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# **Governance, transparency and public participation in transport infrastructure projects**

Risk factors in the planning and permitting of large transport infrastructure projects in the Czech Republic, Slovakia, and Poland



**Authors of the text:** Petr Bouda, Martin Fadrný

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Frank Bold is a purpose-driven law firm using the power of business and non-profit approaches to solve social and environmental problems.

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# 1. Introduction

## 1.1 Authors

**Frank Bold** (formerly Environmental Law Service) is a Czech civil association of lawyers with more than 19 years of experience in the area of administrative and environmental law. Frank Bold's advocacy activities and its other public interest law activities have one common purpose: to protect the environment and promote the rule of law and democracy.<sup>1</sup>

**Friends of the Earth (CEPA)** is a Slovakian civil association involved in protecting the environment, promoting social justice and balanced regional development, and strengthening participation of citizens in issues that are in public interest. Some of CEPA's activities include monitoring investments from public funds (including those coming from the EU budget), as well as focusing on environmental impacts, efficiency, and transparency.<sup>2</sup>

**CEE Bankwatch Network** is an international non-governmental organisation (NGO) with member organisations from countries across central and eastern Europe (CEE). It monitors the activities of international financial institutions (IFIs) that operate in the region and promotes environmentally, socially, and economically sustainable alternatives to their policies and projects.<sup>3</sup>

## 1.2 Subject of the analysis

Governance, transparency and public participation in transport infrastructure projects analysis ("analysis" hereinafter) is focused on large transport infrastructure projects partially funded from both the Cohesion Fund and the European Regional Development Fund ("EU funds" hereinafter) through the national Operational Programmes Transport ("OP Transport" hereinafter) in three European Union member states – the Czech Republic, Slovakia, and Poland – during the programme period 2007–2013. This analysis is based both on the comparison of the EU and national legislation and on the information provided by partners of our project in six case studies of large transport infrastructure projects.

The goal of the analysis is to identify deficiencies in good governance standards, transparency, and public participation in specific planning and decision-making procedures that may serve as clear indicators of an increased risk of violation of the EU law and of the conditions laid down by the legal framework of OP Transport during the planning and building of large transport infrastructure projects ("LTIP" hereinafter). The politicisation of the public administrative bodies responsible for the implementation of the OP Transport and for the realisation of the LTIPs leads to deficiencies both in planning procedures for the whole transport infrastructure network and in specific administrative decision-making procedures such as land use permitting and environmental impact assessment (EIA) processes.

In those decision-making procedures, the aforementioned problems with the LTIPs are caused by political pressure on the public officials responsible for the implementation of the OP Transport to

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1 For more information see <http://en.eps.cz/about-us>

2 <http://www.priateliazeme.sk/cepa/>

3 <http://bankwatch.org>



go through administrative procedures as quickly as possible and simply confirm the pre-assigned variant of the transport infrastructure project. Obviously there is no real interest in due searching for alternative arrangements (an alternate route for a highway, for example). Consequently, one of the results of the politicisation of the whole procedure is that the public participation on the environmental impact assessment of the LTIP is either limited or useless in terms of having a real impact on the project. At the same time, the quality of the assessment of alternatives of the LTIP is appalling, with various legal regulations on the environment being violated or circumvented.

As is shown in specific examples, the common result of these system deficiencies is a loss of public money both from EU funds and from national budgets. The loss of public money may be caused either by the slow and ineffective drawing of EU funds<sup>4</sup> or by the realisation of so-called “dead-end investments” (which results in the conservation of projects that remain unfinished due to lack of money or because of previous violations of environmental law).<sup>5</sup>

**For the purpose of this analysis, the term “dead-end investments” may be defined as an investment into a transport infrastructure project that will not bring the estimated improvements (or positive effects) for the society and thus such project is not necessarily worth the amount of public money that was spent on it.** Every LTIP has both the positive and negative effects that have to be evaluated before its realisation in cost-benefit analysis to assure that the money would be spent in an efficient manner<sup>6</sup> to avoid the dead-end investment. The absence of a transport infrastructure development strategy (or its frequent changes) and the deficiencies in the subsequent EIA procedure affects the state budget negatively because it is difficult to estimate the costs of projects correctly<sup>7</sup> and the original estimates are thus often undervalued.<sup>8</sup> The need to spend an additional amount of money to finish the project or the need to conserve the already-deployed construction which has been stopped because of the lack of money are the most common examples of the negatives.<sup>9</sup>

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4 For example, in 2013 the Czech State Fund for Transport Infrastructure managed to draw only CZK 7 billion from the planned CZK 20 billion and only 76% of the total amount of money was drawn for transport infrastructure projects (including the maintenance costs). See <http://bit.ly/1dQVNcn>.

5 For example, in 2010, 51 unfinished transport infrastructure projects in the Czech Republic were conserved in total because of cuts in the state budget, however the conservation itself cost an additional amount of public money (see <http://bit.ly/1i4OBF5>). Also, the unfinished parts of D8 Highway had to be conserved after the court decided that the planning permission was granted unlawfully (see <http://bit.ly/1fP8XS8>).

6 Among the positive effects of an investment into the construction (or reconstruction) of a transport infrastructure we may include: relief of intense traffic on common roads; time savings; higher level of safety on roads; decrease of pollution; transport capacity enhancement; financial effects such as additional development of the region derived from the realisation of LTIP, temporary reduction of unemployment, profits for construction companies and other effects on the economy. Among the negative effects we may include increase of noise and air pollution; harm to the protected nature sites, including NATURA 2000 sites; loss of biodiversity; displacement of local communities.

7 The Commission criticised the Czech OP Transport because it did not provide answer to the crucial question according to which criteria the transport infrastructure projects have been selected.

8 Which is a common deficiency in building LTIP, according to the analysis of the European Court of Audit, as most of the project costs are higher than the costs taken into account in feasibility studies.

9 For more details, see page 15 of the Czech analysis „Where the billions are being lost“. Available here: [http://www.eps.cz/sites/default/files/publikace/kde\\_se\\_ztraceji\\_mld\\_ld.pdf](http://www.eps.cz/sites/default/files/publikace/kde_se_ztraceji_mld_ld.pdf).



In all three compared EU member states, the OP Transport (or the operational programme from which the LTIPs are being financed) is the biggest single operation programme, with the total amount of allocated money over EUR 46.5 billion. This raises the risk of inefficient spending of public money on large transport infrastructure projects with no or little positive effects.

As for the specific sources of the deficiencies in OP Transport, we identified five problems that are of relevance and that can be used as indicators of the quality of realisation of the LTIPs that are financed through the EU funds. Those deficiencies are as follows:

- 1. High level of politicisation of management and control bodies of OP Transport.** The law does not offer enough protection to public officials against political pressure on their decision-making. As a consequence, public officials are making decisions in accordance with the particular interests of politicians and not in accordance with the environmental legal regulations, or with the long-term development strategies.
- 2. Ineffective legislation that should prevent the conflicts of interest of public officials.** Politicians may be personally interested in the realisation of a particular LTIP, and through pressure on public officials they can influence decisions on which projects will be realised, how much public money will be spent on them, and which construction companies will actually build them. In addition, the same politicians may be directly, or indirectly, linked with the beneficiaries of the selected construction companies. Such conflicts of interest may be proven only indirectly from the suspicious circumstances of public procurement.
- 3. Absence of a coherent long-term development strategy for the transport infrastructure.** This absence of a development strategy enables politicians to promote a particular project that they are interested in without any restrictions. As a result, there is even greater political pressure on the public officials who are responsible for the assessment of the project.
- 4. Deficiencies in Strategic Environmental Assessment (SEA) and Environmental Impact Assessment (EIA) procedures in both their legal regulations and practice.** As a direct consequence of the political pressure on public officials to choose and approve a particular project, deficiencies in the environmental impact assessment can be observed. Another indicator of possible politicisation of the whole procedure is strong opposition from the affected public (that may result in severe delays of the project's implementation). Also, the existence of special "accelerating legislature" that speeds up or circumvents the EIA and other standard approval procedures may serve as another indicator of politicisation.
- 5. Risk that the already realised LTIP will be considered as a dead-end investment.** If some, or all, of the aforementioned indicators of politicisation of an LTIP are observed during the realisation of a particular project, then there is also a strong risk that the result will be a failure from a financial point of view. The previously described deficiencies in implementation may result in financial corrections applied by the Commission. The absence of a development strategy may result in a conservation of the partially constructed project. The projected costs of the entire project may be exceeded considerably as delays or accidents occur.

Some of the LTIPs described in our case studies may serve as the illustrious examples of dead-end investments. For example, the Czech **D8 highway**, which is passing directly through the centre of the protected landscape area České Středohoří<sup>10</sup>, will have practically all of the negative effects

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<sup>10</sup> <http://ceskestredohori.ochranaprirody.cz/en/>



connected with this type of investment: increase of noise and air pollution, risk of harm to the protected nature sites — including NATURA 2000 sites which may lead to a loss of biodiversity — and the risk of landslides because of the unstable subsoil. The anticipated positive effects of the D8 highway are dubious, as it was not clear how intense the traffic would be in 2010 when the highway was supposed to be finished.

There were also severe deficiencies during the realisation of the D8 highway project. The alternate routes of the D8 highway were assessed during 1994 and 1995 without the participation of the public and also during 1995 and 1996 with only partial participation of the public. However, not all of the possible risks were considered in detail, including risk of landslides, because the demands of the public regarding evaluation of alternate routes (that would avoid the landslide area by an underground passage) were declined. The issuing of tens of building permits for various parts of the D8 highway and its subsequent construction was also a mistake as it predetermined the final route of the highway (due to the considerable amount of money that was already spent) despite some problems with the issuing of planning permissions for some sections of the planned highway and with the buy-out of the land that resulted in time delays. As a result, the construction expenses increased by more than 48 percent. It should be also noted here that the D8 highway did not satisfy even the second basic condition of the premises of the OP Transport, which is the economical efficiency (the first basic condition is the previous environmental assessment of all the possible routes). As a result, the responsible Czech state authorities withdrew their applications for subsidies from the EU funds on this LTIP.

As of 2013 the D8 highway is still under construction and it is now expected to be finished in 2016, according to the estimation of the Road and Motorway Directorate of the Czech Republic (it was supposed to be done in 2000). Thus we may conclude that the political pressure during the construction of the D8 highway, circumvention of the environmental law requirements, and the poor assessment of the alternate routes resulted in a dead-end investment.

All of above-mentioned systemic deficiencies in the permitting procedures of selected transport infrastructure projects resulted in problems with financial efficiency and in the withdrawal of money from the EU funds. In some cases the responsible state authorities withdrew their applications for subsidies from the EU funds (which was the Czech case of D8 highway), or the Commission did not give its consent to the proposed loans to the European Investment Bank (Slovakian case of Turany-Hubová section of D1 highway).

The analysis is based on the six case studies of LTIPs that are attached to this analysis. Those case studies – two from each of the compared EU member states – illustrate various problems with recent large transport infrastructure projects (highways and motorways) that are co-financed from the EU funds through the Operational Programme Transport. Each of those case studies describes two groups of problems: the violations of the environmental law — namely of the EIA procedure (deficiencies were detected in all six analysed projects) — and the abuse of law on public procurement. The issue of special accelerating legislation is also mentioned in two of those case studies (Slovakian case of Turany-Hubová section of D1 highway and Polish case study on overuse of special act connected to European football championship on building transport infrastructure).



Both Czech projects – the section Lovosice–Řehlovice of the D8 highway (estimated to cost EUR 506.7 million) and the section Pohořelice–Mikulov of the R52 high-speed road (estimated to cost EUR 357.1 million),<sup>11</sup> both Slovakian projects — railroad Trenčín (costs over EUR 245 millions) and section of Turany – Hubová of D1 highway (estimated costs over EUR 250 millions) — and the Polish project of the S 7 expressway<sup>12</sup> can be considered major transport infrastructure projects according to the EU law.

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11 See Annex 1 of the Operation Programme Transport. Available here: <http://bit.ly/1eexakr>.

12 <http://bit.ly/1ik8rgQ>, page 55.





## 2. Legal and financial framework of the Operational Programmes Transport in the Czech Republic, Slovakia, and Poland

As a starting point, the analysis introduces some basic information on OP Transport in all three compared EU member states, including both the financial framework and the legal framework for providing funds to the LTIP through OP Transport.

### 2.1 Financial framework of the Operational Programmes Transport in compared states

#### Czech Republic

In the Czech Republic, OP Transport is the largest of the 26 operational programmes in the programming period 2007–2013 (approx. 22% of the allocation from EU funds for the Czech Republic). The managing authority of OP Transport is the Ministry of Transport (department for EU funds<sup>13</sup>). In accordance with Art. 59 Par. 2 of the EC Directive No. 1083/2006 the State Fund for Transport Infrastructure<sup>14</sup> intermediate body that shall carry out the pre-financing construction of transport infrastructure projects instead of the managing authority.<sup>15</sup> The main beneficiary of OP Transport relevant for this analysis is the Road and Motorway Directorate.<sup>16</sup>

As for the amount of drawn down money, OP Transport is the most sizable programme. However the managing authority did not avoid deficiencies and errors during the implementation of EU funds. On 9 May 2011, the Ministry of Transport withdrew its application for certification of payments because of the previous suspension of drawing money from EU funds on selected priority axes of the OP Transport. Due to violations of EU law, the Commission halted the process of drawing money from EU funds in 2012 until the final results of the audit of the projects were released. The audit of 24 projects selected from OP Transport on a random basis by the Commission in 2012<sup>17</sup> uncovered several problems related to the management and audit of OP Transport<sup>18</sup> and resulted in a flat rate correction of 10% of the EU funds' contribution of the expenditure paid by the managing authority to the beneficiaries under OP Transport before 1 September 2012.<sup>19</sup> Other problems related to the participation by the European Investment Bank (low allocation of money led to the suspension of

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13 [http://www.mdcr.cz/cs/Evropska\\_unie/Fondy\\_EU/O430/](http://www.mdcr.cz/cs/Evropska_unie/Fondy_EU/O430/)

14 <http://www.sfdi.cz/en/>

15 [http://www.opd.cz/Sheet/AllProjectSheet3\\_54.pdf](http://www.opd.cz/Sheet/AllProjectSheet3_54.pdf)

16 <http://www.rsd.cz/Organisation-RSD>

17 The audit itself was targeted primarily on the follow-up action taken by the Czech authorities as a result of the warning letter sent by the Commission on 19 August 2011.

18 The audit of the Commission detected – inter alia – violations of the Art. 60 b) and g), 62.1 b) and 98.4 of the EU Regulation No. 1083/2006 and related Art. 13.2 to 13.4, 16 and 17 and 23 c) of the EU Regulation No. 1828/2006.

19 Financial correction was deducted from the declarations of expenditure submitted to the Commission on 12 October 2012.



investment credits), or to the deficiencies in the environmental legislature and related procedures such as the EIA procedure also occurred.

OP Transport currently faces another risk of suspension of payments by the Commission because of the deficiencies in the transposition of the EIA Directive (2011/92) into Czech law. These deficiencies should be eliminated in first half of the year 2014 by the complex amendment of the Czech laws, Act No. 100/2001 Coll., on environmental impact assessment, and Act No. 183/2006 Coll., on spatial planning and building regulations (Building Act). However, it is unclear whether the new government will be able to tackle this particular issue successfully.

## **Slovakia**

In Slovakia, OP Transport is the largest operational programme in the programming period 2007–2013. The managing authority of OP Transport is the Ministry of Transport, Construction and Regional Development<sup>20</sup> (department for EU affairs)<sup>21</sup>, which also evaluates applications for payments. The Ministry of Finance acts as a certifying authority for OP Transport and it is also responsible for the interim audit. The National Highway Company<sup>22</sup> is responsible for planning and constructing the highways, as well as their maintenance and repairs (including the realisation of the public procurements). The National Highway Company also acts as an owner of the road infrastructure in Slovakia. The sole owner of this company is the Ministry of Transport, Construction and Regional Development.<sup>23</sup>

As for the amount of drawn down money, OP Transport is the largest programme. However the managing authority did not avoid deficiencies and errors during the implementation of EU funds. The Commission sent a warning letter to the Slovakian Ministry of Transport, Construction and Regional Development in August 2011 in which the Commission announced the suspension of payments. In April 2012 the Commission conducted an audit of the managing authority of OP Transport, and in July 2012 the Commission called off the suspension with the exception of the railway projects<sup>24</sup>. The Slovakian authorities have successfully resolved the problems with OP Transport, but the problems with the railway projects remained unresolved.

However, in February 2013, the payments were suspended again because of findings by OLAF that indicated a risk of corruption and conflict of interest in certain projects co-financed with EU funds through OP Transport. Another problem is the high error rate of those projects (3.33% instead of the allowed 2%) that indicates deficiencies in the management of OP Transport and deficiencies related to the time limits in public procurement.<sup>25</sup> At the end of year 2013, the Commission called off the suspension of payments and approved several major transport projects costing a total of EUR 930 million.<sup>26</sup>

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20 <http://www.telecom.gov.sk/index/index.php?lang=sk>

21 <http://www.telecom.gov.sk/index/index.php?ids=19801>

22 <http://www.ndsas.sk/index/index.php>

23 <http://www.ndsas.sk/spolocnost/10786s>

24 <http://ekonomika.sme.sk/c/6795173/eurofondy-na-dopravu-su-stale-pozastavene.html#ixzz2wUvliu8f>

25 <http://bit.ly/1j5N0SI>

26 <http://bit.ly/1j5N0SI>



## Poland

Unlike the other two states, Poland's transport infrastructure projects are co-financed through the Infrastructure and Environment Operational Programme, which is the biggest operational programme in Poland. The EU contribution is approximately 41% of the total EU support for Poland under the Cohesion policy in the programming period 2007–2013, and it is also the biggest operational programme in the entire European Union<sup>27</sup>. The managing authority of OP Transport is the Ministry of Regional Development (department for the management coordination of infrastructural programmes). The Ministry of Environment acts as the programmes' intermediate body that is responsible for the management of environmental projects. Another important subject is the General Directorate of National Roads and Motorways<sup>28</sup>, which is the central authority of national administration that has been set up to manage the national roads, and it is also the beneficiary of a significant amount of projects that are co-financed with EU funds (45 projects on the main list and 32 projects on the reserve list of OP Infrastructure and Environment).<sup>29</sup>

There were also difficulties in Poland with the management of transport infrastructure projects. At the end of January 2013<sup>30</sup>, the Commission temporarily suspended payments for building the roads in total value of EUR 890 million because of suspected fraud by contractors. The Commission acted in reaction to the criminal investigation of a price-fixing cartel<sup>31</sup>, which involved one director of the General Directorate of National Roads and Motorways and ten former and current executives of large construction companies. The Commission stated that if these allegations were confirmed they would constitute a violation of the EU law on public procurement, which is an indicator of the weakness of the managing and controlling bodies<sup>32</sup>. At the end of March 2013 the Commission found that the Polish government provided sufficient supervision over the programme.

	Total allocation (€)	Drawn down (€)	Corrections
Czech Republic	5.82 billion	4.68 billion	10% of the EU funds' contribution of the expenditure
Slovakia	3.16 billion	1.56 billion	None
Poland	37.56 billion	N/A <sup>33</sup>	None

We may conclude that the main problems connected to the implementation of the LTIP co-financed from the EU funds are caused by the lack of transparency in public administration (for the purpose

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27 <http://bit.ly/1h9l5CV>

28 <http://www.gddkia.gov.pl/en/936/operational-programme-ifastructure-and-environment>

29 The updated list of projects is available here: <http://bit.ly/1h9lgOw>

30 <http://www.euractiv.com/regional-policy/eu-suspends-890-polish-roads-pen-news-517464> Another source stated that the Commission already suspended money for OP Transport and Environment in December 2012: <http://bit.ly/1fBVYqi>

31 According to the recently published study on corruption in public procurement, the most frequent violation of the law in Poland is price-fixing, followed by bribery and conflict of interest. The study is available here: <http://bit.ly/1eeCtAq>

32 <http://bit.ly/1mF8mHn>

33 Because of the fact that in Poland the OP Transport contains investments both to the transport infrastructure and environment it is difficult to count down the precise amount of money that were drawn down on the transport infrastructure projects alone.



of this analysis we may define the term “transparency in public administration” as a level of politicisation of the public administrative bodies and as the degree of risk of the conflict of interest) and by the subsequent poor performance of the public officials in planning and permitting procedures. The synergic effect of the deficiencies in planning procedures (such as the absence of the long-term development strategy for transport infrastructure) and in permitting procedures (like non-assessment of the alternatives of the LTIP during the EIA procedure or depreciation of the negative impact of the LTIP on the environment) lead to serious problems during the construction of the project itself (like time delays or increase of the real costs of the project) and the project may end up like a dead-end investment.

## 2.2 The legal framework for funding the LTIP from EU funds

OP Transport is financed by the European Regional Development Fund and the Cohesion Fund. The basic legal regulation is EU Directive No. 1083/2006 together with EU Directive No. 1828/2006. Those two regulations are directly applicable in EU member states, including the three compared in this analysis. The violations of the law on public procurement or violations of environmental law may lead to the suspension of payments from EU funds, or even the withdrawal of money from a certain operational programme.

According to Art. 9 Par. 2 of Directive No. 1083/2006 the Commission and the EU member states have to ensure that EU funds are used in a consistent manner with the activities, policies, and priorities of the Community. The consistency and complementarities shall be indicated in particular Community strategic guilds, in the national strategic reference framework, and in the operational programmes. For example the Czech OP Transport declares its consistency with EU policies in its article 4.12. The Slovakian OP Transport describes its compliance with the EU strategic documents and legislation in the area of cohesion policy, public procurement and protection of the environment more thoroughly in its part 7.1. The Polish OP Infrastructure and Environment puts its content into the context of the EU law and national strategies and declares its consistency with the principle of sustainable development in part 2.

According to Art. 9 Par. 5 of the aforementioned Directive, it is required that all operations<sup>34</sup> financed by EU funds must comply with the provisions of the Treaty<sup>35</sup> and the acts adopted under it. This particular rule is crucial because it requires that the projects funded through OP Transport (or through EU funds more generally) must be in accordance with EU law on public procurement<sup>36</sup> and also with the EU environmental law such as the amended EU Directive 2011/92 on the assessment of the effects of certain public and private projects on the environment (EIA Directive hereinafter). The importance of the protection of the environment is enhanced by Art. 17 of the EU Directive No.

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34 The term “operation” is defined in Art. 2 Par. 3 of EU Directive No. 1083/2006 as a project or group of projects selected by the managing authority (i.e., by the Ministry of Transport) of the operational programme concerned, or under its responsibility, according to criteria laid down by the monitoring committee and implemented by one or more beneficiaries allowing achievement of the goals of the priority axis to which it relates.

35 Namely with Art. 11 of the Treaty on Functioning of the European Union according to which the environmental protection requirements must be integrated into the definition and implementation of the EU policies and activities, in particular with a view to promoting sustainable development. <http://bit.ly/1dVLdAl>

36 Namely the EU Directive No. 2004/17 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors and the EU Directive No. 2004/18 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts.



1083/2006, which states that the objectives of EU funds shall be pursued in the framework of sustainable development and the Community promotion of the goal of protecting and improving the environment as set out in Article 6 of the Treaty.

According to Art. 40 of the EU Directive No. 1083/2006, “major projects”<sup>37</sup> must be assessed not only for their financial costs and benefits,<sup>38</sup> but also for their impact on the environment. It should be noted here that most LTIP could be classified as major infrastructure projects. The EU member state must provide the Commission with information about the nature of the investment, its financial volume and location; results of the feasibility studies; a timetable for the implementation of the project, and a cost-benefit analysis including a risk assessment and the foreseeable impact on the sector concerned. According to the DG REGIO’s Guide to cost-benefit analysis of investment projects<sup>39</sup>, the environmental aspects and impacts of major projects must be assessed as well because every project (not only the major ones) must be coherent with EU legislation in the specific sector of assistance (mainly transport and environment) and more generally with EU legislation (e. g. public procurement, competition and State-aid).<sup>40</sup> It can be concluded that all the major transport infrastructure projects must be financially efficient and in accordance with the high level of protection of the environment. It should be noted here that all of the case studies attached to this analysis describe major transport infrastructure projects.<sup>41</sup>

EU member states are responsible for the management and control of the implementation of EU funds through operational programmes. They must not only ensure that the management and control systems are set up in accordance with the requirements contained in Art. 58 to 62 of EU Directive No. 1083/2006, but they must prevent, detect and correct irregularities<sup>42</sup> and recover money that has been paid unduly. The Commission must be informed about these irregularities, chiefly because of possible consequences that include the interruption or suspension of payments or correction of payments. The details are described in Art. 27 and EU Directive No. 1828/2006.

The more detailed conditions are established in the programming documents of particular operational programmes, which must be in accordance with the basic legal framework described hereinbefore. In addition to the aforementioned EU Directives, OP Transport must also be in accordance with the Commission’s Community Strategic Guidelines on Cohesion.<sup>43</sup> This document

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37 According to the Art. 39 of the EU Directive No. 1083/2006, the project which consisted of a series of works, activities, or services intended in itself to accomplish an indivisible task of a precise economic or technical nature that has clearly identified goals, and whose total costs exceed EUR 50 million.

38 The cost-benefit analysis can be a useful tool for EU member states for assessing all transport infrastructure projects, not only those with investment costs above the threshold mentioned in Art. 39 of the EU Directive No. 1083/2006.

39 <http://bit.ly/1pZ1RkE>

40 Guide to cost-benefit analysis of investment projects, page 27.

41 The preliminary list of major project, including major transport infrastructure projects in Czech Republic, Slovakia and Poland for the programming period 2007 – 2013 is available here: [http://bankwatch.org/billions/2006/Major\\_projects.pdf](http://bankwatch.org/billions/2006/Major_projects.pdf).

42 According to Art. 2 Par. 7 of EU Directive No. 1083/2006, the irregularity means any infringement of a provision of EU law resulting from an act or omission by an economic operator that has, or would have, the effect of prejudicing the general budget of the EU by charging an unjustified item of expenditure in the general budget.

43 According to Art. 26 and 27 of EU Directive No. 1083/2006.



sets up several principles that must be taken into account during the implementation of EU funds to expand and improve transport infrastructure:<sup>44</sup>

- The objective criteria should be used to determine the level and nature of the investment to be undertaken (i.e., rate of return of the investment shall be measured), including the need to assess the environmental and social implications of the projects;
- Principle of environmental sustainability must be respected to the largest possible extent;

Great emphasis is placed on the protection of the environment, as the Community Strategic Guidelines on Cohesion demand that the synergies between environmental protection and economic growth shall be strengthened. The external environmental costs to the economy (i.e. health costs, damage recovery) should be decreased.

In practice, however, those aforementioned rules and principles are not fully adhered by the EU member states during the realisation of the LTIPs because of the deficiencies in good governance. The frequent changes of politicians responsible for the resort of transport infrastructure may lead to the instability of the management and control bodies and do illustrate the space given by the legal framework for potential political pressure on public officials. The potential political pressure may be enhanced by the absence of the long term development strategy, because it provides more space for the possible political lobbying for the realisation of particular LTIP. As a consequence, the projects with no connection to other transportation projects have been approved; the duplicate roads that copy the track of already existing motorways are planned (which is the case of Czech R52 high-speed road, see attachment number 2 to this analysis) or the unnecessary projects were approved (like the construction of a highway despite the fact that the construction of less costly<sup>45</sup> high-speed way (or express road) will be sufficient enough.

The following chapters describe the aforementioned aspects of the problems in all three compared EU member states. Our findings and conclusions are based on the national legal framework (including EU law) and on the case studies prepared by our partners.

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<sup>44</sup> <http://bit.ly/1ovbg66>, sections 1.1.1 and 1.1.2 of the strategy.

<sup>45</sup> According to the European Court of Audit the construction of an express road is in all cost categories requires less investment than the highway. See <http://fiscalizacion.es/files/2013/07/5-2013-TCEu.pdf>, page 23.



## 3. Poor governance of OP Transport

### 3.1 Politicisation of management and control bodies of OP Transport

Our analysis of the politicisation of public administration will be limited only to the three selected issues which we consider to be of importance: the absence of a separation of political and apolitical positions in public administration, insufficient protection of public officials against dismissal or removal, and the high level of fluctuation of public officials responsible for the implementation of OP Transport. From the state of legal regulations we can then conclude whether or not there is a risk of politicisation of public administration bodies.

#### Czech Republic

The main problem is the ineffectiveness of Act No. 218/2002 Coll., the Civil Service Act<sup>46</sup> that causes many problems related to the risk of politicisation of public administration.<sup>47</sup> The EU repeatedly criticized the absence of an Act on Civil Service<sup>48</sup>, and the act itself has not been efficient even in January 2014. One point is that the clear separation of political and apolitical positions in state administrative bodies is completely absent in the law. Another example of the ineffectiveness of the Civil Service Act is that Act No. 262/2006 Coll., the Labor Act, subject to general legal regulation, provides the termination of service relating to public officials. Paradoxically, the Labor Act provides for better protection of ordinary public officials (they can be dismissed only on grounds stipulated by law) than of senior public officials (i.e., directors of departments, directors of divisions, and directors of sections) whose service relationship is created by appointment, because they can be removed from their position without being given any reason by the person who appointed them (which is often the minister).<sup>49</sup>

Such legal regulation of public officials in public administrative bodies (including bodies responsible for OP Transport) creates a high risk of politicisation<sup>50</sup> and instability<sup>51</sup>, which may be illustrated by

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46 Until the end of year 2013 the situation remained unchanged despite the fact that the politicians declared that either the new Act on Civil Service or its substantial novel must be adopted as soon as possible.

47 Those deficiencies (namely the ineffectiveness of the Act No. 218/2002 Coll.) have been described also by GRECO in its Evaluation Report on the Czech Republic from the year 2006. Available at <http://bit.ly/1jG1gm6>

48 See, for example, Recommendation for a Council Recommendation on the Czech Republic's 2013 National Reform Programme, COM (2013) 353 final, Brussels, 29. 5. 2013, pages 5 and 7, also Assessment of the 2013 National Reform Programme and Convergence Programme for the Czech Republic, Commission Staff Working Document, SWD (2013) 353 Final, Brussels, 29. 5. 2013, pages 29 and 30.

49 An employment relationship does not end upon removal; however if the removed official refuses to perform different work, or if no other work position exists, it constitutes a notice of termination of employment pursuant to Sec. 73a in combination with Sec. 52 (c) of the Labour Act.

50 The absence of protection against unfair dismissal has a negative impact on whistle-blowers. See also Phase 3 Report on implementing The OECD Anti-Bribery Convention in the Czech Republic, page 46. Available at <http://www.oecd.org/daf/anti-bribery/CzechRepublicphase3reportEN.pdf>

51 The problems with the fluctuation of public officials responsible for the implementation of EU funds in the Czech Republic were mentioned in other analyses that examined the efficiency of using money from EU funds. See for example Brown, L., Zimmermannová, L. Problematika čerpání prostředků ze strukturálních fondů v České republice: překážky limitující plynulé čerpání z fondů. available here: <http://bit.ly/1gSnjWg>, or Novotný, T. Vyhodnocení stavu čerpání fondů EU u sedmnácti operačních programů v ČR, available here: <http://bit.ly/1IEg8Uu>.





the results of the analysis of the post-election fluctuation of employees (public officials) in management and control bodies in the Czech Republic.<sup>52</sup> Among ordinary public officials, the turnover is even higher due to “organizational changes” in public administrative bodies that lead to massive changes of employees. Dismissals occur for the reason of redundancy. However, after the change, the new public officials are given exactly the same positions (despite the prohibition of such action in the Labor Act). The organizational changes are also used to get the relevant departments under the control of a very select few people who may then exert their influence upon these key departments.<sup>53</sup>

## Slovakia

Despite the fact that the civil service must be based on the principle of political neutrality and impartiality, as it is required by Act No. 400/2009 Coll., on Civil Service, the reality is that senior public officials are often appointed on the basis of their affiliation with the same political party as that of the minister or director. The Act on Civil Service does not contain a clear division between political and apolitical positions.

The termination of civil service relationship is regulated namely in Art. 47 of the Act on Civil Service. Similarly to Czech legal regulations, Slovakian law distinguishes between the dismissal of ordinary public officials and senior public officials. Unlike the Czech law, senior public officials are protected more effectively against dismissal, or even removal from their position, than ordinary public officials. The law limits the removal of a senior public official to a few specific reasons<sup>54</sup>. After the removal, several other conditions constituting the possibility of dismissal must be met cumulatively.<sup>55</sup> However, such legal regulation does not ensure that the post-election fluctuation of employees (public officials) in management and control bodies of operational programmes (including OP Transport) does not occur.<sup>56</sup> The risk of the politicisation of public administrative bodies that are responsible for implementing EU funds has been confirmed by the Slovakian secret service.<sup>57</sup>

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52 For example, in the post-election year 2007 when a new government was formed and ministers were replaced there were 15 changes of director in 22 operational programmes that were analysed. In following years in which the government was changed additional changes of directors of operational programmes occurred.

53 The systemic corruption risks have been confirmed in the Annual Reports of the Czech Security Information Service for the year 2012 (parts 3.1 and 3.2 of the annual report) and in previous reports for the years 2011 (parts 2.1 and 2.2) and 2010 (parts 1.3 and 1.6). See <http://www.bis.cz/annual-report.html>

54 Loss of qualification due to a criminal record, failure to achieve the required results for 6 months, or the employee is sent abroad on the basis of an application.

55 Despite that the OECD concluded that the protection for whistle-blowers is not sufficient enough. See also Phase 3 Report on implementing the OECD Anti-Bribery Convention in the Slovak Republic, page 45. Available at <http://www.oecd.org/daf/anti-bribery/SlovakRepublicphase3reportEN.pdf>

56 The data shows that from 2007 to 2013, in 6 operational programmes that have been analysed and in 8 relevant positions (directors of agencies, general directors of sections) there were changes of ministers in which the change was connected with the implementation of EU funds in 13 cases out of 18.

57 The Slovakian Information Service describe some of the problems with corruption connected with EU funds management in its annual report for the year 2012: <http://www.sis.gov.sk/for-you/sis-annual-report.html> In the annual report for the year 2011 the SIS concluded that some tenders for contracts on transport infrastructure projects were designed in favour of predetermined suppliers: <http://www.sis.gov.sk/pre-vas/sprava-o-cinnosti-2011.html#ekonomicka-oblast>





## Poland

Despite the fact that the legal regulation of public officials in state administrative bodies is rather complicated,<sup>58</sup> the general principle stipulated in Art. 1 of the Civil Service Act is that civil service shall have apolitical character and that the execution of tasks must be impartial. Similar regulation concerns government officials. Thus we can conclude that Polish legal regulations at least partially separate political and apolitical positions, including who can intervene into personnel matters. On the other hand, the division between political and apolitical positions is neither complete nor sufficient.<sup>59</sup>

As for the dismissal of public officials, the Polish Civil Service Act regulates the termination of an employment relationship of appointed civil service officials in Art. 70 and Art. 71 and the grounds on which the public official may be dismissed<sup>60</sup> are limited.<sup>61</sup> The Act on Employees of Government Offices contains a similar list of grounds.

The fluctuation in public administrative bodies was not analysed in Poland.

## 3.2 Ineffective conflict of interests preventing law in implementation of the OP Transport<sup>62</sup>

In this section of the analysis we will provide answers for two questions: whether the companies with unknown ownership structure (anonymous companies hereinafter) are allowed to be beneficiaries of EU funds and whether there is legislation that may prevent the risk of the conflict of interest of public officials who are involved in the implementation of OP Transport. We might be able to make a conclusion from the answers about whether there is a risk of conflict of interest.

### Czech Republic

The Czech legal regulation does not prevent anonymous companies from applying for a subsidy or bidding in a public tender and thus the anonymous companies may draw public money from EU funds through OP Transport as well as other subjects. There are different rules for the subsidies and for public procurement.

As for these subsidies, according to Art. 14 of Act No. 218/2000 Coll., on Budgetary Rules, a subsidy can be provided by a central body of public administration (ministry of transport in the case of OP

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58 There is a Civil Service Act and an Act on Employees of Government. Both regulate the positions of public officials involved in the management and control of OP Transport.

59 Phase 3 Report on implementing the OECD Anti-Bribery Convention In Poland, Report OECD 2013, pp. 41–42. Available at <http://bit.ly/1eexgZe>.

60 Consecutive negative assessments of a civil service officer; doctor's certificate of permanent inability to work preventing the performance of duties of a civil service officer; loss of moral integrity; serious breach of basic duties of a civil service officer if the fault of the officer is clear; committing a contravention during the term of employment relationship preventing further employment; a loss of competence, by fault of an officer, needed for carrying out the employment relationship in the given position.

61 However it is not the case of public officials employed on the basis of an employment contract (not employed on the basis of an appointment) because they can be dismissed without being given a reason.

62 This chapter is based on analysis "Public money and corruption risks – the risks of systemic political corruption in the management of EU funds and state-owned enterprises in the Czech Republic, Slovakia and Poland" from the year 2013.



Transport) upon an application. If the applicant for a subsidy is a legal person, the law requires that the applicant must provide a list of persons acting in its name (i.e. executive directors or authorized representatives), a list of persons with a share in the applicant (shareholders), a list of persons in which a share is held by the applicant itself, and a list of persons which have a benefit from the applicant's business activities or other gain. However, it does not work in practice because the Ministry of Transport only requires information from the Register of Companies, which is insufficient because the register lacks information about the complete ownership structure. Even if it has the information, it would only be accurate at the precise moment of the statement. Finally, a substantial amount of money from OP Transport is redistributed in the form of public procurement.

As for public procurement, according to Art. 68 of Act No. 137/2006 Coll., the Public Procurement Act,<sup>63</sup> if the supplier has the legal form of a joint-stock company, it must provide a list of the owners of shares whose aggregate nominal value exceeds 10% of registered capital. If the supplier uses subcontractors, it must provide a list of subcontractors along with a list of the owners of shares whose aggregate nominal value exceeds 10% of registered capital.

The prohibition of the materialized bearer-shares for Czech companies, contained in Act No. 134/2013 Coll., which have been reckoned by the Commission,<sup>64</sup> did not resolve the problem because of the existence of foreign anonymous companies (most of them are offshore companies) that may be used instead of Czech anonymous companies.

The legal regulation preventing a conflict of interest is based on Act No. 159/2006 Coll., on Conflict of Interest, which requires certain public officials to submit a declaration of personal interest, a declaration of activities, and a declaration of property acquired during the performance of the office, including the securities or shares in companies if their value exceeds the limit stipulated by law. However the Act on Conflict of Interest can be circumvented through unreported property interest in a joint-stock company with bearer (materialized) shares that can be acquired by a mere tradition, which is not recorded and for which the law does not require a written contract. The fine for an incomplete declaration is very low and public officials must only submit a declaration of property during and after their performance of their office, not before. We can conclude that the Act on Conflict of Interest is ineffective<sup>65</sup> because shares in anonymous companies cannot be proven. This is illustrated in the case of the Minister of Transport, A. Řebíček.

The main reason for suspicion that the minister himself and his colleagues were in a conflict of interest was the dubious growth of Viamont, a.s. Before A. Řebíček was appointed as a minister of transport, Viamont, a.s. had been one of many medium-sized construction companies specializing in transport infrastructure. After A. Řebíček was appointed, the annual profit of the company grew sharply as the company was awarded many public contracts in the transport sector (their total value

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63 Act No. 137/2006 Coll. has been substantially modified by Act No. 55/2012 Coll. Unfortunately this act still allows anonymous companies to enter into contracts with the state despite the fact that the owners of the company remain unknown.

64 Assessment of the 2013 national reform programme and the convergence programme for the Czech Republic, Commission Staff Working Document, SWD (2013) 353 Final, Brussels, 29. 5. 2013, pages 30 and 31.

65 The ineffectiveness was also criticized by GRECO in its reports from the Second Evaluation round, most recently in the Addendum to the Compliance Report on the Czech Republic to the Second Round Evaluation from 2010. However GRECO does not even mention the problems related to the existence of anonymous companies.



was over CZK 14 billion). After A. Řebíček was replaced as a Minister of Transport, the growth of Viamont, a.s. stopped almost immediately, and the company became insolvent in 2012.

### **Slovakia**

Similarly to Czech law, Slovakian law does not prevent anonymous companies from drawing public money from EU funds. There are different rules for subsidies and public procurement.

As for subsidies, the basic legal regulation is contained in Act No. 523/2004 Coll., on Budgetary Rules of Public Administration. This Act however does not require the applicant for the subsidy to unveil its ownership structure. Act No. 25/2006 Coll., on Public Procurement, under which the calls for public tenders co-financed from EU funds are carried out, a contracting authority (public administrative body) may request applicants for a subsidy that they submit the list of all their members and known shareholders containing the identification details of individuals and legal entities. In the case of public tenders worth at least EUR 10 million, however, a contracting entity is obliged to request that applicants that are companies submit a list of all members and known shareholders. The duty applies to shareholders and members who own at least 30% of shares.

Legal regulations preventing a conflict of interest are contained in Act No. 357/2004 Coll., on the Protection of Public Interest during the Performance of Office by Public Officers. The Act requires a declaration of personal interest, activities, and property. A person in a public office is obliged to report in writing whether he or she meets the conditions of incompatibility of offices and to declare the property owned. A public office holder must not make an agreement on silent partnership or acquire bearer shares except for cases where he/she inherits them. In the case of anonymous companies, however, it is possible that a conflict of interest will occur specifically because of the impossibility to ascertain partners or shareholders.<sup>66</sup>

### **Poland**

Polish law does not prevent anonymous companies from drawing public money from EU funds. An analysis of Polish laws did not prove the existence of general regulations requiring the recipients of subsidies or suppliers of public tenders to document the precise ownership structure. Nor is there a consensus whether it is possible to require that subsidy recipients or public tender suppliers show evidence of their ownership structure or whether such requirement would be unlawful.

The prevention of conflict of interest is contained in the Act on Restricting the Conduct of Business Activities by Persons in Public Offices. Public officials that are involved in the process of awarding EU funds cannot be the members of the management or control bodies of companies or foundations conducting business activities. In addition, public officials cannot own more than 10% of shares in companies. However the Polish Act can be circumvented by an undeclared share in an anonymous company.

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<sup>66</sup> Act No. 357/2004 Coll. was considered to be modified. However, the proposed bill did not become an act until the end of the year 2013. The proposal can be found here: <http://bit.ly/1gSnuRi>.



## 4. Absence of long-term development strategy or policy

The politicisation of the public administrative bodies responsible for the realisation of the LTIPs can be observed through the deficiencies in the planning procedures. The long term strategies for the development of the transport infrastructure either does not exist or they are not followed in practice. The decision making for setting priorities in transport infrastructure is based on the actual interests of the current political representation and the following planning procedures simply implement the political decisions into the practice. The other aspects that should be taken into account are often neglected.

### Czech Republic

In the Czech Republic, no overall strategy has ever been adopted that would be based on an evaluation of economic, environmental, and transport characteristics of possible alternatives to the traffic network development, or that would set priorities for individual projects, with (realistic) projected terms of their realisation.<sup>67</sup> In 1993, the government re-approved the proposal of the highway network development, approved in 1963, without taking into account both legislative and factual changes that had taken place since that time, and without any environmental or economic assessment.<sup>68</sup>

The proposal of the development of the traffic network to the year 2010 was approved in 1999.<sup>69</sup> This document, however, does not express the priorities of individual investments and is not based on any economic considerations on what will be the costs of the proposed projects and from which sources they would be paid. In addition, the final version of the proposal did not adopt any of the recommendations included in the SEA statement, issued by the Ministry of Environment.

From 2005–2007, there was an attempt to prepare a plan that would compare alternatives of traffic infrastructure development (including the appropriate SEA), set the priorities, and estimate the costs. However, the elaboration of this plan was terminated before its finalisation.

Instead of this plan, the government approved a “Timetable of traffic infrastructure building in 2007”.<sup>70</sup> This is a mere list (table) of all the planned projects and reconstructions of highways, roads and railways ever. The “timetable” is based on the presumption of the realisation of all these investments, without any justification why all of them are needed, and on an unrealistic presumption of financial resources available (including EU funds, EIB loans, PPP projects, etc.).

This approach is followed also in the “Policy of Territorial Development” of the Czech Republic, approved in 2008. This document was subject to SEA, but a very general one, not evaluating any

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67 This particular subchapter is based on analysis „Kde se ztrácejí miliardy“ from year 2010. For more information see: <http://bit.ly/1dD1rgL> pp. 12–14.

68 The government resolution number 631 on the development of highways and motorways in the Czech Republic up to the year 2005. Available at <http://bit.ly/1kvBeQX>.

69 The government resolution number 741 on the proposal of development of the transport infrastructure in the Czech Republic to the year 2010. Available at <http://bit.ly/1hFull1>.

70 The government resolution number 1064 on the timetable of traffic infrastructure building for years 2008–2013. Available at <http://bit.ly/1fBpBlq>.



systemic alternatives of traffic infrastructure development, impacts of the proposed investments on the environment and human health.<sup>71</sup> This is not in compliance with the requirement of Art. 5.1 of the SEA Directive,<sup>72</sup> which requires taking into account “reasonable alternatives” of the solutions contained in the proposal of the assessed plan in SEA procedure.

All of the above shortcomings are relevant with regard to the proposal of the “Traffic sector strategy”, published in July 2013.<sup>73</sup> According to its Preamble, this document should express the priorities of the traffic infrastructure development, which is a condition for the European Union’s providing of financial resources for OP Transport in the period 2014–2020. However, no justified prioritisation of the project has been carried out, as the neither the “strategy” nor related SEA include any evaluation of needs of individual projects or of legal and economic possibilities of their realisation.

It can be concluded that the non-systemic approach of the government to the development of the traffic infrastructure system led to the situation where the short term priorities of the traffic infrastructure development are de facto decided by the officials of the Directorate of Roads and Highways. The sections of the projects are built according to the status of their technical and administrative preparedness, despite the fact that their continuity is not ensured. This leads to unacceptable environmental results, namely exceeding noise and air pollution limits in areas where the increased amount of traffic is evoked by those means.

These shortcomings described above were approved by the findings of the Supreme Audit Office, concerning the use of resources from the State Fund of Traffic Infrastructure.<sup>74</sup>

## **Slovakia**

Despite the fact that the general strategic document that describes the development of the Slovakian transport infrastructure for years 2010–2020 exists<sup>75</sup> we were unable to assess how the document is applied in practice during the decision-making on the particular transport infrastructure project.

## **Poland**

Planning of the development of transport infrastructure in Poland suffers from the lack of stability of the lists of projects to be implemented and from the low level of prioritisation depending on the real needs.

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71 Available at <http://bit.ly/1dVSj0z>.

72 Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment, OJ L 197, 21.7.2001, p. 30–37

73 Its 2nd phase has been approved by the governmental resolution number 850 on traffic sector strategies. available at [http://www.dopravnistrategie.cz/images/projekt/ke-stazeni/DSS2\\_UsneseniVlady.pdf](http://www.dopravnistrategie.cz/images/projekt/ke-stazeni/DSS2_UsneseniVlady.pdf) All of the related documents are available here: <http://www.dopravnistrategie.cz/>

74 Findings contained in annual reports made by the Czech Supreme Audit Office in 2011, 2012 and 2013 include shortcomings in how programmes’ monitoring indicators are set up, deficiencies in projects’ assessment and selection and control system deficiencies. Predominant shortcomings of final beneficiaries are linked to public procurement and violations of the project implementation terms. Available at <http://www.nku.cz/assets/publikace/eu-report-2011-en.pdf> (page 10). Those deficiencies have been confirmed again in an annual report in 2012 while there were even more cases of financial beneficiaries being paid ineligible expenditures. Available at <http://www.nku.cz/assets/publikace/eu-report-2012-en.pdf>.

75 <http://www.telecom.gov.sk/index/index.php?ids=75682>



The fundamental document concerning the sector is the Transport Development Strategy, adopted by the Council of Ministers in 2013 (it's a mid-term strategy until 2020). It's a rather general document which states the general challenges and directions of investment for the sector, however, there are no specific lists of projects included. For the 2014–2020 EU cohesion policy funding, an Implementation Document for this Transport Development Strategy is currently being developed. It will contain a project pipeline for road, rail, inland water and maritime transport. The projects are to be selected on the basis of objective criteria. The Implementation Document is currently publicly consulted and a Strategic Environmental Assessment is being conducted.

Work on the Implementation Document (actually required by regulations for EU funds 2014–2020 – without it Poland cannot access the funding for transport) gives a chance for really strategic planning and prioritisation of transport investment, provided that the process is carried out properly and the document is of high quality.

However, until now the government has been taking decisions on proceeding with the construction of certain sections of motorways and expressway rather on an ad hoc basis. Currently, the basis for the construction of those is the Programme for National Roads Construction in 2011–2015. The Programme includes annexes with roads which are given green light by the government (tenders can be run for the construction). The annexes are changed frequently. Although the Programme passed the SEA in its original shape, the project lists have been changed many times – some tenders have been suspended in the past due to lack of funding, while new investments are being added. In 2013, tenders have been announced already for projects which will benefit from the 2014–2020 funding.

A key issue is therefore, how do the ad-hoc decisions of the government regarding concrete projects which are started relate to the Implementation Document which should show the prioritisation of the projects?

Construction of motorways and expressways in Poland is demanded by the majority of the public opinion and politicians representing different regions of the country. The order in which the projects are implemented does not necessarily reflect objective criteria such as traffic intensity or the role of a road in the TEN-T network. More often, political trading is involved. For this reason, the Polish motorway and expressway network is very fragmented. For example, expressways providing key connections such as Warsaw–Krakow and Warsaw–Gdansk are finished in some sections but lack the most crucial sections next to the largest cities.



## 5. Deficiencies in implementation of the SEA and EIA Directives in compared states

Despite the fact that in all three compared states both SEA and EIA Directives have been transposed into the national law, the implementation of these legal regulations in practice suffer from certain deficiencies namely in the assessment of the project's impacts on the environment. As this analysis shows, the deficiencies in permitting procedures are correlated with a high level of politicisation of relevant decision making bodies and low standards of good governance. This low level of protection against political pressure on permitting procedures leads to low performance in terms of actual implementation of requirements of SEA and EIA Directives. The legal obligations arising from the aforementioned directives and national laws are often considered to be obstacles in the realisation of the "important" transport infrastructure projects (from the political point of view). Thus the legal regulations that have been aimed at protecting the environment are often circumvented through the special legislation whose aim is to speed up the whole construction process of the LTIP (subchapter 5.1). Thus there are several deviations from the standard EIA procedures. Even in the case that the special legislation did not apply, there are other ways how to evade the law, namely through the "salami-slicing" of the LTIP; through the non-assessment of all the effects of the project or through the limitations of the public participation on the planning and permitting procedures. The circumventions or even direct violations of the SEA and EIA procedures are necessary to ensure that the certain variant of the LTIP (in which some politicians may be interested) will be realized without the risk of its modifications.

However the deficiencies in the environmental legislation may result in a suspension or even corrections of payments by the Commission because of EU Directive No. 1083/2006 that requires that all the projects co-financed through the operational programmes from EU funds must be in perfect accordance with EU policies and legislation, including the EIA Directive.

### 5.1 Accelerating legislation

In all the countries studied, there have been attempts to speed up the processes of permitting traffic infrastructure projects by adopting specific laws, establishing special rules for relevant procedures, compared with the standard development consent procedures. Often, the goal of such laws is to limit the rights of affected people and the general public to express their comments and objections and to defend their rights. Inevitably, adopting of such rules increases the risk of conflicts with the requirements of EU legislation.

#### **Czech Republic**

In the Czech Republic, there were several attempts to proclaim by a specific Act of Parliament that a traffic infrastructure project (highway, railway or a channel) is of "public interest", which would mean that this would not have to be proven in administrative (namely expropriation) procedures. However, in all but one case, the Constitutional Court cancelled these "ad hoc laws", as the court had found them to be in conflict with the constitutional principle of division of powers (the Parliament is not entitled to make decisions on specific projects, which is the domain of the executive branch).

In addition, Act no. 419/2009 "on the acceleration of the building of traffic, water, and energy infrastructure" has been adopted. The act, in its current form, shortens the time limits for issuing permits for infrastructure projects and stipulates special rules for expropriation procedures (i.e. the





property owners can be deprived of their land before the dispute concerning their compensation is resolved).

## **Slovakia**

In 2007, the Slovakian Parliament adopted Act 669/2007 on One-off Extraordinary Measures in Preparation of Selected Motorway Constructions, which was aimed at creating especially favourable conditions for private investors engaged in building highways under PPP (public-private partnership) schemes – which was the case of the project of D1 Highway, Turany–Hubová section.

In addition to several deviations from the standard processes of preparing, licensing, and building constructions subject to general legislation<sup>76</sup>, Act 669/2007 made highway and expressway construction legal even on lands that had not been bought out or expropriated. The investor can settle the property issues of lands where the motorway is built even after the construction is finished and formally approved. In practice, this allows for the real possibility that the property owners would only be compensated several years after the motorway has been opened to traffic. On November 26, 2008, the Slovak parliament adopted an amendment to the Act – it introduced new measures that further exacerbated the existing problems, and it widened the scope of the Act to include all the motorways and expressways. Such practice violates the right to the peaceful enjoyment of possessions guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and its protocols, which is the basic norm of the EU in the area of human rights.<sup>77</sup>

The same Act 669/2007 discharged the National Motorway Company (NDS) of any obligation to perform the so-called “state expertise” assessment. The state expertise assessment is a tool to evaluate economic efficiency and cost justification, and is obligatorily performed for every public work, including motorways, with costs higher than EUR 6.64 million (at that time SKK 200 million).

## **Poland**

Because of the fact that the 14<sup>th</sup> UEFA European Championship (referred to as Euro2012) was hosted by Poland and at that time the Poland has been infamous for its poor transport infrastructure, the country's image was at stake. The Polish lawmakers (under the public and political pressure) decided to speed up the construction of the necessary modern transport infrastructure and as a result several Special Acts were passed, including the Special Act of 7th September 2007<sup>78</sup> and its amendment in 2009 included several provisions allowing the investment process to be prepared faster. In 2009, the list of concrete investments<sup>79</sup> was published in a governmental decree, including

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76 Act 669/2007, for instance, limits verbal proceedings during highway construction licensing, shortens legal persons' periods for appealing against land-use and construction permits, allows the 'state expertise' assessment to be omitted, etc.

77 Article 6 of the Treaty on European Union – the Amsterdam Treaty:

1. The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles that are common to the Member States.
2. The Union shall respect fundamental rights as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law. (...)

78 <http://bit.ly/1pWxrOa>

79 <http://bit.ly/1hkVp04>





stadiums, base camps, railway lines and stations, roads, electricity lines and even elements of the wastewater treatment infrastructure for the city of Warsaw.

In particular, the key provisions of the Special Act concerned a faster expropriation process. The expropriation would now be an automatic consequence of an administrative decision regarding the location of an investment which was related to the Euro 2012. In addition, the Special Act applied an “immediate applicability” clause to all administrative decisions (including environmental decisions) concerning the Euro 2012 investments and shortened the standard periods allowed for submitting complaints to the decisions, as well as for the examination of those complaints.

However, these legislative changes did not prevent significant delays in investments considered as key to the organization of the Euro 2012 Championships. As many planned investments were not finished by June 2012, and the provisions of the Special Act were widely applied, the government attempted to extend the Special Act, although the original motivation – the European Football Championships – had ended. On 6 March 2013, the Constitutional Tribunal issued a ruling<sup>80</sup> which confirmed that provisions of the amended Act are in violation of Art. 2 of the Polish constitution (stating that Poland is a democratic country governed by rule of law and social justice). In particular, the Tribunal considered that the amendment is unconstitutional because it would have an *ex post facto* effect.

## 5.2 Particular problems with the SEA and EIA procedures

The violations of the SEA and EIA Directives may be used as the indicators of the risk of politicisation of public administrative bodies responsible for the implementation of the OP Transport as the variant of the transport infrastructure project proposed by the politicians is pushed forward regardless of the negative impacts of the LTIP on the environment or the risk that the LTIP would become a dead-end investment.

### 5.2.1 Failures to assess real alternatives of individual projects

The absence of systemic concept of the development of the traffic infrastructure (described in chapter 4), which would result from objective evaluation of the transport needs, as well as economic and environmental aspects, directly relates to insufficient assessment of corridors of individual infrastructure projects. With no such concept, it is hardly possible to choose a most suitable alternative to such project. Moreover, the assessment of project alternatives as such is often carried out improperly, or not at all.

According to Article 5.3 of the EIA Directive,<sup>81</sup> information about the project, provided by the developer shall include “an outline of the main alternatives studied by the developer and an indication of the main reasons for his choice, taking into account environmental effects”. The legal requirements in the studied countries vary in this respect – in the Czech Republic, the quoted provision is transposed literally, in Slovakia the law explicitly allows the developer to neglect studying the alternatives, and in Poland, the law clearly requires the environmental report to include description of the alternatives studied by the developer, including a “zero” alternative and a “most environmentally friendly” alternative, both mandatory. There is also a clear requirement for

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80 <http://bit.ly/QJ0FFY>

81 Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment, OJ L 26, 28.1.2012, p. 1–21.



indicating the reasons for their choice. When “NATURA 2000 sites” are affected, the existing alternatives must always be taken into account, as only the one with the lowest impact on the protected areas can be approved (Article 6.4 of 92/43/EC “Habitat” Directive<sup>82</sup>).

The proposal of the EIA directive amendment, as prepared by the EU Commission,<sup>83</sup> included provisions which would strengthen and clarify the duty of the developer (which is the state itself or a public administrative body in compared EU member states) to consider alternatives to the project, “including the identification of the least environmentally impacting one, and an indication of the main reasons for the choice made, taking into account the environmental effects”. During the legislative procedure, the wording was “softened” (or made less clear) to some extent; the version approved by the EU Parliament requires the developer to describe “reasonable alternatives studied”, and an indication of the main reasons “for selecting the chosen option, including a comparison of the environmental effects”.

Despite the not completely clear wording of the EIA directive with respect to assessment of the alternatives, it should be concluded from its current wording already that the developer should provide reasons for choosing a particular alternative of the project, taking into account environmental effects. Moreover, when the project shall be subject to financing from EU funds, it must be proven, at the same time, that the chosen alternative is reasonable from an economic perspective.

These requirements are usually not respected in the studied countries, in the case of traffic infrastructure projects. The information provided by the developer during the EIA procedure often describes only technical variations of the same alternative (corridors). Developers do not consider or assess more environmentally and/or economically favourable alternatives, even though they are likely to be more realistic and reasonable.

### **Czech Republic**

In the Czech Republic, the **R52 high-speed road** is planned as a part of the highway-type connection between Brno and Vienna. No real alternatives of this project were assessed in the EIA procedure for R52 (in 2005) in spite of the fact that the project is set to have significant impacts on NATURA 2000 sites. The Brno–Vienna highway connection could be made with significant financial savings by using the existing D2 (Brno–Bratislava) highway. The Supreme Auditors Office of the Czech Republic had confirmed in 2008 that the R52 project is not reasonable from an economical perspective, its alternatives were not taken into account, and it would have a negative impact on the environmental and cultural values of the affected area.

Similar deficits also appeared in the case of the **D8 highway** Prague–Dresden, which a 16.4 km long section crosses the České Středohoří Protected Area. Alternative corridors of the highway, as well as the variants which would protect at least the core zone of the Protected Area by putting parts of the highway into tunnels, have not been assessed in the EIA procedure. The EIA statement, with regard to choosing the corridors of the highway, referred to a previously issued SEA statement. This statement, however, had no legal basis because there was no possibility of public comments before its adoption. The court cancelled the development consent (land use permit) for the highway section

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82 Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, OJ L 206, 22.7.1992, p. 7–50.

83 <http://ec.europa.eu/environment/eia/pdf/COM-2012-628.pdf>



across the Protected Area seven years after its issuance. Most of the section, however, had already been finalised at that time.

Construction of the parts of the project, for which no valid construction permit was issued at the time of cancelling the land use permit, cannot be initiated. This causes substantial delays in the implementation of the project. It also increases the cost of construction since the price agreed with the contractor is subject to valorisation.

## **Slovakia**

In Slovakia, with regard to the project of **railway reconstruction in the city of Trenčín**, two alternative routes were discussed. In the EIA procedure, however, the alternative that would parallel the existing highway and bypass the town has not been evaluated. According to an additionally made noise assessment, the only alternative assessed in EIA, which would require shifting the track and building a new bridge over the river Váh, would cause an increase in noise in some localities of the city. The company of the former city mayor, who had arranged for all necessary documents (such as the change in the land use plan, planning permission), is now providing engineering services for the reconstruction.

Another example of insufficient evaluation of the alternatives of a traffic project in Slovakia is the **Turany–Hubová section of the D1 Highway**. The Slovakian EIA Act formally requires a two-stage assessment of infrastructure projects: in the first stage, an initial study should evaluate alternative corridors of the entire route and then select the optimal corridor; in the second stage, specific partial sections in the selected corridor should be assessed in more detail. However, in practice, only particular sections are assessed, which was also the case for the D1 highway.

In addition, even the outcomes of the “curtailed” EIA were not respected in the case of the Turany–Hubová section. EIA recommended Variant B1, which bypassed the village of Šútovo. The Ministry of Environment also declared this variant as the most environmentally acceptable. The Ministry of Transport, however, came up with a new variant without any previous discussion and without appropriate EIA assessment. In this variant, the motorway would cross the village of Šútovo. Impacts of this variant would violate the integrity of Natura sites (Malá Fatra, Veľká Fatra and Váh) and thus also obligations requested by the Habitats Directive. A construction permit was issued for this variant by the respective authority, which completely disregarded the results of the EIA.

The result is that 14 years after a technical study had been submitted, the construction of the highway has not even started. Had the authorities preferred the environmentally more acceptable variant as it was suggested not only by environmentalists, but moreover by the Ministry of Environment, the highway section Turany–Hubová would have been already built and authorities would have saved financial resources used for further assessments and mitigating measures.

## **Poland**

In Poland, the **construction of the S7 expressway** section north of Skarżysko-Kamienna entails, among other elements, a road junction and exit from the motorway, named “Skarżysko-Północ”. This particular junction constitutes a threat to the natural values of the area, which serves as an ecological corridor for many protected animal species, including large mammals such as the wolf and the moose. The junction would be located in a forest and over a small river. The justification for its construction is weak – there are enough other exits from the expressway nearby – the city of Skarżysko-Kamienna itself (50 thousand inhabitants) will be served by two others. The negative environmental impact of this expressway section could be to a large extent mitigated by resignation from construction of the “Skarżysko-Północ” road junction and by designing extra animal passages.



Despite the fact that in February 2013 the Polish Supreme Administrative Court revoked the environmental decision for this investment the regional road authority prepared a new environmental report and applied for an environmental decision. The EIA report was published in early 2014. Unfortunately, in terms of the planned investment, the environmental impact would stay the same as in the revoked environmental decision. This shows the inability of the road agency to learn from its own mistakes and to modify the scope of the investment by dropping the plan to construct the road junction in the most sensitive natural area.

### **5.2.2 Failures to carry out an environmental impact assessment of the whole project (“salami slicing”)**

Article 2.1 of EIA directive requires that whole projects likely to have a significant effect on the environment, not only parts of them, be subject to the EIA. This principle is strengthened by the amendment of the EIA directive, according to which Annex III of the directive should explicitly state the “size and design of the whole project” when determining its evaluation.

In practice, however, the investors often artificially “cut” the projects into pieces for the purposes of the legal procedures (so called “salami-slicing”). Only short sections of the projects (especially roads) are then assessed and permitted. Through these means, the environmentally less questionable parts of projects are authorized and built first, which in fact predetermines the following route of the project even across an environmentally valuable territory. This approach also inevitably leads to breaching the requirements of Art. 3 and 5 of the EIA directive (see below) because the assessment of only parts of the whole project does not provide for a sufficiently comprehensive evaluation of all direct and indirect impacts of the project and their interactions.<sup>84</sup>

#### **Czech Republic**

In the Czech Republic the **R52 project** (its whole length is 22.5 km) was divided into three sections for the permitting purposes. This is an example of the typical “salami slicing” practice of the developer. The Road and Motorway Directorate of the Czech Republic, aimed to get development consents for less problematic sections of the project (and to consequently begin construction works on them) so that consent for the most problematic section is already “secured” in this way. In May 2007 (almost two years after the positive EIA statement for the project was issued by the Ministry of Environment), the development consent procedure for the first section (Pohorelice–Ivan) was started. Almost seven years later, no effective development consent (land use permit) has been issued.

The project of **D8 highway** (92 km in the Czech Republic territory) was split up into seven sections. All of them have been finalized, except the one crossing the České Středohoří Protected Area. EIAs were carried out separately for individual sections in 1990s (not for all of them, as some were approved before the EIA Act came into force in the Czech Republic). Impacts of the whole highway were evaluated in the SEA report for the proposal of the development of the traffic network, prepared in 1999. The SEA statement issued by the Ministry of Environment required either bypassing the protected area or building a long tunnel. This statement has however not been respected in subsequent decision-making procedures. For the purpose of issuing construction

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84 For example see ECJ judgements C-392/96 of 21 Sept 1999 (Commission vs Ireland) paragraphs, 76, 82; C-142/07, *Ecologistas en Acción-CODA*, paragraph 44 ;C-205/08, *Umweltanwalt von Kärnten*, paragraph 53; *Abraham and Others*, paragraph 27; C-275/09, *Brussels Hoofdstedelijk Gewest and Others*, paragraph 36.



permits, even the section crossing the Protected Area as such was further divided into more than ten individual building projects.

### **Slovakia**

In Slovakia, as described above, the EIA Act in the first stage of the EIA procedure, alternative corridors of entire routes are assessed. However, in practice, as in case of the D1 highway, this provision is not respected.

### **Poland**

Polish case studies attached to this analysis contain no example of the “salami slicing” of the LTIP.

## **5.2.3 Failure to assess all effects of the project**

Articles 3 and 5 of the EIA directive, together with its Annex IV require that the developer supplies the information necessary so that each important direct and indirect effect of the projects significant to the population, human health, and the environment are assessed. The amendment of the EIA directive explicitly proclaims that the assessment shall deal with indirect and cumulative effects of the investments with other projects, both existing and prepared.<sup>85</sup> Further, it shall contain a description of the measures envisaged to prevent, reduce and, wherever possible, offset any significant adverse effects on the environment.

Namely the duty to assess the cumulative effects of all existing and planned investments is often neglected. This closely relates to failures to carry out environmental impact assessments of whole projects, as described in the previous point.

### **Czech Republic**

In the Czech Republic the impacts of the R52 high-speed road were not assessed in combination with the impacts of other traffic structures (both existing, such as the D1 Prague–Brno highway, and the planned R43 high-speed road northwards from Brno, a south-west tangent highway to connect R52 with D1 and R43, and the I/40 Mikulov–Breclav road passing through the UNESCO heritage site of Lednice), as well as the planned A5 highway in Austria. The construction of A5/R52 would seriously increase traffic levels in the south-western area of the Brno agglomeration, densely populated Brno districts, where more than 50 thousand inhabitants live. It is well known, though ignored, that the legally binding limits for noise and particulate matter in these areas have been exceeded for years. The opportunity to rectify this shortcoming at the SEA procedure for the land use plan (“Principles of Territorial Development”) of South Moravian Region was wasted. The Supreme Administrative Court, namely for this reason, cancelled the entire plan in 2012. There is, therefore, no legal basis for further preparation of the aforementioned traffic infrastructure projects, including R52.

After most of its sections had been built, a massive landslide of the slope took place in June 2013 along the D8 highway. This can be seen as a result of neglecting the expert and public warnings, pointing out that that there is a risk of instability of geological bedrock along the chosen corridor. This incident can be repeated in the future in other parts of the highway section in the České Středohoří Protected Area.

### **Slovakia**

The case studies attached to this analysis do not provide any information on this particular issue.

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<sup>85</sup> See for example ECJ judgments C-332/04, *Commission v. Spain*, paragraphs 33–36, 38, C-50/09, *Commission v. Ireland*, paragraph 36, C-404/09, *Commission v. Spain*, paragraphs 78–80.



## Poland

The case studies attached to this analysis do not provide any information on this particular issue.

### 5.3 Inefficient public participation on SEA and EIA procedures

Articles 6 and 8 of the EIA Directive should guarantee that the public receives sufficient information about the impacts of the project, that the concerned public will have effective and timely possibilities to participate in decision-making procedures, and that the results of public participation are taken into consideration in the development consent procedures. Article 7 shall also grant these rights to the public of the neighbouring countries in case the project could have transboundary impacts. Article 11 provides for legal protection of the participatory rights. All these rights should ensure that the public could efficiently alert the responsible authorities in cases of shortcomings of EIA and permitting procedures, described in the previous sections of this analysis.

The amendment of the EIA directive emphasizes that results of consultations with the public shall be **duly taken into account** in the development consent procedure. According to some studies, public participation and access to justice provisions of the EIA directive would need further amendments to be in full compliance with the UNECE "Aarhus Convention",<sup>86</sup> namely with regard to possibilities of public participation in the screening stage and review of the screening decisions, ensuring participation at early stages of decision-making or a right to ask for an interim relief.<sup>87</sup>

The possibilities of public participation and access to justice are not fully respected or applied in a formal way, and in no way ensure effective remedies of the aforementioned failures. The reason for this is simple – the efficient public participation on the assessment of the LTIP may lead to changes of the project that is pushed forward by politicians or may prevent its realisation if there is a risk that the project would become a dead-end investment (namely because of the significant effects of the project on the environment).

## Czech Republic

In the case of the **D8 highway corridor**, a section through the České Středohoří Protected Area has been chosen in the SEA procedure, which had not been open for public comments. In the EIA procedure, the comments related to this issue have not been dealt with. The land use permit for the highway was issued in 2003 and cancelled by the administrative court in 2010, namely for the failures related to possibilities of public participation. However, due to the lengthy court procedure, the unavailability of injunctive relief, and the fragmented character of the decision-making procedures, most of the building permits for individual parts of the highway section were issued before the court decision. Subsequently, administrative courts refuse to cancel these building permits, on the basis of their formal legality at the time when they were issued. Therefore, the formal possibilities of public participation and access to justice had no real impact in this case.

The **R52 high-speed road** should be part of the connection between Brno and Vienna and therefore has significant impacts on the environment of a neighbouring EU Member State – Austria. The EIA procedure, despite that fact, and despite the requirements from the Austrian side, has not been carried out in compliance with the requirements of article 7 of the EIA directive. In addition, the

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86 Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters <http://www.unece.org/fileadmin/DAM/env/pp/documents/cep43e.pdf>

87 <http://bit.ly/1fBpRqL>





courts have refused to review the outcomes of the EIA procedure, saying that this can be done only together with review of the development consent (land use permit). More than 8 years after the EIA procedure was finalized, no such permit has been issued. Such an attitude does not allow for effective and timely legal protection against failures of the EIA procedure.

### **Slovakia**

In the case of the **Trenčín railroad**, more than 10,000 people have signed a petition against the alternative chosen by the developer requiring a new assessment of the railway track as well as the evaluation of two other variants. Their requirements were not considered. Moreover, in EIA, as well as in other permission proceedings, they were either excluded from the proceedings or their requirements were rejected. It was also not possible for the public to view any documentation of the project.

In both the Czech Republic and Slovakia, there also seem to be systemic failures in the transposition of public participation and access to the justice requirements of the EIA directive. This situation caused the initiation of an “infringement procedure” against both the Czech Republic and Slovakia according to article 258 of the TFEU<sup>88</sup> by the EU Commission for incomplete transposition of the EIA directive. According to the available information, in both cases, the Commission criticizes the limited scope of participants of the decision-making procedure, insufficient guarantees that the public comments from the EIA procedure will be taken into account before the development consent is issued, or restrictive conditions for access to courts to challenge the outcomes of the EIA procedure. Similar deficits have also been identified, with regard to the Czech Republic, by the Compliance Committee of the Aarhus Convention in its findings in case ACCC/C/2010/50.<sup>89</sup>

### **Poland**

On one hand the public participation on the EIA procedure of the **planned S7 expressway** section north of Skarżysko-Kamienna was unsuccessful despite the fact that the Polish environmental NGO, the Association “Pracownia na rzecz Wszystkich Istot” actively monitored for many years the plans regarding this particular project and identified three main threats to the environment (including destruction of a habitat of several rare butterfly species protected both by EU and Polish law) because the environmental decision was issued by the Regional Director for Environmental Protection. Thus the Association appealed to the General Director for Environmental Protection against the environmental decision and afterwards the case ended up in administrative courts. On other hand the public participation was at least partially successful because of the fact that the Supreme Administrative Court found deficiencies in the administrative process and in February 2013, almost five years from the issuance, the environmental decision was revoked, however the realisation consent remained in force (even though the realisation consent was issued later than the environmental decision and could not be issued before the environmental decision was issued). The regional road authority then applied for a new environmental decision. The procedures necessary for building the LTIP are still unfinished.

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88 Treaty on the Functioning of the European Union. OJ C 326, 26. 10 .2012, pp. 47–390.

89 <http://bit.ly/1dEj7Hm>



## 6. Conclusions and recommendations

The final part of the analysis connects the results of the comparison of law and practice in the three EU member states with the recommendations for how to prevent or mitigate the risks of violating of the EU law on the usage of EU funds and on the protection of the environment during the realisation of large transport infrastructure projects under the OP Transport.<sup>90</sup> The structure of this part of the analysis follows the sequence of issues from the problems with management and control bodies to accelerating legislation. The recommendations are targeted at both EU and national authorities involved in the implementation of EU funds through the OP Transport.

### 6.1 Politicisation of management and control bodies of OP Transport

Our analysis of the politicisation of public administration was limited to only a few selected issues. As for **the absence of the separation of political and apolitical positions in public administration**, there is no clear separation of those positions in the public administrative bodies that are responsible for management and control in the Czech Republic and Slovakia. As a consequence, there is a relatively high level of fluctuation of public officials (including those who are responsible for the implementation of the OP Transport) in both countries; in the Czech Republic, the Act on Civil Service is still ineffective (which is the main cause of the risk of politicisation), while in Slovakia there are problems with the application of the law on Civil Service in practice. Only the Polish law partially discriminates between the political and apolitical positions in public administration and defines who exactly can intervene in personnel matters.

**The level of protection of public officials against dismissal or removal** is insufficient both in the Czech Republic and in Slovakia, although for different reasons. In the Czech Republic, the senior public officials can be removed from their positions easily, but the level of protection for ordinary public officials is sufficient. In Slovakia, it is the opposite – the senior public officials are protected better than the ordinary ones. Only in Poland is the level of protection of public officials sufficient.

#### **Recommendations for the EU authorities:**

Despite the fact that the EU has very limited competence in the area of public administrative law of its member states, the aforementioned deficiencies may be used as indicators of risk of bad governance (violating the EU law) in public bodies responsible for the OP Transport by the Commission or by the European Court of Audit in their audits of the LTIP or OP Transport. Also, the EU may try to influence the public administration in its member states by setting up Specific Country Recommendations.

#### **Recommendations for the national authorities:**

As for the national lawmakers, the law on civil service must clearly discriminate between the political and apolitical positions in public administrative bodies. Only the political positions shall be staffed on the basis of political key, and such public officials shall not intervene into the personnel affairs of the ordinary public officials. The grounds for dismissal of civil servants, as well as their removal from the office, should be clearly stipulated by law. The number of grounds must be limited and a reasonable

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<sup>90</sup> It should be noted here that there were deficiencies in implementation of the aforementioned operational programmes in all three EU member states.





explanation must be provided in each case of dismissal or removal of a public official. Organisational changes should not be misused for mass dismissal of employees (i.e., in order to circumvent the legal regulations on dismissal of civil servants), and the stability of the organisational structure and staff of public administration bodies responsible for the realisation of the LTIP should be guaranteed by the law on Civil Service.

## 6.2 Ineffective law on conflict of interests

Our analysis was limited to only two issues: the allowing of companies with unknown ownership structure to become beneficiaries of subsidies and public money, and the efficiency of the legal regulations on the conflict of interest of public officials involved in implementation of the OP Transport.

**The law in all three compared EU member states does not prevent companies with unknown ownership structure** (i.e., companies with bearer shares in materialised form or offshore companies) from the possibility **of applying for subsidies from the EU funds and** from the possibility **of bidding in a public tender**. In the Czech Republic, the law prescribes that the applicant for a subsidy must provide a list of his or her owners; however, the law does not work in practice and the law on public procurement, which requires the applicant to provide a list of owners of his or her contractors and subcontractors, can be easily circumvented. In Slovakia, regulation of public procurement is similar to that in the Czech Republic. The Polish law, too, does not prevent anonymous companies from drawing public money from the EU funds.

As for conflicts of interest in public office-holders and the national regulation that should prevent the risk of their disguised ownership of construction companies connected to public tenders or subsidised from the EU funds, the law is inefficient in practice because it can be circumvented through the bearer shares in materialised form or through offshore companies with hidden ownership structure.

### **Recommendations for the EU authorities:**

**The EU may regulate both the public procurement and the EU funds, thus the Commission may propose amendments of the relevant EU law, including the Directive 2004/18/EC and the third Anti-money laundering directive 2005/60/EC**, in such a way that the EU member states would have the chance to adopt law that will enable them to unveil the complete ownership structure of the companies with unknown ownership structure (so-called anonymous companies) or to exclude them from the possibility of obtaining public money in the form of grants or subsidies or public procurement<sup>91</sup> if such companies are unable or unwilling. Such law will have to ensure that the complete ownership structure will be at any moment known at least to the companies themselves and to the law enforcement agencies, tax collectors, and other relevant authorities through central registries containing up-to-date information on owners and shareholders of the companies.<sup>92</sup> This may serve as a way to prevent the conflict of interest of public officials.

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91 Only the successful candidates of the public procurement will have a duty to fully disclose their ownership structure.

92 Such recommendation is in full accordance with the initiative of the G8 states in Lough Erne in 2013.



**The amount of money granted to the anonymous companies through subsidies or public tenders may serve as an indicator of a risk of misuse the public money on LTIP** for the audit and control authorities such as the Commission, OLAF, or the European Court of Audit.

**Recommendations for the national authorities:**

**The EU member states should introduce electronic registers of contracts and grants** that would be complementary to the already existing electronic register of public procurement contracts; this would give the public the ability to access and control all of the public contracts. This may reduce the risk of misuse of public money because anyone could see what LTIP and under which conditions the EU funds have been used for. **The Slovakian Freedom of Information Act in which the register of contracts is contained may serve as an example of good practice.** In the Czech Republic, the bill on the register of contracts was proposed at the end of year 2013, and it is now in legislative process in the Chamber of deputies of the Parliament of the Czech Republic.<sup>93</sup>

### 6.3 Absence of long-term development strategy or policy

Both in the Czech Republic and in Poland, the ad hoc approach prevails, which means that the current development of transport infrastructure is decided solely by the public officials of the Directorate of Roads and Highways (in the Czech Republic) or by public officials of the General Directorate of National Roads and Motorways (in Poland), respectively. As a result the selection and approval of certain projects may reflect neither the real needs nor objective criteria such as feasibility, traffic intensity, environmental impacts, or economical efficiency.

Despite of the fact that one of the new requirements for being able to obtain finances from EU funds in programming period 2014–2020 through OP Transport is the existence of a strategic document that will contain a list of transport infrastructure project with justifiable prioritisation and proper strategic impact assessment, the latest documents prepared by the Czech authorities' "Traffic sector strategy" from July 2013 does not comply with the aforementioned requirements. In Poland, the new "Implementation Document" is now being assessed under the SEA procedure.

**Recommendations for the EU authorities:**

Such an approach represents a risk of politicisation of the decision-making procedures and as a consequence there is a risk of approving a dead-end investment. Thus the Commission should pay more attention to the content of the national long-term development strategies and consider carefully which transport infrastructure projects would be co-financed from the EU funds.

### 6.4 Failures to assess real alternatives of individual projects

The transposition of the EIA Directive and its requirements into the national law vary in compared EU member states, including the duty of the developer to assess alternate routes of the proposed transport infrastructure project. In the Czech Republic, the EIA Directive is not transposed correctly in all its aspects; moreover, in practice the alternate routes are not assessed properly, as both case studies on R52 high-speed road and D8 highway prove. Slovakian law allows the developer to neglect studying the alternatives (as illustrated by the case of D1 highway) despite the fact that the law requires two-stage assessment; in reality, only one stage is conducted. In Poland, the law clearly

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93 See <http://www.psp.cz/sqw/historie.sqw?o=7&T=42>



requires the environmental report to include a description of the alternatives studied by the developer, including mandatory both “zero” alternative and “most environmentally friendly” alternative. The Polish law may thus serve as an example of good practice despite the fact that in some cases the law requirements are neglected in practice (which was the case with the S7 expressway).

#### **Recommendations for the EU authorities:**

The Commission and the European Parliament should adopt an amendment of the EIA Directive in which the duty to assess alternate routes of the transport infrastructure projects “in full extent” will be clearly declared, together with the duty of the developer to provide reasonable explication as to which of the alternatives is the preferred one, taking into account both environmental and financial aspects of the project.

The absence of assessment of alternate routes may serve as an indicator of risk of misuse of public money on a project that may end up as a dead-end investment.

#### **Recommendations for the national authorities:**

The Czech and Slovak laws (the Acts on Environmental Impact Assessment) should be amended in a way that will guarantee that the alternatives to the proposed project will be assessed properly and “in full extent”. The Polish legal regulations that implement the EIA Directive (Act on Providing Information on the Environment and Environmental Protection, Public Participation in Environmental Protection and on Environmental Impact Assessment of 3<sup>rd</sup> October 2008) may be used as an example of good practice. The EU member states should have a duty to choose the most “environmentally friendly” alternative for each project.

## 6.5 Failures to carry out environmental impact assessment of whole projects (“salami slicing”)

Although the EIA Directive requires that the projects that may affect the environment significantly must be assessed as one whole investment, such requirement is circumvented in practice both in the Czech Republic and in Slovakia. In both these EU member states, the investors (developers) intentionally cut the one LTIP into a series of small — supposedly standalone — projects so the overall environmental impacts of the LTIP seems less serious than they would if the whole LTIP were assessed, as the synergic effects of the smaller projects cannot be assessed properly (not all of the effects of the project can be assessed).

As a consequence, the environmentally less-problematic parts are authorised and built early, and thus the concrete route of the LTIP is selected and the existence of the already-built parts may be used as an argument for finishing the particular variant.

#### **Recommendations for both the EU and national authorities:**

The Commission should consistently promote, also by means of the infringement procedures, the requirement of the EIA Directive that all important aspects of whole projects, including cumulative, synergy, and indirect impacts, are thoroughly assessed in EIA procedures. The national authorities must respect these requirements of the EIA Directive and not accept the request for permits of artificially separated parts of LTIPs. Legislative amendments explicitly forbidding “salami slicing” of such projects for purposes of EIA and development consent procedures should be introduced.



## 6.6 Inefficient public participation on SEA and EIA procedures

In all of the three compared countries, there are some deficiencies in the possibilities of public participation in the EIA and subsequent development consent procedures. In some cases, the assessment procedures were not even open to the public (Czech Republic D8 case). Another problem is that the proposals for the environmental impact assessment of the alternate routes may be rejected and the results of the EIA procedure not taken into account during the subsequent administrative procedures. The national authorities only have a duty to assess the environmental impacts of the project, not a duty to respect the outcome of the assessment.

In all but one of the case studies of LTIPs attached to this analysis, the EIA procedure was not carried out in compliance with the requirements of the EU law, and the actions taken before the court by the public to review the EIA procedure were refused because of the fact that the results of the environmental impact assessment cannot be reviewed alone but only together with the review of the development consent (or land use permit). Even in the case in which the court revoked the environmental decision, the building permits remained in force (which is the case of the Czech Republic and Poland).

### **Recommendations for the EU authorities:**

The Commission and the European parliament should adopt an amendment of the EIA Directive in which the EU member states will be obliged not only to carry out an environmental impact assessment of the project, but also to act upon the results of that assessment. The EIA Directive should also contain a specific provision according to which the public concerned would have right to challenge the environmental decision (the result of EIA procedure) before the national court directly, instead of waiting for the subsequent decisions (development consent) to be issued.<sup>94</sup>

### **Recommendations for the national authorities:**

Because of the fact that neither the EU law nor the Aarhus Convention prevents the EU member states from adopting stricter legal regulations to protect the environment, the national lawmakers may adopt similar legal regulations as the EU authorities, including the amendments of the codes of administrative justice<sup>95</sup>

## 6.7 Accelerating legislation

In all of the three compared countries, there have been attempts to speed up the processes of permitting traffic infrastructure projects by adopting specific laws, establishing special rules for relevant procedures. In all of the three compared countries, such laws shorten the time limits in which the administrative decisions have to be rendered, reducing possibilities for public participation on the development consent procedures, including time limits for objections or complaints. In all three countries, the specific laws also deviate from the standard expropriation procedures by means of how the property owners can be deprived of their land before the necessary expropriation procedure ends (in the Czech Republic) or even before the beginning of the expropriation procedure

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94 Thus both the EIA directive and the national legal regulations will be in accordance with the Art. 9 Par. 2 of the Aarhus Convention.

95 Including the Czech Act No. 150/2002 Coll., Code of Administrative Justice.



(as is the case of Slovakia and Poland). In Slovakia, the specific law also discharged the National Motorway Company from the duty to perform an economic efficiency assessment of the LTIP.

In the Czech Republic and Poland, some of these specific accelerating laws have been found unconstitutional by the national Constitutional Courts.

**Recommendations for the EU authorities:**

The aforementioned EU authorities should also consider an amendment of the EIA Directive that would explicitly provide the public concerned with the possibility to challenge the final decision in the case of transport infrastructure project, including the right to ask for an injunctive relief.

The existence of the specific accelerating laws may be used by the audit and control authorities (Commission, European Court of Audit) as an indicator of a risk that the EU law on environment may be circumvented or breached in favour of the fast realisation of the large transport infrastructure projects because of the limited time for the economic and environmental assessment of the projects. The risk of an inadequate assessment of the environmental impacts of the project may result in a dead-end investment.

It is also evident that the standard administrative processes of evaluating, preparing, permitting, and building constructions are not working well in practice if they must be circumvented through these special laws.

**Recommendations for the national authorities:**

The national lawmakers should avoid adopting similar acts if their purpose is to circumvent standard legal requirements on planning and building the transport infrastructure projects, including the EIA procedures. As was described in the case studies, such legislation is contra-productive because the accelerated project may turn into a dead-end investment.

# Case studies

**D8 highway Lovosice–Řehlovice section (Czech Republic)**

**R52 high-speed road Pohořelice–Mikulov (Czech Republic)**

**Railway reconstruction in Trenčín (Slovakia)**

**D1 highway Turany–Hubová section (Slovakia)**

**S7 expressway Skarżysko–Kamienna section (Poland)**

**Legal consequences of the rush to implement investments in public infrastructure (Poland)**



# D8 highway Lovosice–Řehlovice section

**Author:** Miroslav Patrik, Friends of the Earth, **Czech Republic**

## 1. Introduction

The D8 highway, leading from Prague through Lovosice and Ústí nad Labem (Czech Republic) and on to Dresden, was passed by the government of Czechoslovakia in 1963. In 1976, the Ministry of Culture declared České Středohoří to be a protected landscape area. The D8-0805 section of the D8 highway passes through this protected area.

In 1993, the Czech government approved the concept for the development of highways and four-lane roads up to 2005. The concept also included the D8 highway “Prague–Lovosice–German State Border” with a length of 92 km and consisting of seven sections (from D8-0801 to D8-0807). In the concept, the D8-0805 section (length 16.41km) “Lovosice–Řehlovice” leading through the protected landscape area České Středohoří, with two short tunnels (270m and 602m) and three large bridges, was supposed to be completed in 2000 for CZK 3 billion.

According to the agreement/contract between the Road and Highway Directorate of the Czech Republic and the selected association of contractors, the D8-0805 section of the highway was supposed to be built between 2007 and 2010 at a cost of CZK 9.9 billion. Currently, the construction is estimated to be completed in mid-2016 at a cost of CZK 15 billion (~ 52% increase).

In January 2009, the Czech Republic asked the European Commission for CZK 8.2 billion to co-finance the D8-0805 section. This request states that the construction was approved in accordance with the law: the effects on the environment were evaluated, there are no ecological hazards (including landslides), the public had a say in the matter, and the construction is economically efficient (calculation implemented in 2008).

In January 2011, the Czech Republic informed the European Commission that the D8-0805 did not have all the requisite planning permissions (cancelled in June 2010) and building permits (the last planning and building permission was issued in August 2012 but in December 2012 the planning permission was cancelled by the court). In December 2011, the Czech Republic retracted its request for CZK 8.2 billion for the D8-0805 section from the Operational Programme Transport because not all of the permits were issued yet.

According to the public, experts, and several public institutions (ombudsman, Supreme Audit Office, courts, etc.), the sanctioning of the D8-0805 section transpired without the legitimate presence of the public, in accordance with the EIA Directive. In addition, not all versions (and corridors) were evaluated in accordance with the law, ecological hazards were underestimated (particularly landslides), and legislation was continually violated (the courts cancelled at least ten writs: e.g. three planning permissions were cancelled and new ones were not issued).

Therefore, the D8-0805 section fails to meet the terms and conditions of the Operational Programme Transport and Article 9 (5) of the Council Regulation No. 1083/2006/EC for drawing financial support from EU funds. According to Act No. 244/1992 Coll., the D8-0805 section was not correctly evaluated by the SEA process or the EIA process. Furthermore, it was not evaluated according to Act No. 100/2001 Coll., which is not in abeyance with the EIA Directive even after novelization by Act No. 93/2004 Coll. and Act No. 436/2009 Coll.



## 2. Mistakes during the selection and evaluation of alternate routes for the highway

During 1994 and 1995, the existing corridors of the highway were not evaluated correctly, according to Act No. 244/1992 Coll. The public was never made aware of this process; therefore, it could not participate or submit suggestions. Three corridors of the D8-0805 section were evaluated with seven versions: in two versions the route led through tunnels. On 20<sup>th</sup> April 1995, the Ministry of the Environment of the Czech Republic recommended constructing a corridor with two short tunnels. Not all ecological risks were considered in detail, e.g. landslides.

During 1995 and 1996, only two versions without a long tunnel were evaluated for the route of the D8-0805 section in the selected corridor (1995). It was done by the EIA process, which followed the SEA process. Several civic associations and citizens were involved in the EIA process. They demanded that the long tunnel routes must be analysed as well. At the same time, independent experts pointed out that the selected corridor from 1995 crosses directly through a large landslide area, so they also recommended the evaluation of a long tunnel version in a different corridor.

The demands of the public regarding the evaluation of different corridors were declined. On 15<sup>th</sup> November 1996, the Ministry of the Environment issued an EIA approval of the C2 corridor version, which had been selected in 1995. This was in conflict with Act No. 244/1992 Coll., because not all versions of D8-0805 routes in all corridors were evaluated with public involvement.

In 2003, the ombudsman affirmed this violation of Act No. 244/1992 Coll., regarding the evaluation of the D8-0805 section's effects in the years 1994–1996. He also proposed to subsequently evaluate the version with the Kubačka tunnel (length 3.44km) according to professional research from 2000. This tunnel is located in a selected corridor from 1995; it avoids the high-risk landslide area (length 2km) as well as a valuable landscape area with biotopes of specially protected species (the highway length is about 0.5km shorter).

In 2012, three verdicts of the regional court in Ústí nad Labem brought about the same verification of the violation of Act No. 244/1992 Coll., which cancelled two planning permissions for the D8-0805 section, with a length of 0.1 km (February) and 4.7km (July, and again in December).

A huge landslide of soil (500,000 cubic meters) on a D8-0805 section under construction in June 2013 can be considered a direct result of this violation of the law. Both the public and independent experts labelled this area as high-risk. They also recommended the construction of a long tunnel that would have avoided the 2km-long landslide area. So far, it is not known how this landslide will be dealt with or how much it will cost.

## 3. The “salami slicing” of the EIA process regarding the issuing of planning permissions

### 3.1 Absence of the environmental impact assessment for the entire route of the D8 highway

The D8 highway has a length of 92km and consists of seven sections. The EIA statement was only issued for three of those sections, according to Act No. 244/1992 Coll.; namely, D8-0803 “Nová Ves–Doksany” (1994), D8-0805 “Lovosice–Řehlovice” (1996) and D8-0807 “Trmnice–German State Border” (1996). Regarding the other four, preparations were made before the approval of the act.





In July 2003 (four years before the start of construction), the ombudsman released a statement regarding the D8-0805 section. In this statement, he proved that the evaluation of the environmental impacts was not done in accordance with Act No. 244/1992 Coll. This statement was not respected. In July 2000, the Ministry of the Environment allowed an exception to Act No. 114/1992 Coll. regarding the passing of the D8-0805 section through České Středohoří. By doing so, the ministry ignored its own SEA statement from June 1999 regarding the concept for the development of infrastructure up to 2010, which evaluated the environmental impacts of the whole route (whole corridor) of the D8 highway from Prague through Lovosice to the German State Border for the first time. The ombudsman also pointed out this fact.

The correct approach should have been to evaluate the impacts of the entire route of the D8 highway in various corridors, e.g.: 1) the highway could lead from Prague through Lovosice and the protected landscape area České Středohoří and on to Ústí nad Labem, 2) the highway could lead from Prague around the protected landscape area České Středohoří to Chomutov. Several corridors of the A17 highway in Saxony were evaluated in a similar way during the 1990s.

### **3.2 Authorization of the D8-0805 section done in parts**

The issuing of tens of building permits for various parts of the D8-0805 section “Lovosice–Řeholovice” and the sequential construction of the highway based on the gradual issuing of building permits, was also a mistake.

According to the original plan, all building permits were supposed to be issued by the end of 2007, and the highway was supposed to be built in three years (completed in 2010). Eventually, the first building permit was issued in 2007 and the last one in 2012, because the investor had not bought all the pieces of land yet. The construction of the highway started in October 2007 and it is projected to be finished in June 2016.

Planning permission must be issued before issuing any building permits. The planning permission for the entire D8-0805 section of the highway (length 16.41km) was issued in 2003. But it was cancelled by the regional court in 2010. New planning permission has not been issued thus far because several building permits were already issued. According to the Building Act, there is no need to issue new planning permission if the building permits already exist.

So far, the D8-0805 section has no final planning permission, which is the condition for issuing the building permit, because all three were cancelled and new ones were never issued. The 16.41km long D8-0805 section received ten partial building permits between 2007 and 2010. One of them was cancelled by the court.

## **4. Deficiencies in public participation**

According to Act No. 244/1992 Coll., regarding the evaluation of environmental impacts, which was replaced by Act No. 100/2001 Coll., a SEA statement was issued on 20<sup>th</sup> April 1995. Only one of the three corridors of the D-0805 section was chosen.

The selection of the corridors was concluded without the involvement of the public, which could not participate in the evaluation of the effects and submit its objections. This was a breach of the law; and it was already criticized by the ombudsman in his statement from 2003, and also confirmed in 2012 by the three verdicts of the regional court in Ústí nad Labem that cancelled two planning permissions.



First, the public objected to the violation of Act No. 244/1992 Coll. in 1996, when there was an ongoing evaluation of the environmental impacts of the previously selected corridor of the D8-0805 section through the EIA process. The Ministry of the Environment rejected these objections as “unsubstantial” claims, and then followed by issuing the EIA statement on 15<sup>th</sup> of November 1996. Once again, the public pointed out the violation of the law to the Ministry in 1999. No rectifications were made.

The public objected to the violation of its rights between 1994 and 1996, and again in 2003 in a lawsuit against issuing the planning permission for the entire length of the highway. In January 2010, the regional court ruled that the objection was unsubstantial. Despite this, the court cancelled the planning permission for different reasons, and a new one was never issued.

The same objection was used by the public between 2008 and 2012 in lawsuits against ten building permits. The courts rejected this objection repeatedly because, according to Czech laws, the EIA statement cannot be sued together with a lawsuit against an issuing of a building permit, but only together with a lawsuit against an issuing of a planning permission. This juristic opinion can be viewed as a fallible one because it is not in accordance with the EIA Directive.

In 2012, the objection against the inability to partake in the evaluation of the environmental impacts enabled two planning permissions, for parts of the D8-0805 section (lengths of 0.1km and 4.7km), to be cancelled. However, the building permits were not cancelled. As a result, the construction of the D8-0805 section continues even without a valid planning permission; and it was repeatedly proven in court proceedings, according to Act No. 244/1992 Coll., that the public could not participate in the evaluation of the environmental impact assessment, and the SEA statement (1995) and the EIA statement (1996) were issued in violation of the law.

## 5. Deficiencies in the court review

In the case of permission of the D8-0805 section, the aggrieved public took legal action and submitted the total sum of twenty-six lawsuits between 2003 and 2012. Eleven were found justified, ten were rejected, and the remaining five lawsuits are still pending (the projected decision is by the end of 2015). In spite of this, it can be said that legal protection is weak because the aggrieved public is rarely given the option of suspensive effect. In the lawsuits concerning the D8-0805 section, the suspensive effect was granted just once – in a suit against the issuing of a building permit.

Therefore, the cancellation of the planning permission for the entire route of the D8-0805 highway section in June 2010 had no practical effect because the court acknowledged two legal action objections but rejected the fundamental objection that claimed the EIA process and the issuing of the EIA statement were illegal (the court confirmed this in 2012 when it cancelled three partial planning permissions). New planning permission was not issued because the building permissions were already issued.

The flaw of the judicial system results in the inability to take legal actions against the EIA process and the issuing of the EIA statement, both together with the suit against the issuing of the planning permission and the issuing of the building act. Even when the EIA statement is in accordance with the law, a professional basis for all the following administrative proceedings (including planning and building proceedings), it is only possible to sue the EIA statement together with the suit against the issuing of the planning permission.

This opinion causes an improper situation: when it is possible to sue the EIA statement together with the suits against the issuing of the planning permission, but at the same time no suspensive effect is



granted in these suits. Therefore, once the planning permission has been issued illegally, and the building permit has been issued illegally, and then the illegally issued planning permission is cancelled and not re-issued, there is no way to rectify the situation. The public has no recourse because it cannot succeed with its lawsuit, even when there is evidence in the verdict that the EIA process and the issuing of the EIA statement were illegal at the beginning of the construction endorsement.

The evidence of improper court procedure is the discussed D8-0805 section. In 2012, the public received three verdicts about the cancellation of the three partial planning permissions. The reason was the illegal evaluation of the effect on the environment, according to Act No. 244/1992 Coll. No recitations were made – no new partial planning permissions were issued because the building permits already existed. And there is no possibility to sue the EIA statement with the suit against the issuing of the building permit.

## 6. Flaws in the rational use of public funds

### 6.1 The risk of low economic efficiency

In 2008, the HDM-4 programme calculated the economic efficiency for the D8-0805 section. It was a mandatory part of the application for the CZK 8.2 billion from the Operational Programme Transport. But this data cannot be considered to be up to date or relevant. Therefore, the D8-0805 section does not even satisfy the second basic condition of the premises of the Operational Programme Transport (the first condition is the environmental impact assessment with public attendance, as well as the evaluation of multiple versions).

According to two studies from 2000 and 2001, the economic efficiency of the D8-0807 section “Trmnice–German State Border” was calculated for 4.6% (discount rate was 6.6%). In order to receive funds from the European Investment Bank (EIB), the D8-0805 section “Lovosice–Řeholovice” and the D8-0807 section “Trmnice–German State Border” (finished in 2006 together with the German highway A17) were merged and their economic efficiency was raised to 8.9% (discount rate was 8%).

In its audit report No. 06/03 from 2006, named “Funds Designated for the D8 Highway Purchase”, the Supreme Audit Office considered the calculations of the economic efficiency to be unconvincing because there was an increase of about 48% in construction expenses for both sections (the limit of economic efficiency according to the construction expenses was 40%, therefore the increase of 48% exceeded the limit). In addition, it was unclear what kind of transportation intensity would be expected in 2010, when the D8-0805 section of the highway was supposed to be completed. Therefore it cannot be deemed conclusive that the socioeconomic analysis proved the economic efficiency of the D8-0805 section “Lovosice–Řeholovice”, as is required by the premises of the Operational Programme Transport.

Since 2007, there has been approximately a 52% increase in construction expenses – up to about CZK 15 billion. At the same time, it cannot be established how high the additional expenses will rise as a result of the huge landslide. It is also unclear when this section will actually be finished (instead of 2010, the middle 2016 has been projected).

### 6.2 A lack of professional evaluation of the landslide hazard

The second important matter has proven an irrational abuse of public funds. It is the underestimation of the risk of the reemerging of the old landslides along the route of a 1.5km long section of D8-0805 between the towns of Dobkovičky and Radejčín. This risk was pointed out by



independent experts as well as by the aggrieved public. As a result, an environmental impact assessment was requested for the highway route with the long tunnel (the version with the Kubačka tunnel), in accordance with Act No. 244/1992 Coll.

For example, regarding the selected route for the D8-0805 section without the long tunnel, RNDr. Jan Čurda from the Czech Geological Survey stated (December 2004): "The terrain is heavily prone to the creation of slippery landslide areas – even in many unexpected places... The mild toe of the slope absolutely cannot secure the stability of the slope, which leads to the creation of the landslide... These are usually activated after a prolonged period of precipitation..."

On the other hand, Professor Ing. Jaroslav Pašek, DrSc. has defended the selected route of the highway since 1996. In his last report (December 2004) he stated: "...the tendency to reroute the highway through the tunnel is not justified because the recurring fears of terrain instability are not legitimate at all. The area is affected by fossil phenomena which are currently stable and the highway route is strictly conducted in a way that it does not disrupt this stability, furthermore it should even secure it."

In June 2013, after a prolonged rainy period, a huge landslide of about 500,000 cubic meters of soil occurred in the area of 200 meters of the unfinished highway. The destruction of 200 meters of railway proved RNDr. Jan Čurda to be right. Professor Jaroslav Pašek was critically wrong. The landslide happened in the high-risk area where the Kubačka tunnel could have been built.

This is astonishing, because several possible versions for the D8-0805 section with long tunnels which could have been realised did exist between 1994 and 2004: 1) between 1994 and 1996 there was a route with a 2.2km long tunnel, 2) in 2000 there was a route with the Kubačka tunnel (length 3.35km), 3) in 2005 there was a route with an altered Kubačka tunnel (length 3.44km). The detailed evaluations of these long tunnels were always rejected with a claim that the construction of the D8-0805 section would be prolonged and the cost would be significantly higher.

The cost of clearing the huge landslide and the realisation of a safe solution for the D8-0805 section with a 2km landslide risk area is yet unknown. Expenses are estimated from hundreds of millions up to a billion Czech crowns. The completion date for the D8-0805 section will be prolonged for about 1 to 1.5 years (the economic efficiency of the D8-0805 section is highly dubious with regard to the current situation).

## 7. Flaws in the transparency of construction financing

Another flaw of the D8-0805 section "Lovosice–Řeholovice" is the tender. Its conditions cannot be considered to be fair due to time and material limitations. As a result, only a few contractors could meet these conditions (mostly contractors that had previous experience with large construction projects).

The tender was won by an association of contractors led by EUROVIA CS, a. s. and Metrostav, a. s. The contract from September 2007 states that the D8-0805 section was supposed to be built by the end of 2009 for the price of CZK 9.9 billion (VAT not included). An association of contractors led by Skanska, a. s. and STRABAG, a. s. did not succeed in the tender. Neither did any foreign contractor, although concerned parties from Germany showed interest in constructing this section of the D8 highway.

In September 2007, Transparency International – Česká republika, o.p.s. (TIC) sent a letter to the Office for the Protection of Competition. The letter concerned an investigation of the Commission



“Execution of the Construction 0805 Lovosice–Řeholovice, D8 highway”. The letter was sent because a code of equal treatment of the contractors that were interested in the D8-0805 section construction might have been violated.

In its letter, TIC mostly criticised the very short time limit for a tender submission (45 days which is the shortest possible time limit). These conditions may have been severely discriminating for the foreign contractors due to the need for a longer time period for translation and documentation study.

The second objection of the TIC was against setting discriminating conditions. These conditions also limited the foreign contractor. For example, these requirements included: to prove high revenue regarding construction jobs for the last term, long operative experience in transportation construction including tunnel construction, etc. It also included the requirement of providing detailed information about the number of construction equipment and machines, their utmost age and minimum output, etc. Conditions defined in such a way create the impression that they can only be fulfilled by specific Czech contractors, known by the investor.

It is shocking that the tender was concluded even before (2007) all the building permits were issued (2007–2012). The contractors could not have known the extent or the complexity of the construction, or all related financial risks.

In February 2008, the Office for the Protection of Competition rejected TIC's objection. It was rendered unsubstantial because the investor had allegedly proceeded by the law and no discrimination had occurred.



# R52 high-speed road Pohořelice–Mikulov

**Author:** Miroslav Patrik, Friends of the Earth, **Czech Republic**

## 1. Introduction

The project consists of the construction of a four-lane high-speed road (23.1 km), which is supposed to become a section of the Brno–Vienna corridor (TEN-T priority axis No. 25 Gdansk–Brno/Bratislava–Wien). The realisation of this project would damage unique southern Moravian landscape areas (Pálava), affecting three Natura 2000 Sites (SCI Musovsky luh, SPA Stredni nadrz vodniho dila Nove Mlyny, and SPA Palava).

The realisation of R52 would also lead to an increase in transit traffic. This would also affect other areas like the municipalities southwest of Brno that are already overburdened by noise and air pollution caused by existing traffic, mainly from the D1 (Prague–Brno) motorway.

There is an alternate possibility of a highway connection between Brno and Vienna, which would make use of the existing D2 (Brno–Bratislava) motorway and the Břeclav bypass, the construction of which is also currently planned. The connection of this alternate route with the planned Austrian A5 highway would also be possible.

A number of administrative procedures concerning permits necessary for the realisation of the R52 road have started since 2005, when the EIA opinion for this investment was issued. However, apart from four decisions on exceptions from conditions for protected species (two of them later cancelled by the court), no valid permit has been issued. In addition, the court annulled two regional and two local land use plans that included the R52 road. The official authorities, however, continue to promote the project in various policies and strategic documents.

## 2. No evaluation of alternatives

A positive EIA statement for the R52 high-speed road was issued in 2005. In the EIA process, while partial “sub-variants” (all in the Pohorelice–Mikulov corridor) have been assessed, there was no assessment of a practical alternative for a highway-type connection between Brno and Vienna (see above). This is in conflict with Article 5, Paragraphs 1 and 3 of the EIA Directive in connection of Point 2 Annex IV of this directive.

In 2006, SEA was carried out for a land use plan of “Břeclavsko district”, including the corridor of the planned R52. Again, no alternatives to this route were assessed. The Supreme Court cancelled the land use plan in 2009. In 2011, another land use plan for the entire South Moravian Region was adopted, again containing the R52 corridor with no assessment of alternatives. In 2012, the Supreme Administrative Court also abolished this land use plan.

The failure to assess the alternatives of a Brno–Vienna highway connection are even more serious with respect to the fact that realizing the R52 would affect SCI Mušovský luh and the bird habitat areas of Pálava and Nové Mlýny. Non-assessment of the alternatives represents a breach of Art. 6, Paragraphs 2, 3, and 4 of the Habitat Directive, and Art. 4, Paragraph 4 of the Bird Directive, pursuant to which, a project with negative implications on NATURA 2000 sites can only be carried out under the condition of the absence of alternative solutions (that would have less negative impacts on these sites).



### 3. “Salami slicing” of the project for development procedural purposes

Despite the court’s abolition of the aforementioned land use plans, the investor continued in the preparations of the R52 high-speed road. This investor divided the project into four parts for the purposes of permitting procedures. Such artificial “slicing” of an infrastructure project into small parts represents a typical miscarriage of law, whose aim is to obtain at least some permits as quickly as possible and to begin construction of the road. The contested sections of road are decided upon later, and “logically” the authorities will almost never refuse to issue permits for them when parts of the road have already been built.

In the R52 case, although the first request for a partial permit was submitted in 2007, no section of the road has been approved so far. Approval is impossible in the situation of the non-existence of a regional land use plan.

### 4. Failure to assess all aspects of the project, specifically its indirect effects (Article 3 of EIA directive)

The impact of the road construction and the generated traffic on the overburdened area southwest of Brno has not been assessed. The strain on this region would further increase in the event of the realisation of other currently planned transport structures, particularly the Kuřim–Třebíč section of the high-speed road R43 and the extension of the D1 motorway. Thousands of people in many villages and Brno city districts would be exposed to even higher traffic volumes as a result of the additional transport structures, including the R52 roadway.

The impacts of the project have not been assessed in combination with the impacts of the other traffic structures mentioned. In addition, the heavier traffic interference of the Lednice–Valtice UNESCO World Cultural Heritage Site as a result of building R52 has not been taken into account. This is contrary to Articles 3, 5 and Annex IV of the EIA Directive, pursuant to which the assessment must identify, describe and assess in an appropriate manner, both the direct and indirect effects of a project on human beings, fauna, flora, soil, water, etc.

On a more general level, similar deficits constituted the main reasons for the Supreme Administrative Court’s abolition of the South Moravian regional land use plan. The court concluded that the impacts of the planned traffic infrastructure projects, including R52, have not been properly assessed, taking into account their interrelationships.

### 5. Inefficient public participation – no transborder assessment

Since the R52 would be part of the connection between Brno and Vienna, the project must have, in the sense of Article 7, Paragraph 1 of the EIA Directive, significant effects on the environment of a neighbouring EU Member State – Austria. From the side of the Czech Ministry of Environment, the EIA process has not been carried out as a transborder assessment and did not comply with the requirements of the EIA Directive on transborder projects (e.g. Article 7, paragraphs 3 and 4).

### 6. Denial of access to justice against outcomes of EIA

A local NGO and a landowner that would be affected by construction of the road filed a lawsuit against the EIA opinion. The Administrative Court refused to deal with it due to the non-binding





character of the opinion under Czech law. It can be considered as a breach of Art. 10a (now 11) of the EIA Directive (as well as Art. 9.2 of the Aarhus Convention).

The court argued that to meet the requirements of the aforementioned provisions, it is sufficient that subsequent development consent is subject to a judicial review. This argument ignores the fact that, although the EIA opinion is not binding, it is an “act subject to the public participation provisions” of the EIA Directive. Moreover, a judicial review of the development consent cannot be considered as “timely” in the Czech legal system.

In addition, another lawsuit has been filed against the screening decision concerning the planned accompanying facility of the R52 project (a “rest area”), which falls under the scope of Annex II of the EIA Directive. The outcome of the screening procedure was not to carry out the complete EIA procedure. This lawsuit has been dismissed for the same reasons as the one aiming to review the EIA final statement for the R52 roadway. In its findings in case ACCC/C/50 (Czech Republic), the Aarhus Convention Compliance Committee has concluded that, by not providing access to review procedures concerning EIA screening decisions, The Czech Republic fails to comply with Art. 9(2) of the Aarhus Convention.

## 7. Irrational use of public resources

The R52 project is not only questioned by its opponents for its environmental impacts, but also for its economic inefficiency and uselessness.

The Ministry of Transport has prepared a draft of a concept called the General Plan of Traffic Infrastructure Development in 2005. This concept also contained an analysis proving that the R52 high-speed road is the least needed highway-type road planned in the Czech Republic. The “General Plan” has never been finalized or adopted. The alternative solution of the Brno–Vienna highway connection, including the bypass of the city of Břeclav in sufficient capacity, was recommended by a number of independent studies of traffic experts.

The Supreme Audit Office, in its Control Report No. 08/26 of 2009<sup>96</sup>, has come to the conclusion that the alternatives of the R52 project have not been assessed properly. It also concluded that the R52 project itself is not an efficient form of transportation taking into account the estimated traffic intensities, as well as from an economic point of view.

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<sup>96</sup> <http://www.nku.cz/kon-zavery/K08026.pdf>



# Railway reconstruction in Trenčín

**Author:** Miroslav Mojžíš, Friends of the Earth (CEPA), Slovakia

The mentioned railway part is to be reconstructed to serve trains at the maximum speed of 160 km per hour. The critical point is the centre of the town, where there were two variants discussed – the so-called null variant, which would copy the existing railroad, and the second variant would require shifting the track and building a new bridge over the river Vah.

Neither Environmental Impact Assessment from 2002 nor other technical and economical analyses focused on an alternative variant, which would copy the highway and bypass the town. **Citizens of Trenčín also demanded the assessment of this variant**, however, neither the variant on the existing railroad, nor the bypass were as assessed as the variant with the shifting and the new bridge. According to an additionally made noise assessment, there will be an increase in noise in some localities close to the track even if noise reduction measures are constructed.

The then management of the town (under Žiška as the mayor) was against the variant through the town favouring the null variant. After elections in 2002, the management changed (Liška elected as mayor) and so did also the political decision. **Without any further arguments**, the town changed its initial disapproving attitude and agreed with the variant through the town. Some citizens assume that the reason behind the change is the interconnection of local firms with political parties. Company of another of the former mayors, Celler (2004–2010), who had arranged for all necessary documents (such as the change in the land use plan, planning permission) now provides engineering services for the Railways of the Slovak Republic (ŽSR).

Citizens protested and the petition was signed by more than 10 000 people (Trenčín has 55 thousand inhabitants). **Citizens** required new assessment of the railway track as well as the evaluation of other two variants: keeping the status quo and transferring the track beyond the city limits close to the highway D1. Their requirements were not considered. Moreover, in EIA as well as in other permission proceedings they **were either excluded from the proceedings or their requirements were rejected**.

It was also not possible to see the project. **The ŽSR denied access to project documentation even to the management of the town** as late as in 2011 after Rybníček was elected mayor.

## Public procurement<sup>97</sup>

Nevertheless, the variant through the town was finally approved and in late 2009 ŽSR announced public procurement for the 12 km long track from Zlatovce to Trenčianska Teplá. Skanska offered the lowest bid in the amount of almost EUR 201 million without VAT. The second lowest bid was offered by TSS Grade in the amount of approximately EUR 245 million without VAT.

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<sup>97</sup> <http://www.vyvlastnenie.sk/clanok/a/europsky-sud-po-myte-preveri-zeleznice/>

<http://www.vyvlastnenie.sk/clanok/a/modernizacia-zeleznice-je-ohrozena/>

<http://spravy.pravda.sk/ekonomika/clanok/248412-skansku-opaet-vylucili-zo-zelezniceho-tendra/>



Despite the lowest price offered Skanska did not win the tender due to alleged inconsistency in the length of practice of construction engineer and their certificates from The Slovak Chamber of Civil Engineers Public. Public Procurement Office (UVO) asked to include Skanska into tender again, so the procurement was repeated. Again, ZSR excluded Skanska with their lowest bid; Skanska declared it was discriminatory and suspected manipulation in the second round of evaluation. In 2012, Skanska demanded provisional remedy from UVO, so that ZSR cannot conclude a contract with TSS Grade. UVO did not issue the provisional remedy and ZSR contracted the TSS Grade. Also, Skanska objected the second rejection, but UVO turned the objection down. Therefore, Skanska took legal action against UVO to inspect the legality of its decision.

Despite the mentioned issues, ZSR began reconstructing the rail track with TSS Grade, which has already executed one third of the whole reconstruction. The point is that, the whole reconstruction is financed through an OP Transport under the priority axis 1 by The Cohesion Fund. In August 2013<sup>98</sup>, Ministry of Transport and ZSR signed The Contract for the Non-Repayable Financial Contribution. Some grant was already paid and the reconstruction began.

Skanska filed a complaint to the Brussels. In January 2014, European Commission included the case into a so-called EU Pilot, which inspects deficiencies related to observance of the EU regulations.<sup>99</sup> EC has five months for the investigation.

The worst case scenario is that if Slovakia does not remove or clarify these deficiencies, an infringement process can begin. The result might be – EC does not support the reconstruction and the spent subsidy must be returned and secondly, Skanska would have to be repaid for lost profits – all from the Slovak budget.

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<sup>98</sup> <http://bit.ly/1hl2s99>

<sup>99</sup> <http://ekonomika.sme.sk/c/7068748/brusel-vysetruje-tender-na-obnovu-zeleznice-pri-trencine.html>



# D1 highway Turany–Hubová section

**Author:** Miroslav Mojžíš, Friends of the Earth (CEPA), Slovakia

The Slovak Motorways PPP D1 Phase I project in Slovakia sought to link the economically wealthier western part of Slovakia with the less developed eastern part.

In 2007, Slovak government approved a PPP approach to construct the highway in its Decree 753/2007. Subsequently, the Slovak parliament **adopted Act 669/2007 on One-off Extraordinary Measures in Preparation of Selected Motorway Constructions, which was aimed at creating especially favourable conditions for private investors engaged in building highways under PPP schemes.** Besides several deviations from the standard processes of preparing, licensing and building constructions subject to general legislation<sup>100</sup>, Act 669/2007 made highway and expressway construction legal even **on lands that had not been bought out or expropriated.** (The investor may settle the property relations of lands where the motorway is built even after the construction is finished and formally approved. In practice, this allowed for the possibility that the property owners would be compensated only several years after the motorway has been opened to traffic. On November 26, 2008, the Slovak parliament adopted an amendment<sup>101</sup> to the Act – it introduced new measures, which further exacerbated the existing problems, and it widened the scope of the Act to all the motorways and expressways.) **Such practice violates the right to the peaceful enjoyment of possessions guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and its protocols, which is the basic norm of the EU in the area of human rights.**<sup>102</sup>

The very same Act 669/2007 discharged the National Motorway Company (NDS) of **any obligation to perform the so-called state expertise.** The state expertise is a tool to assess economic efficiency and cost justification, and is obligatorily performed for every public work with costs higher than EUR 6.64 million (then SKK 200 million), including motorways.

The European Investment Bank (EIB) approved a loan for the project in December 2008, however by summer 2010 it had still not received clearance for the project by the European Commission. In April 2010, the EBRD approved a EUR 250 million loan for the project, with the remainder of the financing expected to come from eighteen commercial banks. However, the shortcomings in the project made the project subject to considerable controversy in Slovakia and eventually led to the collapse of the PPP.

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<sup>100</sup> Act 669/2007 for instance limits verbal proceedings at highway construction licensing, shortens legal persons' periods for appealing against land-use and construction permits, allows the 'state expertise' assessment to be omitted etc.

<sup>101</sup> <http://www.nrsr.sk/Dynamic/Download.aspx?DocID=306995>

<sup>102</sup> Article 6 of the Treaty on European Union – the Amsterdam Treaty:

1. The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles that are common to the Member States.
2. The Union shall respect fundamental rights as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law. (...)



## Environmental Impact Assessment

In the case of linear transportation projects, the act on EIA counts on their appraisal in two phases: first, appraisal of an initial study for the whole section of a linear transportation project which contains a variant design solution of the proposed route and the selection of an optimal corridor; and second, appraisal of particular partial sections. **However, such two-phase appraisal has never been carried out in Slovakia and only particular partial sections have ever been appraised.**

Alarmingly, it should be pointed out that even the **result of this curtailed EIA was not respected by NDS** as is the case with section Turany–Hubová.

### Turany–Hubová section

The EIA recommended Variant B1, which bypassed the village of Šútovo in the “Korbelka” tunnel. This variant was also declared as the most environmentally acceptable by the Ministry of Environment of the Slovak Republic in 2002. In 2005, Ministry of Transport, Post and Telecommunication of the Slovak Republic came up with a new variant without any previous discussion and without appropriate EIA assessment<sup>103</sup>. In 2007, NDS adopted the new variant, which meant replacing the 5.7 km long “Korbelka” tunnel with three shorter ones (“Šútovo” – 400 m, “Malá Fatra” – 280 m, and “Rojkov” – 1.550 m), while the motorway should cross the village of Šútovo. For this variant, now named B2, a construction permit was issued by the respective authority in Ružomberok, which thus **disrespected the results of the EIA.**

The approved surface route threatens characteristic habitats in the area of Šútovo - Rojkov (Malá Fatra, Veľká Fatra and Váh River Special Areas of Conservation), including migratory and wintering water birds, bats, amphibians and large carnivores. The impacts on Natura 2000 sites by surface route in the Turany–Hubová section was assessed in a study by Peťková & Mika (2007), which was ordered by the Ministry of Transport, Post and Telecommunication. However, this study has been strongly criticized by subsequent independent assessments (e.g. Topercer et al 2009, Volf 2010), as being seriously flawed and based on incomplete, methodically incorrect and misinterpreted sources of information. For example, it does not examine the Rojkovske raselinisko mire separately, in spite of its unique characteristics, omits to mention several protected habitat types, and lays out only a few, weak mitigation measures. Moreover, the decisions taken by the relevant Slovak authorities show that they have not adopted any compensation measures for the project and that the mitigation measures have been implemented only partly.

According to Topercer<sup>104</sup>, some impacts of the approved variant would violate the integrity of relevant sites of European importance (Malá Fatra, Veľká Fatra and Váh) as well as the overall coherence of the Natura 2000, thus also obligations requested by the Habitats Directive.

The change of variants from B1 to the preferred B2 was justified only very generally by lower costs, but a comparison of the financial effectiveness of both variants has never been made public. The inhabitants from the affected communities have made it clear that they do not agree with the construction under Variant B2, and that they refuse the buy-out or expropriation of their properties.

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<sup>103</sup> <http://bit.ly/1fBq796>

<sup>104</sup> <http://bit.ly/1pYl2hC>



The project was due to be financed by both the EBRD and the EIB, but as a result of civil society requests the European Commission looked into the project and was not able to give clearance for the EIB to proceed with its loan. Financial close for the project was repeatedly delayed and in summer 2010, the new Slovak government, which had in any case criticized the project, decided not to grant any further extensions for the financing deadline.

European Commission asked the Slovak Republic for appropriate assessment of the project according to the Habitats Directive 92/43/EHS, which the Slovakia repeatedly and unsuccessfully (more than seven attempts) submitted.

In 2012, additional voluntary impact assessment was prepared, which is according to Topercer not appropriate according to the Habitats Directive, article 6.3.

Nevertheless, discussions with the European Commission resulted in the end in an approval from European Commission at the end of 2012 after it had accepted the mitigating measures suggested by Slovak authorities. However, in April 2013 there was a massive landslide near Šútovo, which as a result made NDS demand new documents and required a more detailed geological survey with the inclusion of the Korbělka tunnel, as it was initially demanded by the civic associations. In addition, the Slovak Republic has commissioned the Transport Research Institute in Žilina to make a new analysis with the aim to compare the three variants. The institute has allegedly supported the variant through the Korbělka tunnel, however the research is not publicly available.

In 2013, NDS announced public procurement to supply all types of project documents. At the moment, building permit process is going on. NDS has probably due to supposed lower costs accepted the variant with two tunnels, the Rojkov tunnel and the Havran tunnel. The Korbělka tunnel variant is not mentioned.

The result is that 14 years after technical study had been submitted, in 2000 the construction of the highway has not even started. Had the NDS preferred the environmentally more acceptable variant as it was suggested not only by environmentalists, but more over by the Ministry of Environment of the Slovak Republic, the highway section Turany–Hubová would have been already built and authorities would have saved financial resources used for further assessments and mitigating measures.<sup>105</sup>

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<sup>105</sup> See also: <http://bit.ly/1dQX1UU> and <http://bit.ly/1fP9F1I>



# S7 expressway Skarżysko–Kamienna section

**Author:** Przemek Kalinka, CEE Bankwatch Network, **Poland**

This case study concerns a short section of the S7 expressway in the northern part of the Świętokrzyskie region in Poland (between the city of Skarżysko-Kamienna and the northern boundary of the region). The S7 expressway will serve as the fastest high-quality road connection between Warsaw and Krakow, two largest Polish cities. At this point, only a few sections of the motorway exist.

The planned section north of Skarżysko-Kamienna entails, among other elements, a road junction and exit from the motorway, named “Skarżysko-Północ”. This particular junction constitutes a threat to the natural values of the area, which serves as an ecological corridor for many protected animal species, including large mammals such as the wolf and the moose. The junction would be located in a forest and over a small river. The justification for its construction is weak – there are enough other exits from the expressway nearby – the city of Skarżysko-Kamienna itself (50 thousand inhabitants) will be served by two others.

Plans regarding the investments have been monitored for many years by a Polish environmental NGO, the Association “Pracownia na rzecz Wszystkich Istot”, which is actively monitoring the development of transport infrastructure in view of its impact on ecological corridors. The main threats to nature which have been identified due to the planned investment would be:

- destruction of a habitat of several rare butterfly species, protected by national and EU law;
- harmful impact on groundwater resources;
- blocking an important ecological corridors, as not enough animal passages have been foreseen.

The negative environmental impact of this expressway section could be to a large extent mitigated by resignation from construction of the “Skarżysko-Północ” road junction and by designing extra animal passages.

The first environmental decision for the investment was issued by the Regional Director for Environmental Protection on 30 October 2008 (including the controversial road junction). However, after an appeal from the Association, the decision was overturned by the General Director for Environmental Protection in 2010. The case ended up in administrative courts – the Regional Administrative Court ruled in favour of the road agency in 2012, however, the Supreme Administrative Court found deficiencies in the administrative process and finally, in February 2013, the environmental decision was revoked.

Nevertheless, the consent regarding the realisation of the investment remained in force (even though this is a decision which is issued later than the environmental decision). The regional road authority prepared a new environmental report and applied for an environmental decision. The EIA report was published in early 2014. Unfortunately, in terms of the planned investment, the environmental impact would stay the same as in the revoked environmental decision. This shows the





inability of the road agency to learn from its own mistakes and to modify the scope of the investment by dropping the plan to construct the road junction in the most sensitive natural area.

The case could be an interesting precedent – if the expressway section is further pushed forward according to the plans of the regional road agency, it would unfortunately show that the authorities are not ready to admit that the approach to the planning of the investment has been wrong from the beginning. The case is likely to end up as a complaint to the European Commission.

The other interesting precedent is the staying in force of the realization consent, even though a superior decision – the environmental decision – was revoked as a consequence of the ruling of the Supreme Court.

Implementation of numerous transport projects in Poland, most of which are co-financed by EU cohesion policy, has in general led to improvement in the quality of EIA procedures. The 16 regional directorates for environmental protection and the General Directorate for Environmental Protection were created in 2008, for the first time allowing enough capacity of public institutions to deal sufficiently with the EIA process. The same act that brought those institutions to life provided modifications in the Polish EIA procedures in order to comply with the EIA directive. The well-known case of the Rospuda valley, where environmentalists managed to change the routing of a planned road bypass in order to avoid destruction of a valuable Natura 2000 site, gave an impression that the transport investments in Poland will from that point be planned in a way which preserves the environment to the extent possible.

However, the case of the S7 expressway section in the vicinity of Skarżysko-Kamienna is a proof that civil society's monitoring of large transport investments is still necessary, as authorities tend to disregard EIA legislation and nature protection requirements, if those require a significant modification of the investment which had already been planned.



# Legal consequences of the rush to implement Investments in public infrastructure

**Author:** Przemek Kalinka, CEE Bankwatch Network, **Poland**

The 14<sup>th</sup> UEFA European Championship in football (referred to as Euro2012) was hosted by Poland and Ukraine, taking place between 8 June and 1 July 2012. The common bid submitted by Poland and Ukraine to host the event was selected by UEFA's Executive Committee on 18 April 2007. Since that date, preparation of the infrastructure necessary to host the championships became a political priority for the Polish government. Most of this infrastructure needed to be built from the beginning – in Poland, this included three new stadiums (in Warsaw, Gdansk and Wroclaw) plus one totally reconstructed stadium in Poznan.

Apart from stadiums and base camps for football teams, a big investment effort concerned transport infrastructure. Most of the newly built motorways and expressways, as well as modernized railways or airports would have been realized anyway, as the preparations for the event coincided with implementation of the 2007–2013 EU cohesion policy funding in Poland. However, huge pressure could be observed in the public opinion, mass media and in the political arena to speed up the transport investments in order to finalize them before visitors from all over Europe came to visit Poland for the championships in June 2012. The country's image was at stake, as before its accession to the EU, Poland had been known for its poor transport infrastructure.

This public and political pressure translated into a legislative initiative aimed at making the investment processes faster by reducing the threat of delays. Indeed, most large infrastructure investments in Poland, including those financed from EU Cohesion Policy are commonly delayed in relation to the original schedules. For this reason, in particular in relation to road investments, several consecutive Special Acts were prepared and passed in Poland, which removed or shortened certain steps of the standard administrative procedure related to infrastructure investments. The Euro 2012 Special Act is one such example, and this time its justification was the need to speed up investments in order to successfully host the football event.

The Special Act of 7 September 2007<sup>106</sup> and its amendment in 2009 included several provisions allowing the investment process to be prepared faster. In 2009, the list of concrete investments<sup>107</sup> was published in a governmental decree, including stadiums, base camps, railway lines and stations, roads, electricity lines and even elements of the wastewater treatment infrastructure for the city of Warsaw. In particular, the key provisions of the Special Act concerned a faster expropriation process. The expropriation would now be an automatic consequence of an administrative decision regarding the location of an investment which was related to the Euro 2012. In addition, the Special Act applied an "immediate applicability" clause to all administrative decisions (including environmental decisions)

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<sup>106</sup> <http://bit.ly/1pWxrOa>

<sup>107</sup> <http://bit.ly/1hkVp04>



concerning the Euro 2012 investments and shortened the standard periods allowed for submitting complaints to the decisions, as well as for the examination of those complaints.

The public pressure and legislative changes did not prevent significant delays in investments considered as key to the organization of the Euro 2012 Championships. In particular, the prestigious A2 motorway, the first ever high-quality road connection of Warsaw with the western border and countries of the EU, was opened to traffic on 6 June, two days before start of the championships. The motorway between Warsaw and Lodz had not been completed by that time, however, the government introduced legal provisions which allowed opening the road even though some elements of the infrastructure were missing (including the last layer of asphalt as well as environmental protection elements such as anti-noise screens. In spite of this the A2 was classified as “passable” and traffic was allowed, although speed limits were introduced. After the Euro 2012, it took several more months to fully finalize the investment.

As many planned investments were not finished by June 2012, and the provisions of the Special Act were widely applied, the government attempted to extend the Special Act, although the original motivation – the European Football Championships – had ended. An amendment allowing this was prepared and passed through Parliament in October 2012. However, before signing the modified Special Act, the President of Poland requested an opinion of the Constitutional Tribunal. The amendment specified that the provisions of the modified Special Act would have been in force since 8 June 2012 (the first day of the Euro 2012).

On 6 March 2013, the Constitutional Tribunal issued a ruling<sup>108</sup> which confirmed that provisions of the amended Act are in violation of Art. 2 of the Polish constitution (stating that Poland is a democratic country governed by rule of law and social justice). In particular, the Tribunal considered that the amendment is unconstitutional because it would have an *ex post facto* effect.

The case of the Polish Special Act concerning the Euro 2012 Championships, and in particular the attempt to prolong its application after the championships took place can be a good example of how the rush to implement infrastructure projects can actually complicate the situation instead of simplifying the conditions for the investment. In order to make the investment processes smoother, long-term solutions should be sought, instead of ad hoc Special Acts. In any case, the right of citizens to meaningfully participate in environmental procedures or to be allowed to negotiate the conditions of the expropriation should not be compromised – whether or not a prestigious sport event is being prepared.

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<sup>108</sup> <http://bit.ly/QI0FFY>