77</sup> Topercer *et al*, *supra*, n. 9, at 10. According to the authors of the 2009 specialist opinion, this 'supports our doubts about the professional competence of the author [Pospiechová] in the area of mire hydrology' and, thus, undermines a range of the related findings by Petková and Mika.

<sup>78</sup> *Ibid.*

*ÚEV River Váh:*

33. In the case of impacts upon the protected habitats within the ÚEV River Váh, the 2007 appraisal concludes that loss of habitat through direct encroachment is the most significant impact of the construction, but that the impact can be mitigated by means of the measures suggested, including reduction in the number of bridge pillars intruding into the river and upon river bank vegetation.<sup>79</sup> It also found that deterioration in water quality due to construction would only be temporarily moderately unfavourable and that such deterioration due to winter road maintenance would be moderately unfavourable, but could be mitigated. It found that the creation of shadow and precipitation by the new bridges would only affect a small area and not be significant<sup>80</sup> and that the impact of air pollution, soil pollution and dust, though significant, can be reduced.<sup>81</sup> The impact of invasive species was not found to be significant and can anyway be effectively mitigated.<sup>82</sup> Regarding impacts on fauna, the appraisal concludes that temporary effects on species during construction and fragmentation of the affected section of the river are likely to be significant but can be mitigated by minimizing interference with the river bed,<sup>83</sup> while the impact due to direct destruction of habitats and interference with less mobile protected animals cannot be mitigated but is only moderately significant.<sup>84</sup>

34. However, in respect of the impact on a number of protected habitats, and particularly on the herbaceous vegetation along alpine river banks and hydrophilous tall herb fringe communities, the appraisal merely notes complacently that '[t]he size of the area is not available since this can only be established during the period of vegetation' and, further, that '[s]ince this is not its vegetation period, the state of the habitat cannot be established'.<sup>85</sup> Perhaps this is one of the reasons that, in its concluding section on the prospects for the integrity of the ÚEV River Váh, the appraisal does not strike a confident note, stating:

'From the point of view of its integrity, this is the most threatened territory of protected animal species and non-woodland habitats. ... When the individual habitats that cease to exist as a result of motorway construction are properly mapped, it may transpire that the proportion of their area is significant for retaining the territory's integrity.'<sup>86</sup>

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<sup>79</sup> Petková and Mika, *supra*, n. 8, at 34-35.

<sup>80</sup> *Ibid.*, at 35.

<sup>81</sup> *Ibid.*, at 37-38.

<sup>82</sup> *Ibid.*, at 38-39.

<sup>83</sup> *Ibid.*, at 39. However, somewhat contradictorily, the concluding section on the impacts of the Project on the overall integrity of the ÚEV River Váh points out, at 40, that:

'The proposed motorway crosses the ÚEV River Váh at four points ... which will essentially result in the section to be separated into five segments. In view of the fact that the bridges crossing the river Váh are on the average 50 metres wide, this represents a significant impact on the coherence of the territory.'

<sup>84</sup> *Ibid.*, at 40.

<sup>85</sup> *Ibid.*, at 35-36.

<sup>86</sup> *Ibid.*, at 40.

Indeed, in its final conclusions, the appraisal finds that the loss of habitats has to be considered significant to the extent that ‘compensatory measures will be necessary’ – an issue usually addressed under Stage 4 of the appropriate assessment, after it has been determined that a project or plan will inevitably have significant adverse effects upon the integrity of a Natura 2000 site and, further, that there exist no viable alternatives to such a project or plan.

35. Once again, the shortcomings in the appraisal alleged by Topercer *et al* regarding the ÚEV River Váh site echo those alleged in respect of the ÚEV Malá Fatra and ÚEV Veľká Fatra sites. The authors point out that Petková and Mika only conducted a short-term survey outside the vegetation and reproduction period and excluded three habitats of Community importance, including one priority habitat, and four species of Community importance protected within the SAC.<sup>87</sup> In addition, they claim that the 2007 appraisal seriously underestimated the risk of significant changes in species composition and subsequent deterioration of habitats due to decline of sensitive native species, spread of expansive and invasive species, and the risk of significant losses and fragmentation of habitats.<sup>88</sup> They also assert that it failed to assess the likelihood of significant interference with valuable core parts of the home ranges of certain protected species and impacts on the structure and appearance of the Upper Váh River valley landscape.<sup>89</sup>

*CHVÚ Malá Fatra:*

36. As one of the most important sites in Slovakia for the nesting of a wide range of bird species, and as an area in which more than one per cent of the national population of an even wider range of bird species nest, the 2007 appraisal concluded that disturbance during the construction period would only have a moderately adverse impact, as would the ongoing existence and operation of bridges and flyovers and electric cables which could be mitigated by installing protective barriers and by burying cables.<sup>90</sup> Therefore, it was found that the Project would not have an impact sufficiently significant to adversely effect the integrity of CHVÚ Malá Fatra,<sup>91</sup> even though it assumes elsewhere, in a seemingly almost unrelated discussion of cumulative impacts, that ‘there will be an impact on the size of habitats safeguarding site and food requirements of birds in CHVÚ Malá Fatra’ from a number of planned and ongoing activities.<sup>92</sup> Once again, this observation seems somewhat incongruous with the appraisal’s general conclusions.

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<sup>87</sup> Topercer *et al*, *supra*, n. 9, at 8.

<sup>88</sup> *Ibid.*, at 8.

<sup>89</sup> *Ibid.*, at 8-9.

<sup>90</sup> Petková and Mika, *supra*, n. 8, at 42-43.

<sup>91</sup> *Ibid.*, at 43 and 48.

<sup>92</sup> *Ibid.*, at 47.

## Conclusions:

37. Somewhat confusingly, there appears to have been some uncertainty as to the precise role of the Petková and Mika appraisal in the conduct of the “appropriate assessment” required under Article 6(3) of the Habitats Directive. Arguing that this study ‘cannot be used in lieu of the process of appropriate assessment that is required by the article 6.3 of the Habitats Directive’, the specialist opinion prepared by Topercer *et al* highlights that ‘[e]ven the authors themselves admit on page 11 (of original) that “our study to some extent substitutes only this phase of project assessment” (i.e. the phase of screening...).’<sup>93</sup> However, though not explicitly set out in the document itself, it appears that the appraisal by Petková and Mika is actually intended to constitute the “appropriate assessment” of the impact of the proposed D1 Turany – Hubova Project required under Article 6(3) of the Habitats Directive, on the basis of which the Slovak national competent authorities agreed to permit the Project.<sup>94</sup> The Concessionaire clearly regarded the study as absolutely central to the requirements of Article 6(3) while framing the parameters for the Biodiversity Management Plan (BMP).<sup>95</sup>
38. For one thing, in a discussion of its ‘methodology of plan appraisal’, the appraisal reproduces in detail the four stages for the “appropriate assessment” set out under the 2002 EU Commission Guidance on Article 6(3)<sup>96</sup> and then proceeds, in its examination of the likely impact of the Project on each of the Natura 2000 sites affected, systematically to address the key questions identified in Stage 2: “Appropriate Assessment”.<sup>97</sup> In addition, it is equally apparent that the Petková and Mika appraisal was at all times driven and informed by the requirements of the Commission Guidance.<sup>98</sup> It would appear to have taken account of a fairly wide range of documentation<sup>99</sup> and even expressly draws attention to the potential shortcomings, having regard to the Commission Guidance, in its own

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<sup>93</sup> Topercer *et al*, *supra*, n. 9, at 11, referring to Petková and Mika, *supra*, n. 8, at 14 (English translation).

<sup>94</sup> The relevant Natura 2000 Declarations issued by the Slovak competent authorities for State Nature Conservation are available at <http://www.telecom.gov.sk/index/index.php?ids=70901&lang=eng>

<sup>95</sup> See Slovenské Dial’nice a.s., *D1 Motorway Project Slovakia: Request for Proposal for the Preparation of the Biodiversity Management Plan* (20 May 2010), which explains, at 1, that:

‘A number of studies have been undertaken in relation to the Project’s impact on the designated European sites and in particular the Creative study (2007) which sought to comply with Article 3 [*sic*] of the Habitats Directive for an “appropriate assessment”.’

<sup>96</sup> European Commission, *Assessment of plans and projects affecting Natura 2000 sites: Methodological guidance on the provisions of Article 6(3) and (4) of the Habitats Directive 92/43/EEC* (Luxembourg, 2002). See Petková and Mika, *supra*, n. 8, at 13-15.

<sup>97</sup> These include:

- Step One: Information required;
- Step Two: Impact Prediction;
- Step Three: Conservation objectives;
- Step Four: Mitigation measures; and
- Outcomes.

See, EU Commission Guidance, *ibid.*, at 25-32.

<sup>98</sup> See Petková and Mika, *supra*, n. 8, at 4.

<sup>99</sup> See Petková and Mika, *ibid.*, at 15.

methodology.<sup>100</sup> The assessment of the Project's implications for each Natura 2000 site<sup>101</sup> is quite comprehensive, setting out Project data of relevance to the site, a description of the site and data on its key characteristics, a description of the habitats and species of flora and fauna likely to be affected, an appraisal of the impact of the Project on those habitats and species, an account of the proposed mitigating measures, and an appraisal of the impact of the Project on the overall integrity of the site. Though the Steps associated with Stage One: "Screening" in the EU Commission Guidance are somewhat similar,<sup>102</sup> the Petková and Mika study appears to go a good deal further by, for example, setting out mitigating measures.<sup>103</sup> Therefore, the level of detail provided under the Petková and Mika study is more in line with that required under Stage Two: "Appropriate Assessment" as set out under the EU Commission Guidance, and suggests that the appraisal was intended to satisfy the overall requirement for an "appropriate assessment" under Article 6(3).

39. This understanding of the role of the Petková and Mika study is more in keeping with judicial statements on the sequential ordering and intensity of the various assessment processes required under Article 6(3). In the *Waddenzee* case, the European Court of Justice (ECJ) explained that

'the first sentence of Article 6(3) of the Habitats Directive subordinates the requirement for an appropriate assessment of the implications of a plan or project to the condition that there be a probability or a risk that the latter will have significant effects on the site concerned.'<sup>104</sup>

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<sup>100</sup> See Petková and Mika, *ibid.*, at 16, where the authors point out that

'In order to be able to carry out a more accurate assessment of the impact of the proposed motorway on sites of Natura 2000 it would be necessary to obtain ... maps of natural habitats ... for comprehensive appraisal of the scope, quantity and quality of the impact on flora (needs to be carried out during the growing season).'

Further, the authors concede that

'A more accurate forecast of the cumulative effect was not possible due to the absence of information on future intentions for the area, *i.e.* railway modernization, free time activities, community development plans.'

<sup>101</sup> The four Natura 2000 sites likely to be affected by the proposed D1 Turany-Hubova Motorway Project and examined under the Petková and Mika appraisal include:

- (a) ÚEV (SCA) Malá Fatra;
- (b) ÚEV (SCA) Vel'ká Fatra;
- (c) ÚEV (SCA) River Váh; and
- (d) CHVÚ (SPA) Malá Fatra.

<sup>102</sup> These include:

- Step One: Management of the site;
- Step Two: Description of the project or plan;
- Step Three: Characteristics of the site;
- Step Four: Assessment of significance; and
- Outcomes.

See, EU Commission Guidance, *supra*, n. 96, at 17-23

<sup>103</sup> In relation to Step Four: Assessment of significance, for example, the EU Commission Guidance states, *ibid.*, at 20, that

'The significance test may require little more than consultation with the relevant nature conservation agency.'

<sup>104</sup> Case C-127/02, *Waddenzee* [2004] ECR I-7405, para. 43.

Therefore a second, more detailed assessment is required where the preliminary assessment identifies a risk of significant effects having regard to the precautionary principle, ‘by reference to which the Habitats Directive must be interpreted’.<sup>105</sup> Indeed the Court found that ‘such a risk exists if it cannot be excluded on the basis of objective information that the plan or project will have significant effects on the site concerned’, which in turn ‘implies that in case of doubt as to the absence of significant effects such an assessment must be carried out’.<sup>106</sup> Thus, ‘[t]he case law of the ECJ makes it clear that the trigger for an appropriate assessment is a very light one, and the mere probability or a risk that a plan or project might have a significant effect is sufficient to make an “appropriate assessment” necessary’.<sup>107</sup> As it is nowhere suggested in any of the earlier project documentation that it has been conclusively ascertained that the Project presents no risk of significant effects on the Natura 2000 sites at issue, and as the Petková and Mika study involves a reasonably in-depth assessment of such possible effects including, for example, detailed proposals for mitigation measures, it seems safe to assume that this study constitutes the Stage Two 2: “Appropriate Assessment” for the purposes of Article 6(3) of the Habitats Directive.<sup>108</sup>

40. However, this is not to conclude that the Petková and Mika appraisal satisfies all the requirements of Stage Two: “Appropriate Assessment” as set out under the EU Commission Guidance. For example, the Guidance requires that an appropriate assessment report ‘should be made available for consultation with relevant agencies and the public’ and suggests that an objective conclusion as to adverse impacts on the integrity of the site can only be reached ‘[f]ollowing the receipt of the comments of those consulted’.<sup>109</sup> It further provides that, in

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<sup>105</sup> *Ibid.*, para. 44. See further, for example, J. Jans and H.B. Vedder, *European Environmental Law* (3<sup>rd</sup> ed.) (Europa Press, Groningen, 2008), who note, at 460, that

‘this provision involves a two-stage assessment of the environmental impact. If it cannot be excluded, on the basis of objective information, that the plan or project will have a significant effect on that site, either individually or in combination with other plans or projects, a second in-depth assessment is required.’

<sup>106</sup> *Ibid.*

<sup>107</sup> G. Simmons, ‘Habitats Directive and Appropriate Assessment’, (2010) 17 *Irish Planning and Environmental Law journal* 4, at 7. See also, C-127/02, *Waddenzee* [2004] ECR I-7405, paras. 41 and 45.

<sup>108</sup> It has been accepted by the ECJ that several different studies might in combination constitute the “appropriate assessment for the purposes of Article 6(3) of the Habitats Directive. See Case C-304/05, *Commission v. Italy*, 20 September 2007, para. 62, which notes, before going on to list

‘The assessments which might be considered appropriate within the meaning of Article 6(3) of Directive 92/43’

that

‘It is apparent from the documents submitted to the Court that prior consideration was given to the matter on a number of occasions before authorisation was granted’.

Similarly, the EU Commission Guidance on implementation of Article 6(3), *supra*, n. 96, notes, at 12, that

‘Where projects or plans are subject to the EIA or SEA directives, the Article 6 assessments may form part of these assessments. However, assessments required by Article 6 should be clearly distinguishable and identified within an environmental statement or reported separately.’

<sup>109</sup> EU Commission Guidance, *ibid.*, at 24. This merely reflects the requirement in Article 6(3) that

determining what level of mitigation is required, the relevant national authority ‘should take into consideration suggestions from ... [*inter alia*] ... NGOs’.<sup>110</sup> This omission is noted by Topercer *et al*, who complain that ‘[t]he public did not have opportunities to give comments and opinions, which is required by the Habitats Directive and EIA Directive’.<sup>111</sup>

41. Adding further to the confusion about the precise role envisaged for the Petková and Mika appraisal in satisfying the requirements of Article 6(3), the appraisal appears on a number of occasions to confuse mitigation and compensatory measures,<sup>112</sup> the latter being envisaged under Stage Four: “Assessment where no alternative solutions exist and where adverse impacts remain” of the Article 6(3) assessment process as set out under the EU Commission Guidance.<sup>113</sup> Though this might not be regarded as a serious matter substantively, as the provision of compensatory habitat might conceivably be regarded as a measure which mitigates the impact of the Project on the overall integrity of the site as envisaged under Stage 2: “Appropriate Assessment”, it does raise concerns about the sequential coherence and logical integrity of the processes employed in the study, bearing in mind the Guidance stipulation that ‘[p]redicting impacts should be done within a structured and systemic framework’.<sup>114</sup>
42. Even more significantly perhaps, whereas the EU Commission Guidance on the conduct of an appropriate assessment under Article 6(3) sets out in some detail the range of ‘impact prediction methods’ which might be employed, the study by Petková and Mika appears to provide little or no information on the methods used. The ‘impact prediction methods outlined in the Commission Guidance include:
  - *Direct measurements*: to identify proportionate losses from species’ populations, habitats and communities;
  - *Flow charts, networks and systems diagrams*: to identify chains of impacts resulting from direct impacts and indirect impacts, illustrating interrelationships and process pathways;
  - *Quantitative predictive models*: to provide mathematically derived predictions based on data (including trend analysis, scenarios, analogies which transfer information from other relevant locations, *etc.*) and assumptions about the force and direction of impacts;

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‘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.’

<sup>110</sup> *Ibid.*, at 30.

<sup>111</sup> Topercer *et al*, *supra*, n. 9, at 11.

<sup>112</sup> See, for example, the proposals to employ compensatory measures in respect of ÚEV (SCA) Vel’ká Fatra to mitigate the effects of loss of habitat and of light penetration of the woodland and the possibility of incursion by invasive and non-woodland species, Petková and Mika, *supra*, n. 8, at 26.

<sup>113</sup> See European Commission, *Assessment of plans and projects affecting Natura 2000 sites: Methodological guidance on the provisions of Article 6(3) and (4) of the Habitats Directive 92/43/EEC* (Luxembourg, 2002), at 40-44.

<sup>114</sup> *Ibid.*, at 27.

- *Geographical information systems (GIS)*: to produce models of spatial relationships (such as constraint overlays) and to map sensitive areas and locations of habitat loss;
- *Information from previous similar projects*: especially if quantitative predictions were made initially and have been monitored in operation;
- *Expert opinion and judgment*: derived from previous experience and consultations.<sup>115</sup>

More generally, the Guidance stresses that '[p]redicting impacts should be done within a structured and systemic framework and completed as objectively as possible.'<sup>116</sup> However, on the issue of the 'methodology for appraising the impact of the proposal', the Petková and Mika appraisal provides no such detail, except to qualify the level of scrutiny employed by stating that '[w]e evaluated the significance of the impacts in a simplified form, taking into account the purpose of this paper'.<sup>117</sup> In contrast, the specialist opinion produced by Topercer *et al* cites, where relevant, published and unpublished studies in support of their position and clearly outlines what they consider to be the key shortcomings in the predictive models used by Petková and Mika.<sup>118</sup>

43. From the outset, the Petková and Mika appraisal expresses a general concern that 'In order to able to carry out a more accurate assessment of the impact of the proposed motorway on sites of Natura 2000 it would be necessary to obtain the following information: ... maps of natural habitats (including phytocenological imaging) for comprehensive appraisal of the scope, quantity and quality of the impact on flora (needs to be carried out during the growing season).'<sup>119</sup>

It should be remembered that the 'existing baseline conditions of the site' is expressly included among the information required under the EU Commission Guidance in order to complete an appropriate assessment.<sup>120</sup> Indeed, the Guidance clearly states that '[w]here [such] information is not known or not available, further investigations will be necessary',<sup>121</sup> though there is nowhere in the appraisal any indication that such investigations were carried out. The appraisal concedes in respect of the assessment of the Project's impacts on

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<sup>115</sup> See European Commission, *Assessment of plans and projects affecting Natura 2000 sites: Methodological guidance on the provisions of Article 6(3) and (4) of the Habitats Directive 92/43/EEC* (Luxembourg, 2002), at 27. See also, the detailed guidance on 'Impact Prediction' provided in Annex 1 to the Commission Guidance, at 61-62.

<sup>116</sup> *Ibid.*

<sup>117</sup> Petková and Mika, *supra*, n. 8, at 16. Unfortunately, the Petková and Mika study is not entirely clear about the purpose of the study as regards which stage of the Article 6(3) appropriate assessment methodology it was intended to carry out.

<sup>118</sup> For example, in respect of ÚEV Malá Fatra, see Topercer *et al*, *supra*, n. 9, at 5. In respect of the Rojkovské Rašelinisko Mire, located within the ÚEV Vel'ká Fatra, and the predictive models employed in the seminal hydrogeological assessment, see *ibid.*, at 10.

<sup>119</sup> Petková and Mika, *supra*, n. 8, at 16.

<sup>120</sup> European Commission, *Assessment of plans and projects affecting Natura 2000 sites: Methodological guidance on the provisions of Article 6(3) and (4) of the Habitats Directive 92/43/EEC* (Luxembourg, 2002), at 26.

<sup>121</sup> *Ibid.*, at 25.

hydrophilous tall herb fringe communities and on alkaline fens in the ÚEV Vel'ká Fatra, for example, that due to the fact that 'it is not now the growing season it is impossible to evaluate the condition of the habitat'.<sup>122</sup> Topercer *et al* draw particular attention to this deficiency in the context of the appraisal's assessment of the impacts on the Rojkovské Rašelinisko Mire, which forms part of the Vel'ká Fatra SAC.<sup>123</sup> This shortcoming would appear also to have impeded effective assessment of the impact of the Project on the protected habitats within the ÚEV River Váh.<sup>124</sup>

44. Similarly, though the EU Commission Guidance lists among the information essential for completion of the Article 6(3) appropriate assessment '[t]he characteristics of existing, proposed or other approved projects or plans which may cause interactive or cumulative impacts with the project being assessed and which may affect the site',<sup>125</sup> the appraisal notes, somewhat complacently, that '[a] more accurate forecast of the cumulative effect was not possible due to the absence of information on future intentions for the area, *i.e.* railway modernization, free time activities, community development plans.'<sup>126</sup> However, though additional technical meetings were held between the Regional Environment Authority and the Highway Designs in 2008,<sup>127</sup> there is no evidence of formal efforts to take account of cumulative impacts, even though the appraisal lists a range of 'envisaged activities' with which 'the impact of motorway construction will generally speaking cumulate'.<sup>128</sup> This omission is of some practical significance in respect of the appraisal of the impact of the project on the ÚEV River Váh, where Petková and Mika note that '[w]e do not consider the impact of the proposed motorway to be significant but if taken together with other projects (small hydroelectric power stations, railway modernization, zoning developments) this could become significant'.<sup>129</sup> Elsewhere, the appraisal notes that

'Of all the cumulative factors mentioned, the more significant ones are the reduction of riverbank vegetation along the river Váh and the fragmenting

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<sup>122</sup> Petková and Mika, *supra*, n. 8, at 26-27.

<sup>123</sup> Topercer *et al*, *supra*, n. 9, at 10.

<sup>124</sup> Petková and Mika, *supra*, n. 8, at 33-34 and 40.

<sup>125</sup> *Ibid.*, at 26. Indeed, the Commission Guidance even provides, at 13, an indicative list of '[i]mportant issues in carrying out cumulative impacts assessments', which include:

- the setting of boundaries for the assessment;
- establishing responsibilities for carrying out assessments where projects or plans are proposed by different proponents or controlled by different competent authorities;
- characterising of potential impacts in terms of causes, pathways and effects;
- taking particular care in assessing mitigation options and allocating responsibility for appropriate mitigation.

Of course, the requirement for an assessment of cumulative impacts stems directly from the wording of Article 6(3), which refers to a plan or project likely to have a significant effect 'either individually or in combination with other plans or projects'.

<sup>126</sup> Petková and Mika, *supra*, n. 8, at 16.

<sup>127</sup> See further, MOT Response to DG Environment.

<sup>128</sup> Petková and Mika, *supra*, n. 8, at 46.

<sup>129</sup> *Ibid.*, at 34.

impact of the barrier on migration of earthbound animals, in particular large mammals.<sup>130</sup>

Similarly, in respect of impacts on CHVÚ Malá Fatra, the appraisal notes, after having concluded that the Project would not impact on the integrity of this Natura 2000 site, that

‘In addition to the cumulative effect of these [listed] factors, it can be assumed that there will also be an impact on the size of habitats safeguarding site and food requirements of birds in CHVÚ Malá Fatra from new free-time facilities which are expected to be built in the area Chleb South, and of operations at Bystrička stone quarry.’<sup>131</sup>

As regards cumulative impacts, Topercer *et al* note in particular the possible cumulative impacts in combination with the project “Exploitation of hydroelectric potential of Váh River in the section Krpel’any – Ružomberok by small hydroelectric power stations”, as well as with modernization of railways, development of a cableway and ski pistes on Mt. Chleb, and of resuming mining in the Bystrička quarry.<sup>132</sup>

45. It is perhaps inevitable that the conduct of an “appropriate assessment”, as required under Article 6(3) of the EU Habitats Directive, will give rise to some uncertainty as to the precise process to be employed and the precise nature of the various tests to be applied. For example, it is telling that the EU Commission Guidance on Article 6(3) appears to expect that the assessment might be carried out in various phases and be reported in a variety of documents:

‘Unlike EIAs, however, the Article 6 assessments do not require the production of a single report such as an ES, and therefore this review package [Guidance] should be used as a systematic means of assessing a range of documentary evidence of the assessments carried out under Article 6.’<sup>133</sup>

Academic commentators have consistently identified uncertainties inherent to implementation of Article 6(3). One group has identified ‘sources of uncertainty encountered in the significance decision procedure as part of the assessment of article 6 Habitats Directive’ and outlined ‘how they affect the use of knowledge during the three steps of the assessment process, *i.e.* identification of site conservation objectives, predicting the impact of the planned activity and assessing the significance of any effects on the Natura 2000 site’.<sup>134</sup> More generally, Riki Therivel, a leading authority on environmental and ecological assessment, points out that

‘various guidance documents have been published, but there is still considerable debate about just what methodology should be used, how to

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<sup>130</sup> *Ibid.*, at 47.

<sup>131</sup> *Ibid.*

<sup>132</sup> Topercer *et al*, *supra*, n. 9, at 10-11.

<sup>133</sup> *Supra*, n. 6, at 45.

<sup>134</sup> P.F.M. Opdam, M.E.A. Broekmeyer and F.H. Kistenkas, ‘Identifying uncertainties in judging the significance of human impacts on Natura 2000 sites’, (Nov. 2009) 12/7 *Environmental Science and Policy*, at 912-921.

test impacts on site “integrity”, what avoidance and mitigation measures are adequate, who should be responsible for these measures, *etc.*’.<sup>135</sup>

Indeed, one study of practice in Finland examined 73 Appropriate Assessment reports and 70 official opinions issued by regional environmental authorities on the basis of these reports between 1997 and 2005, and found that

‘The findings of the study demonstrate typical shortcomings of ecological impact assessment: a weak information basis for assessment outcomes and lack of proper cumulative impact assessment with respect to ecological structures and processes.’<sup>136</sup>

This study further found that ‘[r]egional environmental centres considered one fifth of the AA reports to be inadequate because of lacking (*sic*) data’.

46. However, as an appropriate assessment for the purposes of Article 6(3) of the Habitats Directive, the November 2007 study by Petková and Mika suffers from a number of serious deficiencies which one would expect EBRD to identify as part of the due diligence appraisal of the Project required under the EBRD Environmental Policy 2003. Principally, the study suffers from a lack of clarity and focus with regard to its precise role in and contribution towards the conduct of the “appropriate assessment”, namely as to whether it was intended to satisfy Stage One or Stage Two of the assessment process as elaborated under the EU Commission Guidance. This uncertainty is exacerbated by the inclusion among the mitigating measures identified in the study of proposals for measures to compensate for deteriorated habitats, a type of measure envisaged under Stage Four of the process. Most significantly, the Petková and Mika appraisal provides no detail about the ‘impact prediction methods’ employed in the assessment and little evidence that the prediction of ecological impacts was actually ‘done within a structured and systemic framework’, as required. Indeed, major methodological shortcomings in the assessment include a failure adequately to consider cumulative impacts, a deficiency in baseline ecological data, and reliance on short-term surveys of protected habitats and species which would all appear to have taken place outside of the growing season. In addition, the public consultation required under Article 6(3) and stressed under the EU Commission Guidance as part of the assessment does not appear to have taken place and, while failure in respect of public consultation is not specifically alleged in the current Complaint as a ground of non-compliance *per se*, it is relevant to the issue of the adequacy of the appropriate assessment as required under Article 6(3).<sup>137</sup>

47. The European Court of Justice (ECJ) has provided some judicial clarification as to the standards required for an adequate Stage Two: “Appropriate Assessment” and leading commentators have observed that ‘the Court has put the bar quite high

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<sup>135</sup> R. Therivel, ‘Appropriate assessment of plans in England’, (July 2009) 29/4 *Environmental Impact Assessment Review*, at 261-272.

<sup>136</sup> T. Söderman, ‘Natura 2000 appropriate assessment: Shortcomings and improvements in Finnish practice’, (Feb. 2009) 29/2 *Environmental Impact Assessment Review*, 79-86.

<sup>137</sup> Though public consultation was conducted on the ESIA in accordance with the Bank’s requirements and would have been required on the Biodiversity Management Plan had the Project gone ahead.

indeed'.<sup>138</sup> In its 2007 judgment in *Commission v. Italy*, the ECJ evaluated whether a 2000 environmental impact study and a 2002 report were adequate in combination to be considered appropriate assessments within the meaning of Article 6(3).<sup>139</sup> In reaching the 'inescapable conclusion' that the earlier study did 'not constitute an appropriate assessment on which the national authorities could rely for granting authorisation for the disputed works pursuant to Article 6(3) of Directive 92/43',<sup>140</sup> the Court emphasized 'the summary and selective nature of the examination of the environmental repercussions' of the proposed works,<sup>141</sup> the fact that the 'study itself mentions a large number of matters which were not taken into account' and thus recommends 'additional morphological and environmental analyses and a new examination of the impact of the works ... on the situation of certain protected species'<sup>142</sup> and, further, that 'the study takes the view that the carrying out of the proposed works ... must comply with a large number of conditions and protection requirements'.<sup>143</sup> Each of these shortcomings might be attributed to the Petková and Mika study. For example, its conclusions in respect of the impacts of the Project on the integrity of the ÚEV River Váh could hardly be described as definitive or conclusive,<sup>144</sup> while the concerns expressed therein about the lack of baseline information necessary 'for comprehensive appraisal of the scope, quantity and quality of the impact on flora' highlight the study's deficiencies and the need for further analysis.<sup>145</sup> As regards the later report, the Court reached a similar conclusion, and complained that it 'does not contain an exhaustive list of the wild birds present in the area' for which the SPA at issue had been designated,<sup>146</sup> 'contains numerous findings that are preliminary in nature and it lacks definitive conclusions'<sup>147</sup> and, further, stresses 'the importance of assessments to be carried out progressively, in particular on the basis of knowledge and details likely to come to light during the process of implementation of the project'.<sup>148</sup> Once again, these shortcomings are echoed in the Petková and Mika study. Take, for example, the failure to consider impacts upon various protected habitats and species in its examination of each of the Natura 2000 sites affected, as ably pointed out by Topercer *et al.*<sup>149</sup> Indeed, the Court provides a very clear and concise indication of the deficiencies in an assessment (or series of assessments) which would render it inadequate for the purposes of Article 6(3) of the Habitats Directive:

'It follows from all the foregoing that both the study of 2000 and the report of 2002 have gaps and lack complete, precise and definitive

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<sup>138</sup> Jans and Vedder, *supra*, n. 105, at 461.

<sup>139</sup> Case C-304/05, *Commission v. Italy*, Judgment, 20 September 2007.

<sup>140</sup> *Ibid.*, para. 65.

<sup>141</sup> *Ibid.*, para. 62.

<sup>142</sup> *Ibid.*, para. 63.

<sup>143</sup> *Ibid.*, para. 64.

<sup>144</sup> See Petková and Mika, *supra*, n. 8, at 40. See, *supra*, n. 86.

<sup>145</sup> *Ibid.*, at 16. See, *supra*, n. 119.

<sup>146</sup> Case C-304/05, *Commission v. Italy*, Judgment, 20 September 2007, para. 66.

<sup>147</sup> *Ibid.*, para. 67.

<sup>148</sup> *Ibid.*

<sup>149</sup> Topercer *et al.*, *supra*, n. 9, at 4-10.

findings and conclusions *capable of removing all reasonable scientific doubt as to the effects* of the works proposed on the SPA concerned.<sup>150</sup>

48. On this basis, the Compliance Review Expert has had little difficulty in finding that the 2007 appraisal by Petková and Mika of the Project's potential impacts on the integrity of protected Natura 2000 sites was inadequate for the purposes of the requirements of Article 6(3) of the EU Habitats Directive. However, this conclusion does not necessarily imply a finding of non-compliance on the part of the Bank in respect of the first allegation. The duty arising under Article 6(3) of the Habitats Directive to ensure that the project 'shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives' is primarily imposed upon the competent authority of the Member State.<sup>151</sup> While it would not be adequate for EBRD to rely solely on the determination by the competent Slovak authorities that the appropriate assessment was adequate,<sup>152</sup> as Paragraph 21 of the EBRD Environmental Policy 2003 places a clear duty on the Bank to require that projects meet applicable EU environmental standards, the Bank did commission successive comprehensive Environmental and Social Assessment Reviews from a number of consultants which aimed, *inter alia*, to verify that determination.<sup>153</sup> The terms of reference produced for each of these review exercises stressed the need 'to identify and address all potentially significant adverse environmental impacts, including ... biodiversity impacts', and to '[a]ssess also the adequacy of proposed mitigation measures and monitoring'.<sup>154</sup> While the text of the March 2010 Enviconsult /

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<sup>150</sup> C-304/05, *Commission v. Italy*, Judgment, 20 September 2007, para. 69 (emphasis added).

<sup>151</sup> Habitats Directive, Article 6(3). See also EU Commission Guidance, *supra*, n. 96, at 25, which clearly states that

'It is the competent authority's responsibility to carry out the appropriate assessment.'

<sup>152</sup> Decision of Ministry of Environment, Section for Nature and Landscape Conservation Studies (17 January 2008); Expert Statement of Regional Environmental Authority in Žilina (29 July 2008); and Declaration of ŠOP SR – State Nature Conservancy of the Slovak Republic (22 August 2008). See Enviconsult / Citrus, *D1 Motorway Project, Slovakia: Environmental and Social Review- Supporting Documents* (March 2010), Document 1, at 3-4 and Document 4, at 1-4.

<sup>153</sup> Scott Wilson, *D1 Motorway and R1 Expressway Environmental and Social Due Diligence – Recommendations*, 24 November 2008; Enviconsult / Citrus, *D1 Motorway Project, Slovakia: Environmental and Social Review* (March 2010). After the emergence of concerns in respect of the quality and accuracy of the review conducted by Scott Wilson, EBRD commissioned a further review by Enviroconsult / Citrus. EBRD also relied, quite reasonably, upon due diligence conducted by EIB, see further EIB Completions Report, *supra*, n. 11.

<sup>154</sup> EBRD, *Terms of Reference: D1 Motorway and R1 Expressway Slovakia - Environmental and Social Due Diligence* (August 2008), at 4-5. Indeed, the later and even more focused EBRD, *Terms of Reference: Assessment of Biodiversity Aspects of D1 Slovakia Road Project* (January 2010), listed, at 1-2, the scope of work for the specialist consultants as follows:

- To identify the areas of concern along the proposed road based on the information provided in the EIA, permit requirements, Natura 2000 declarations, Management Plans and other relevant information;
- To identify any gaps with respect to the potential environmental impacts ... associated with the proposed Project on Natura 2000 areas; and
- To identify any gaps with respect to the mitigation measures and propose measures to the included in the Environmental and Social Action Plan (ESAP) aimed at preventing and

Citrus review, the key report on which Bank officials relied, only makes brief reference to the Petková and Mika study and appears not at all to address the many serious issues raised by the Topercer appraisal,<sup>155</sup> the outline ESAP proposed therein is quite comprehensive in respect of ‘Biodiversity / Natura 2000’ impacts and would appear to address most, if not all, of those very issues.<sup>156</sup> For example, the ESAP clearly seeks to take account of possible cumulative impacts of the Project.<sup>157</sup> Indeed, the Biodiversity Assessment Review, conducted in support of the March 2010 Enviconsult / Citrus review, contains a detailed analysis of the impacts on Natural 2000 sites within the Turany-Hubová section of the motorway, including a review of the Petková and Mika study and a number of additional recommendations and mitigating measures.<sup>158</sup> The March 2010 Enviconsult / Citrus review concluded that

‘although the project will impact Natura 2000 sites, these sites ... have been adequately assessed ... and mitigation measures in the Final Statements are considered sufficient. These mitigation measures will be carried through in the Biodiversity Action Plan for the Project’.<sup>159</sup>

Therefore, for the purposes of ensuring compliance with the requirements of Paragraph 21 of the EBRD Environmental Policy 2003, it appears reasonable for Bank officials to have relied on the conclusions of expert consultants charged with reviewing the adequacy of the “appropriate assessment” as required under Article 6(3) of the Habitats Directive.<sup>160</sup>

49. Regarding compliance with the standards of an adequate “appropriate assessment” required under Article 6(3), it should be noted that, though the EU Commission has not yet completed its technical review of this Project’s compliance with the key provisions of the Habitats Directive, the Board of Directors of EBRD had made it perfectly clear that its approval for EBRD’s

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mitigating potential adverse environmental impacts on Natura 2000 areas during the construction and operation of the proposed project.

<sup>155</sup> *Supra*, n. 153, at 3-4.

<sup>156</sup> *Ibid.*, at 19-21.

<sup>157</sup> *Ibid.*

<sup>158</sup> Enviconsult / Citrus, *D1 Motorway Project, Slovakia: Environmental and Social Review- Supporting Documents* (March 2010), Document 2, at 7-14.

<sup>159</sup> Enviconsult / Citrus, *D1 Motorway Project, Slovakia: Environmental and Social Review* (March 2010), at 4. It is important to remember in this regard that, according to the European Commission guidance on the implementation of Art. 6(3), *supra*, n. 7, at 45, the “appropriate assessment” need not be set out in a single document, which infers that it need not necessarily be carried out in a single stage nor by means of a single appraisal exercise.

<sup>160</sup> On the reasonableness of relying upon the conclusions of expert consultants, it is useful to note the situation under the Bank’s 2008 Environmental and Social Policy, where Para. 6 of Performance Requirement (PR) 6: “Biodiversity Conservation and Sustainable Management of Living Natural Resources” provides that, in relation to the requirements applying to “protected and designated areas” ‘the client will retain qualified and experienced external experts to assist in conducting the appraisal’.

While the 2008 Policy does not apply to the present Complaint it is reasonable to assume that there exists considerable continuity in terms of the standards of due diligence required of the Bank under both the 2003 and 2008 Policies. Para. 5 of PR 6 further provides that

‘The Bank may engage independent biodiversity specialists to assist in its due diligence.’

funding of the Project was conditional on it being found to be in compliance with the requirements of EU environmental legislation.<sup>161</sup> Further, EBRD would include whatever additional mitigating measures the Commission might identify as necessary in order to bring about a satisfactory resolution of the outstanding environmental issues. It is quite clear that Bank officials confidently believed that EBRD due diligence had already identified the key shortcomings in respect of compliance with the Habitats Directive and that these would be adequately addressed in the Biodiversity Management Plan.<sup>162</sup> At any rate, any further mitigation measures identified by the EU Commission as necessary could easily be accommodated within the adaptive management structure envisaged under the ESAP and BMP.<sup>163</sup> Therefore, the Bank has taken all reasonable steps to identify and address the outstanding issues necessary to ensure compliance with the Habitats Directive,<sup>164</sup> has provided for the possibility that the EU Commission might stipulate additional such issues, and has made EBRD funding conditional on a finding by the Commission that the Project can be brought into compliance by such means.

50. In declining to make a finding of non-compliance on the part of the Bank, the Compliance Review Expert found it useful to take a purposive approach to the interpretation and application of the provisions of the Environmental Policy 2003, which would appear to justify the measures taken by the Bank in order to ensure the best possible environmental outcomes for the Project. In relation to the general principles set out in the 2003 Environmental Policy, Paragraph 6 dealing with the ‘management and sustainable use of natural biodiversity resources’ provides that EBRD ‘will seek to ensure that it’s operations include measures to safeguard and, where possible, enhance natural habitats and the biodiversity they support’, while Paragraph 9 provides that ‘[t]he EBRD will work with *other international financial institutions, the European Union ... and other organizations in promoting a coordinated approach to effective environmental interventions in the region*’.<sup>165</sup> Further, Paragraph 14 provides that the twin aims of the Bank’s environmental appraisal process include ‘both to help EBRD decide if an activity should be financed and, if so, the way in which environmental issues should be incorporated in project financing, planning and implementation’. Indeed, Paragraph 21, which contains the key requirement for the Bank to ensure that projects meet EU environmental standards, also provides that ‘[w]here such

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<sup>161</sup> Minutes of the Meeting of the Board of Directors (BDS10-079), 27 April 2010.

<sup>162</sup> See, for example, the e-mail communication dated 26 March 2010, which notes that:

‘The Environmental and Social Action Plan incorporates additional requirements to meet EBRD policy requirements. ... It is possible that this [EU DG Environment technical review] may result in additional offset measures. The Bank has included the requirement for a Biodiversity Management Plan within the Environmental and Social Action Plan which could address and accommodate any EU DG Environment recommendations that are made in regard with ensuring that the integrity and conservation objectives of the affected Natura 2000 sites are protected or compensated for.’

<sup>163</sup> See, Minutes of the Meeting of the Board of Directors, *supra*, n. 161.

<sup>164</sup> See further, *ibid.*

<sup>165</sup> Emphasis added.

standards ... are inapplicable, the EBRD shall identify other sources of good international practice ... and require compliance with the selected standards'. One might argue that, in the present case, the time for conducting an adequate appropriate assessment had passed. Clearly, the Bank has made every reasonable effort to safeguard habitats and biodiversity in cooperation with the European Investment Bank and the European Commission.<sup>166</sup>

51. Also, though the Bank's 2008 Environmental and Social Policy clearly cannot have any direct application to the present Project, it would appear reasonable to regard the latter Policy largely as the most recent iteration of the Bank's Environmental Policy developed in the light of practice and experience and, thus, to assume some continuity of intent as between both documents. In this regard, it is interesting to note that, in setting out the Bank's commitment to ensuring the environmental sustainability and regulatory compliance of the projects it finances, Paragraph 3 of the 2008 Policy states that:

'The Bank's role is: (i) to review the client's assessment; (ii) to assist clients in developing appropriate and efficient measures to avoid or, where this is not possible, minimize, mitigate or offset, or compensate for adverse social and environmental impacts consistent with the PRs; (iii) to help identify opportunities for additional environmental or social benefits; and (iv) to monitor the projects' compliance with its environmental and social covenants as long as the Bank maintains a financial interest in the project.'

In the present case, the Bank can be regarded as having agreed the putting into place of a process which would satisfy each of the above roles. Similarly, Paragraph 10 appears to anticipate some of the complications which can arise in respect of co-financed projects and provides that '[w]hen co-financing projects with other international financial institutions, the EBRD will cooperate with them to agree on a common approach to project appraisal, project requirements and monitoring'. The approval granted by the EBRD Board for the present Project, which is conditional on a finding by the European Commission that the Project can be brought into compliance with the requirements of the Habitats Directive,

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<sup>166</sup> In a case such as this, where the Bank is a co-financier who has become involved in the Project after the initial appropriate assessment has been carried out and after the competent national authorities have given their approval the Bank may be tempted, rather than seeking to ensure environmental improvements in the Project so that it substantively meets the applicable EU standards, as it did, to seek from the Board of Directors a derogation from the 2003 Environmental Policy under Paragraph 24, which provides that

'Where alternative approaches are required by the circumstances of a particular project ... such approaches will be subject to Board consideration on a project-by-project basis.'

This option would be unlikely to produce the same environmental improvements. It is important to note that according to Paragraph 33 of the Environmental Policy 2003

'An important aspect of the EBRD's additionality is promoting environmental improvements in its projects in the region. The EBRD will identify environmental opportunities in projects in which it invests and seek to incorporate a wide range of environmental measures that improve its project sponsors' environmental, operational and economic performance ... These measures could include ... biodiversity investments, best practices in environmental management, and improved environmental performance.'

can be regarded as just such a cooperative and common approach to project appraisal. Further, Paragraph 16 merely provides that

‘The EBRD *may refrain from financing* a proposed project on environmental or social grounds, for example when a proposed project fails to address environmental and social issues in a satisfactory way and cannot be expected to meet the requirements set out in the applicable PRs of this Policy’.<sup>167</sup>

This suggests that the Bank is permitted a certain measure of flexibility in cases where a proposed project cannot in the circumstances fully meet the formal requirements of the Policy. Indeed, the measures identified as necessary by the Bank would generally appear to satisfy the requirements of Paragraphs 6–8 of PR 6 on ‘appraisal of issues and impacts’ as well as those of Paragraph 12 on ‘natural habitats’. Finally, Paragraph 15 of PR 6 on ‘protected and designated areas’ requires the client to ‘demonstrate that any proposed development in such areas is legally permitted and that due process leading to such permission has been complied with by the host country’. The Bank’s approval of the Project conditional on a Commission finding of compliance with EU law would appear to be the only practical and effective means of doing just that.

52. Therefore, after due consideration of all the relevant facts and circumstances, the Compliance Review Expert finds that the EBRD did not fail to ensure full compliance with its obligation under Paragraph 21 of the Environmental Policy 2003 to ‘require that projects be structured so as to meet ... EU environmental standards, insofar as these can be applied to a specific project’. Specifically, the EBRD cannot be regarded as having failed to take all reasonable and appropriate steps to ensure compliance with the requirement under Article 6(3) of the Habitats Directive for an appropriate assessment of the implications of the present Project for the Natura 2000 sites concerned.

#### Insufficient Mitigation Measures

53. The EU Commission Guidance on the practical implementation of Article 6(3) of the Habitats Directive makes it quite clear that mitigation measures can only properly be identified on foot of an adequate “appropriate assessment” of the impacts of a project on Natura 2000 sites. It states that ‘[e]ffective mitigation of adverse effects on Natura 2000 sites can only take place once those effects have been fully recognised, assessed and reported’.<sup>168</sup> Therefore, in light of the above findings regarding the inadequacy of the assessment conducted by means of the Petková and Mika study, a lack of confidence in the sufficiency of the mitigation measures proposed therein might be expected.

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<sup>167</sup> Emphasis added.

<sup>168</sup> EU Commission Guidance, *supra*, n. 7, at 14.

54. However, the Petková and Mika study provides quite detailed proposals for mitigating measures identified as necessary during the course of the appraisal.<sup>169</sup>

These include:

- the provision of optical barriers along bridges and flyovers and visible noise barriers along roads as well as the laying of electricity cables underground in order to protect birds and bats;
- the provision of appropriate fences along the motorway and the careful storage and removal of waste at service facilities in order to prevent animal intrusion;
- the provision of adequate migration corridors in order to maintain communication between animal sub-populations;
- the replacement of damaged amphibian reproductive sites;
- the redesign of bridges so as to avoid the positioning of pillars in the river channel or among river bank vegetation;
- the provision of a protective waterproof barrier between the motorway and the Rojkovské Rašelinisko Mire and effective isolation of the Rojkov tunnel in order to maintain the existing water regime;
- the safe and effective drainage of polluted water from the motorway; and
- the taking of measures to prevent the intrusion of invasive species due to exposed vegetation and construction landfills;

In addition, the Petková and Mika appraisal recommended compensatory measures in order to maintain the protected habitats at their existing area.<sup>170</sup>

Though it is not entirely clear that compensatory measures should be considered as part of the Stage Two: “Appropriate Assessment”, rather than under Stage Four of the Article 6(3) methodology,<sup>171</sup> these recommendation might reasonably be considered among the proposed mitigation measures.

55. Though the Complaint alleges, having regard to the 2009 specialist opinion prepared by Topercer *et al*, that ‘the experts claim that along with the insufficient assessment the PEŤKOVÁ & MIKA 2007 study seriously neglects mitigation measures’, this does not in fact appear to be case. Instead, the specialist opinion contends that the various permits and decisions issued subsequently to the Petková and Mika study fail to include all of the mitigation measures proposed therein.<sup>172</sup> Specifically, it argues that the land-use permit<sup>173</sup> does not include any requirements in respect of mitigation or compensation and that the decision by the relevant nature conservation authority<sup>174</sup> only requires the developer to pay financial compensation to the Environmental Fund. Topercer *et al* suggest that this decision should have included conditions relating to the restoration of damaged riverbanks and other damaged habitats after completion of the construction operations, as well as various compensatory measures.<sup>175</sup> Most

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<sup>169</sup> Petková and Mika, *supra*, n. 8, at 48-52.

<sup>170</sup> *Ibid.*, at 52-53.

<sup>171</sup> See EU Commission Guidance, *supra*, n. 7, at 24-45.

<sup>172</sup> Topercer *et al*, *supra*, n. 9, at 12.

<sup>173</sup> Issued by Mesto Ružomberok on 18 January 2008, No. SP-4050/2007-TA1-1-Ta.

<sup>174</sup> Issued by NCA at Ružomberok on 22 July 2008, No. OP 2008/1250-11.

<sup>175</sup> Topercer *et al*, *supra*, n. 9, at 12-13.

seriously, Topercer *et al* contend that the building permit<sup>176</sup> only includes a few of the mitigation measures proposed by the Petková and Mika study, namely the ecoduct in Kral'oviansky meander, the biocorridor at Ratkovo village, and specified motorway fencing.<sup>177</sup> Therefore, they argue that the building permit fails to include requirements in respect of the modification of bridges, the removal of bridge pillars from the channel of the River Váh, the construction of a waterproof wall for the protection of the Rojkovské Rašelinisko Mire, and the provision of a waterproof barrier to protect the River Váh SAC.<sup>178</sup> Further, they contend that the building permit and its supporting documentation do not adequately specify the requirements for the isolation of the Rojkov tunnel, the measures for the effective management of polluted waters from the motorway, nor measures for provision of optical barriers and visible noise barriers for the protection of birds and bats.<sup>179</sup>

### Findings on Compliance with respect to Sufficiency of Mitigation Measures

56. While it is abundantly clear that the Petková and Mika study considered the mitigation measures outlined above to be absolutely essential in order to reduce the impact of the Project to a degree that was acceptable in terms of the requirements of the Habitats Directive,<sup>180</sup> and that the failure specifically to require such mitigation measures might be argued to amount to possible non-compliance with the Directive on the part of the relevant national competent authorities,<sup>181</sup> it is equally clear that this is not due to any failure on the part of EBRD. Preparation of the Environmental and Social Action Plan (ESAP) and the steps taken towards preparation and introduction of a Biodiversity Management Plan (BMP) clearly illustrate the key role played by EBRD due diligence in ensuring that the mitigation measures identified as necessary in the Petková and Mika study would be carried out.

57. Section 2.14 of the ESAP sets out, in some detail, the general requirements for the mitigation of the Project's potential impacts on Natura 2000 sites, which are to be implemented by means of the BMP. These include obligations on the Concessionaire and its contractors to design and conduct mitigation measures relating to a wide range of the potential impacts on Natura 2000 sites, such as

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<sup>176</sup> Issued by the Ministry of Transport, Post and Telecommunications SR on 3 March 2009, No. 01934/2009-SCDPK/9102.

<sup>177</sup> Topercer *et al*, *supra*, n. 9, at 12.

<sup>178</sup> *Ibid.*

<sup>179</sup> *Ibid.*, at 12-13.

<sup>180</sup> For example, the Petková and Mika study states, *supra*, n. 8, at 53, that

‘If the proposed measures are not carried out, most of the impact will be re-categorized as significant.’

<sup>181</sup> For example, the European Commission's assessment of the Project's compliance with Article 6(3) of the Habitats Directive states:

‘It should be further stressed that the mitigation measures identified in the “Creative study” were not fully incorporated in [the] project.’

Reproduced as Annex 1 to Slovenské Dial'nice a.s., *DI Motorway Project Slovakia: Request for Proposal for the Preparation of the Biodiversity Management Plan* (20 May 2010).

‘measures to avoid impacts [on] the stream and river banks of the Vah River at each crossing point’ and to ‘undertake the revitalisation and restoration of [specified] habitats’.<sup>182</sup> The request for proposals from consultants for preparation of the BMP itself records that

‘Prior to the EC’s review, the Lender’s (EBRD) due diligence of the D1 Project had identified the need for a Biodiversity Management Plan to be developed within the Projects Environmental and Social Action Plan. This plan is to be implemented by the Concessionaire and its contractors and will be monitored by the Independent Engineer for the D1 Project.’<sup>183</sup>

The request for proposals further outlines the function and content of the BMP, stating that

‘The BMP will summarise in one concise document the potential impacts of the Project on biodiversity or the structure and function of ecosystems, as well as on the integrity and conservation objectives of the affected Natura 2000 sites, and propose mitigation and compensation measures as well as a comprehensive management / monitoring programme to ensure that the project does not result in a net loss of sensitive biodiversity.’<sup>184</sup>

Therefore, the aims of the BMP largely reflect the corresponding objectives of the Habitats Directive itself, as set out in general terms in the recitals to the Directive.<sup>185</sup> Specifically, the request for proposals invited suitably qualified consultants to undertake additional biodiversity assessment and review of impacts ‘in conformity with the Habitats Directive to address issues identified by the European Commission’ and, thus, to

‘Define additional avoidance or minimisation and mitigation measures based on the precautionary principle [and]

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<sup>182</sup> *D1 Motorway Project, Slovakia: Environmental and Social Action Plan (Final Draft)*, (April 2010), at 14-16. Further mitigations measures are specified in the ESAP in respect of a range of potential environmental / ecological impacts, including Hazardous Materials, Waste Management, Noise, Air Quality, Water Quality, and Earthworks and Soil Management, *ibid.*, at 11-14.

<sup>183</sup> *D1 Motorway Project Slovakia: Request for Proposal for the Preparation of the Biodiversity Management Plan* (20 May 2010), at 1, where it is further explained that:

‘Biodiversity Management Plan (BMP) means “A time bound management plan for the conservation of natural habitats and habitats of species (including wild birds) defining i) proactive, preventive, procedural and stakeholder engagement requirements for site conservation and protection, ii) all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected and iii) responsibilities, both internally and externally, for biodiversity management”.’

<sup>184</sup> *Ibid.*, at 2.

<sup>185</sup> Such objectives include, for example, the following:

‘Whereas, the main aim of this Directive being to promote the maintenance of biodiversity ...; Whereas, it is appropriate, in each area designated, to implement the necessary measures having regard to the conservation objectives pursued ...; Whereas an appropriate assessment must be made of any plan or programme likely to have a significant effect on the conservation objectives of a site which has been designated ...; Whereas it is recognised that the adoption of measures intended to promote the conservation of priority habitats and priority species ... is a common responsibility of all Member States; Whereas a system should be set up for surveillance of the conservation status of the natural habitats and species covered by this Directive;’

Provide environmental monitoring recommendations and compensation measures for any detected additional damage to the Natura 2000 sites caused or expected to be caused by the D1 Project'.<sup>186</sup>

In addition, the request for proposals provided detailed suggestions regarding the structure for the BMP, recommending *inter alia* that the 'impact prediction should be presented in a structured and systematic way ... using the precautionary principle approach', and consultants were required to propose a methodology for the BMP which would 'take into account guidance in IFC's Guidance Note for Performance Standard 6'.<sup>187</sup> The request for proposals further stipulated a review of the potential impacts on the hydrology of the Rojkov Peat Bog and monitoring of the related mitigation and compensation measures, an assessment of the potential impacts on the River Vah ecosystem and definition of appropriate mitigation and compensatory measures, and a review of the options or mitigation measures required to prevent bird kills.<sup>188</sup>

58. The Complaint further claims that the harm allegedly caused to the Rojkovske mire by the digging of a trench 'rings an alarm bell about the approved variant's further potential effects on the mire and *adequacy of the proposed mitigation measures*', thus suggesting that this incident provides evidence of inadequacy in respect of the mitigation measures stipulated by EBRD. Indeed, the final sentence of Section 2.14 of the ESAP, which sets out the mitigation measures required in respect of 'Biodiversity / Natura 2000', states plainly that

'The Biodiversity Management Plan shall be reviewed and approved by the IE [Independent Engineer] and EBRD & the Lenders prior to work commencing in the area. The plan will be implemented into management system of contractors.'<sup>189</sup>

This certainly suggests that construction works of any sort, including preparatory works, should not have commenced until the BMP had been finalized and incorporated, as part of the ESAP, into the legal agreement to be concluded between the Bank and the Project Sponsor / Concessionaire.<sup>190</sup> However, this implies that the requirements of the ESAP and the BMP can only become binding upon the Project Sponsor / Concessionaire once the contractual arrangements have been concluded. Therefore, though both the ESAP and the proposed BMP would appear wide enough in scope to have been able to identify and effectively avoid or mitigate any such alleged harmful effects on the hydrological regime of the Rojkovske mire,<sup>191</sup> the process for the identification and stipulation of

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<sup>186</sup> *D1 Motorway Project Slovakia: Request for Proposal for the Preparation of the Biodiversity Management Plan* (20 May 2010), at 2.

<sup>187</sup> *Ibid.*, at 2-3.

<sup>188</sup> *Ibid.*, at 3-4.

<sup>189</sup> *D1 Motorway Project, Slovakia: Environmental and Social Action Plan (Final Draft)*, (April 2010), at 16.

<sup>190</sup> EBRD Environmental Policy 2003, para. 17.

<sup>191</sup> See *D1 Motorway Project, Slovakia: Environmental and Social Action Plan (Final Draft)*, (April 2010), which provides, for example, at 14, that the BMP should cover, *inter alia*:

'Monitoring of potential impacts on the local water regime and the peat bogs at PR Rojkovske raselinisko, focus on possible changing in water regime (surface and underground, quality and

detailed mitigation measures was not complete and the requirements contained therein could not, in advance of agreement, operate to constrain the activities of the Project Sponsor / Concessionaire in the absence of applicable national legal controls. Indeed, this appears to be a potential difficulty in relation to such PPP projects generally, as EBRD has no influence over the conduct of works undertaken in advance of the selection of the Concessionaire or in advance of the transfer of lands to the Concessionaire. Such works fall outside of the scope of application of the Bank's safeguard policy.

59. Also, it must be stressed that the requirements imposed upon EBRD under the Environmental Policy 2003 primarily amount to 'due diligence' obligations, comprising obligations as to conduct rather than as to result, and so the occurrence of actual harm of the type which the relevant obligation is designed to prevent will not be determinative of non-compliance on the part of the Bank. This understanding of EBRD obligations under the Environmental Policy corresponds with the established practice of international environmental law.<sup>192</sup> For example, in the context of the generally accepted duty to prevent significant environmental harm, State practice and the case law of international tribunals generally characterize the duty as one of due diligence.<sup>193</sup> Therefore, the fact that the Bank exercised appropriate due diligence and discharged its obligations under the Environmental Policy would generally amount to compliance, even in the event that harm nevertheless occurs.

60. At any rate, the Complainants have neither established that any harm has actually been caused to the peat bog, nor that the Concessionaire or its contractors have

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quantity), impact to biodiversity state and ensuring the goals of nature protection. Additional mitigation measures will be developed based on the results of the research monitoring, if needed.' Similarly, *D1 Motorway Project Slovakia: Request for Proposal for the Preparation of the Biodiversity Management Plan* (20 May 2010), requires, at 3, that

- 'The BMP shall for the Peat Bog include a detailed monitoring plan for
- o The management of the local hydrology
  - o Monitoring of the mitigation measures and compensatory measures.'

<sup>192</sup> See EBRD Environmental Policy 2003, Section II., para. 8, which provides that

'The EBRD will actively seek, through Bank-financed projects, to contribute to the implementation of relevant principles and rules of international environmental law.'

See also, EBRD Independent Recourse Mechanism, *Compliance Review Report Relating to the Vlorë Thermal Power Generation Project* (17 April 2008), which draws, at 7, on the established practice of international environmental law in respect of the duty to prevent significant harm in order to elaborate upon the notion of a 'material violation' for the purposes of non-compliance with the EBRD Environmental Policy 2003.

<sup>193</sup> See, for example, R. Pisillo-Mazzeschi, 'Forms of International Responsibility for Environmental Harm', in F. Francioni and T. Scovazzi (eds), *International Responsibility for Environmental Harm* (Graham & Trotman, London, 1991) 15, who observes, at 19, that

'It is clear that such agreements do not establish the strict obligation not to pollute (obligation of result), but only the obligation to 'endeavour' under the due diligence rule to prevent, control and reduce pollution. For this reason the breach of such obligation involves responsibility for fault (rectius: for lack of due diligence).'

See also, R. Pisillo-Mazzeschi, 'The Due Diligence Rule and the Nature of International Responsibility of States' (1992) 35 *German Yearbook of International Law*, 36; P.-M. Dupuy, 'La diligence due dans le droit international la responsabilité', in OECD, *Aspects Juridiques de la Pollution Transfrontière* (1977), 396.

acted in any way that was unlawful or contrary to the requirements of best practice. The relocation of the telecommunications cables was permitted under the building permit and the contractors would appear to have acted in accordance with the conditions stipulated therein.<sup>194</sup> The contractors would also appear to have acted in accordance with the requirements of the National Nature Protection Authority (ŠOP SR Banská Bystrica) and in accordance with the monitoring system for ‘early works’ required under the third amendment agreement to the Concession Agreement dated 3 March 2010. This system required that:

- the Concessionaire has to comply with all the legal requirements and the requirements of the building permits
- an independent engineer has to be appointed for monitoring the works,
- a Safety, Quality and Environmental manual has to be prepared, approved by the independent engineer and complied with,
- an environmental manager has to be appointed,
- monthly progress reports need to be submitted to the Public Authority,
- progress meetings need to be held,
- the Public Authority has access to the construction site.<sup>195</sup>

61. WS Atkins International Ltd. was appointed to the Independent Engineer’s role and monthly progress meetings appear to have been held. The Safety, Quality and Environmental (SQE) documentation was submitted to the Independent Engineer on 18 October 2009 and approved on 11 December 2009. RNDr. Ivan Pirman was appointed to the role of environmental manager and the Public Authority established its own internal supervisory team to actively monitor the site during construction operations.<sup>196</sup> Regarding the excavation of the trench in question, the environmental manager concluded that the excavation works did not interfere with the hydrological regime of the peat bog so as to endanger its natural functions<sup>197</sup> and the independent engineer concurred with this finding<sup>198</sup> as well as confirming that the contractor complied with the SQE documentation during the works.<sup>199</sup> In addition, the site was visited by several national specialist authorities during the excavation works. The Nature Protection Inspectorate (Žilina) paid a visit to the site on 28 April 2010 and did not raise any objections, while the National Nature Protection Authority Vel’ka Fatra National Park visited

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<sup>194</sup> For example, Part II, item 7 of the building permit required that

‘The excavations within protective zone of underground telecommunications lines, facilities and traction lines as well as sewage networks must be carried out manually without using machines.’

See Slovenské Dial’nice, *Memorandum: D1 Motorway – Complaints with regard to the Rojkov Peat-Bog* (12 May 2010), at 1.

<sup>195</sup> *Ibid.*, at 2.

<sup>196</sup> See generally, *ibid.*, 2-3.

<sup>197</sup> *Ibid.*, at 3.

<sup>198</sup> WS Atkins International Ltd., *D1 PPP Motorway Project: The Rojkov Peat Bog Site* (Author – Marek Sliwinski, Independent Engineer’s Office, Ružomberok), at 2.

<sup>199</sup> Slovenské Dial’nice, *Memorandum: D1 Motorway – Complaints with regard to the Rojkov Peat-Bog* (12 May 2010), at 3.

the site on 30 April 2010 and specified the method for back-filling of the trench.<sup>200</sup>

### Conclusion

62. In the light of the above, it is quite clear from the ESAP, which was ‘prepared to achieve ... [t]he implementation of EBRD policy requirements’,<sup>201</sup> and from the steps taken to prepare the BMP, the need for which was identified in the course of the EBRD due diligence of the Project,<sup>202</sup> that the Bank’s efforts would have achieved much in terms of addressing the alleged insufficiency of the mitigation measures stipulated under the various permits and, indeed, are likely even to have done much to obviate the general underestimation of ecological risks to Natura 2000 sites confirmed above. Therefore, the Bank would appear to have complied fully with the spirit and intent of the relevant requirements of the EBRD Environmental Policy 2003, as outlined above. Specifically, the Bank can credibly claim to have identified and recommended ‘measures needed to prevent, minimize and mitigate adverse impacts’,<sup>203</sup> to have adopted ‘a precautionary approach to the management ... of natural biodiversity resources’ and to have included ‘measures to safeguard and, where possible, enhance natural habitats and the biodiversity they support’,<sup>204</sup> and to have developed an Environmental Action Plan as a means of giving effect to such mitigation measures and ‘address opportunities to further improve the environmental performance of the project’.<sup>205</sup> Therefore, the Compliance Review Expert does not find that the EBRD failed in its obligation to ensure that sufficient mitigation measures were included in the Project design.

63. As it has not proven possible to establish that any harm has been caused to the Rojkov peat bog due to the inadequacy of the mitigation measures stipulated by the EBRD, the Compliance Review Expert once again declines to find that the EBRD failed in its obligation to ensure that sufficient mitigation measures were included in the Project design.

### Non-availability of the Construction Permit

64. Though the Complaint expressly alludes to the ‘public unavailability of the construction permit’, this issue was not presented therein as a stand-alone breach of EBRD policy, but rather to help to explain the frustration of civil society organizations in seeking to ascertain the facts relating to this Project. In addition,

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<sup>200</sup> *Ibid.*, at 4. See also, Doprastav a.s., *Statement of the Contractor towards the Complaint submitted to the European bank for Reconstruction and Development* (16 June 2010).

<sup>201</sup> *D1 Motorway Project, Slovakia: Environmental and Social Action Plan (Final Draft)*, (April 2010), at 2.

<sup>202</sup> *D1 Motorway Project Slovakia: Request for Proposal for the Preparation of the Biodiversity Management Plan* (20 May 2010), at 1.

<sup>203</sup> EBRD Environmental Policy 2003, paras. 9 and 10.

<sup>204</sup> EBRD Environmental Policy 2003, para. 6.

<sup>205</sup> EBRD Environmental Policy 2003, para. 17.

in the course of a meeting conducted between the Compliance Review Expert and the Complainants in Budapest on 18 November 2010, it became clear that this issue was not regarded as central to the Complaint. As a result of that meeting, the Complainants forwarded a detailed account of the contacts they had made with official Slovak authorities regarding the D1 Project, including various requests for a range of project documents.<sup>206</sup> According to this account, the Complainants requested a copy of the Construction Permit, as well as the background “documentation for construction permit” (*i.e.* maps, drawings, *etc.*), from the Slovak Ministry of Transport on 8 December 2010. The account reports that the Ministry denied the request for the Construction permit because Friends of the Earth – CEPA had not participated directly in the construction permitting procedure, while the contractor, Doprastav a.s., objected to the disclosure of the background documentation on the ground that this was the intellectual property of the company.

65. The Complainants further explain, however, that they ‘did not pursue this matter further as we were able to obtain at least the text of the construction permit through informal channels’.<sup>207</sup> Indeed, with regard to the relevant background documentation, the Complainants also confirm that, in June 2010, ‘the experts we work with were able to inspect the accompanying documentation’.<sup>208</sup> The general, if informal, availability of the Construction Permit is corroborated by the Topercer *et al* study, which refers to the text of the Permit on a number of occasions. Indeed, this study published in November 2009 suggests that both the Construction Permit and the relevant background documentation were generally available before June 2010.<sup>209</sup> Also, it appears that the Complainants had ready access to the Land-Use Permit, to which they refer in the same account.
66. There is no evidence to suggest that EBRD was made aware, prior to the submission of the Complaint, by the Complainants or otherwise, of any problem with respect to the public availability of the Construction Permit or of the relevant background documentation. Indeed, in the initial Bank Response to the Complaint, the relevant Bank officials confirm that ‘EBRD were advised that information regarding the disclosure of the permit to stakeholders was carried out in line with Slovakian requirements’<sup>210</sup> and, though the Complainants inform the Bank that such advice was erroneous, they only do so in their comments on the

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<sup>206</sup> See e-mail communication from Ms. Klara Sikorova to Dr. Owen McIntyre, 19 November 2010.

<sup>207</sup> See *Comments on EBRD Complaint Report*, attached to e-mail communication from Ms. Lucia Lackovicova to Ms. Anoush Begoyan, 16 August 2010, and forwarded in e-mail communication from Ms. Klara Sikorova to Dr. Owen McIntyre, 19 November 2010.

<sup>208</sup> *Ibid.*

<sup>209</sup> *Supra*, n. 9. See, for example, at 12, where the study points out, in the context of mitigation measures proposed in the Permit, that:

‘From the text of the building permit, however, one is unable to learn whether those objects have the adequate parameters or whether their proposal was consulted with relevant agencies or experts. On the contrary, several proposed mitigation measures have not appeared in the building permit itself ... nor in the *accompanying documentation*’. (Emphasis added).

<sup>210</sup> Bank Response to the Complaint, 5 July 2010, reproduced as Annex 2 to the Eligibility Assessment Report: D1 Motorway Phase I, Slovak Republic, at 21.

EAR and thus after submission of the Complaint.<sup>211</sup> Similarly, the Client, Slovenské dial'nice, a.s., states in its response that 'to date none of the two organizations have approached us with their complaint or with any request for information'.<sup>212</sup>

#### Findings on Non-availability of the Construction Permit

67. While the Complainants' allegations regarding the stance taken by the Slovak national authorities in respect of access to the Construction Permit, and to the background documentation upon which the decision to grant the construction permit was based, might raise questions concerning the Slovak Republic's compliance with its obligations under the EU Environmental Information Directive,<sup>213</sup> they do not suggest any non-compliance on the part of EBRD with its obligations under the 2003 Environmental Policy. As noted above, Annex 2 to the 2003 Environmental Policy simply requires the Bank to oversee that national requirements, including in this case EU requirements, on informational disclosure are met. The Environmental Policy provides no further details regarding the nature or extent of the obligation imposed on the Bank by this provision but, in the absence of any expression of concern to the Bank by stakeholders, it seems reasonable for the Bank to rely on assurances provided by Client and / or the national competent authorities.<sup>214</sup>

#### Conclusion

68. On this basis, the Compliance Review Expert declines to find that EBRD failed in its obligation, arising under Annex 2, Part II, Paragraph 1, to oversee the requirement to ensure that all applicable national requirements on the public disclosure of environmental information are met.

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<sup>211</sup> See e-mail communication from Ms. Lucia Lackovicova to Ms. Anoush Begoyan, 16 August 2010, forwarded in e-mail communication from Ms. Klara Sikorova to Dr. Owen McIntyre, 19 November 2010.

<sup>212</sup> Client Response to the Complaint, 25 June 2010, reproduced as Annex 3 to the Eligibility Assessment Report: D1 Motorway Phase I, Slovak Republic, at 24.

<sup>213</sup> *Supra*, n. 23.

<sup>214</sup> See Bank Response to the Complaint, *supra*, n. 210.