

Philippe Maystadt, President
European Investment Bank
100 boulevard Konrad Adenauer
L-2950 Luxembourg

Dear President Maystadt,

The European Investment Bank is appraising an application for the financing of several highway sections that the Slovak government has decided to build under a public-private partnership programme. We would like to inform you about the troubling implications of these projects. **If the EIB decides to finance them, it will directly contribute to the violation of international conventions related to fundamental human rights and the environment, and to the neglect of the fundamental principles of economic planning.**

On July 8, 2008, the EIB announced on its website¹ that the Ministry of Transport, Post and Telecommunications of the Slovak Republic (MTPT SR) had applied for financing for selected D1 highway sections that are to be built under a public-private partnership (PPP) scheme. The EIB incorrectly states on its website that the potential beneficiary of the planned credit is MTPT SR and not the private companies that will win the concession tender for the construction and operation of the D1 highway sections Dubná Skala – Turany, Turany – Hubová, Hubová – Ivachnová, Jánovce – Jablonov and Fričovce – Svinia.

In fact it is the National Motorway Company, Inc. (NDS)² which formally acts as the investor. According to information from MTPT SR, however, the beneficiary of the credit will be the private company that wins the construction and operation concession tender. The ministry has further informed us³ that it is also negotiating cooperation with the EIB in financing further PPP projects for motorway and expressway construction and operation.

The use of the PPP approach was approved by the Slovak government on September 5, 2007, in its Decree 753/2007. After a proposal from the government, the Slovak parliament subsequently adopted Act 669/2007 on One-off Extraordinary Measures in Preparation of Selected Motorway Constructions. This act is aimed at creating especially favourable conditions for private investors engaged in building highways under PPP schemes. It relates only to those motorway and expressway sections that are explicitly mentioned in it, - exactly the same ones as those the government has decided to build under PPP. This list also includes the sections proposed for EIB financing.

¹ <http://www.eib.org/projects/pipeline/2008/20080070.htm>.

² NDS is a joint-stock company under the full control of MTPT SR and is one-hundred-per-cent-owned by the state.

³ E-mail communication with MTPT SR from August 19, 2008.

Besides several deviations from the standard processes of preparing, licensing and building constructions subject to general legislation⁴, this act makes highway and expressway construction legal even on lands that have 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 allows for the possibility that the property owners will be compensated only several years after the motorway has been opened to traffic.

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.⁵ According to several legal experts, Act 669/2007 is also in stark contradiction with the Constitution of the Slovak Republic. For this reason, **a proposal to abrogate the provisions of Act 669/2007 has been filed with the Constitutional Court of the Slovak Republic.** The court has not decided in this matter so far.⁶

The very same Act 669/2007 discharges 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 SKK 200 million (approximately EUR 6.64 million), including motorways. **If the state expertise is not carried out for the PPP motorway construction projects, the government will possess no legal instrument to influence the costs of these investments.**

We are drawing attention to this shortcoming especially with regard to the recent case of cartel agreements among construction companies engaged in motorway construction in Slovakia.

On December 23, 2005, the Anti-monopoly Office of the Slovak Republic issued a ruling in which it stated that “seven construction companies coordinated their bids in a public tender for construction of a D1 motorway section, thereby breaking the law on competition.”⁷ Among the seven companies convicted of a cartel agreement are Skanska, Doprastav, and Mota-Engil which – as members of two consortiums – are bidding for the D1 motorway section construction for which financing is sought from the EIB credit.

In view of these precedents, the state expertise would represent a significant tool to prevent artificial price increases. Taking into consideration that in the past cartel agreements have been documented and that some of the companies involved in the agreement are now serious

⁴ 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.

⁵ 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.

(...)

⁶ The proposal is available on the Constitutional Court's website:

http://www.concourt.sk/podanie.do?id_spisu=109435.

⁷ <http://www.antimon.gov.sk/article.aspx?c=12&a=2032>.

bidders for the concession raises grave concerns about the risk of financial inefficiency of the D1 motorway construction.

In terms of the motorway crossing Slovakia from west to east, another variant also exists, leading through the centre of Slovakia, south of the variant being carried out now. **This alternative motorway routing would likely be less costly due to the less demanding landscape configuration, and would also serve a slightly higher number of inhabitants.**

However, these two corridors have never been compared either in terms of their economic efficiency, or in terms of their impacts on the environment. This is despite the fact that Act 127/1994 on Environmental Impact Assessment (EIA), which was in force already in the preparation period for the D1 motorway sections that the EIB is considering financing, requires the examination of strategic transport documents.

In addition, and 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 is not being respected by NDS. As an example, we refer to the practice of NDS and licencing authorities when deciding on the motorway routing for the section Turany – Hubová.

The EIA recommended Variant B1 which bypassed the village of Šútovo in the “Korbel’ka” tunnel. Nevertheless, in 2007 NDS decided on a change – replacing the 5.7 km long “Korbel’ka” 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, which thus disrespected the results of the EIA.

This change is being justified only very generally by lower costs but a comparison of the financial effectiveness of both variants has never been made public, if it ever existed. 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. Regarding the disagreement of affected inhabitants with the buy-out of their lands for the changed motorway routing, we can realistically expect that the provisions of Act 669/2007 (as outlined above) will be applied in Šútovo, and that construction will be launched on private properties without any compensation for their owners.

For these reasons detailed above, we would ask the EIB not to finance the construction of PPP projects on the D1 motorway, unless the serious flaws stated in this letter are eliminated. The EIB definitely should not finance projects that violate the rights guaranteed by basic European legislative documents, such as the Amsterdam Treaty and European Convention for the Protection of Human Rights and Fundamental Freedoms. The EIB should not provide finance to companies which break competition rules and which have been convicted of operating under cartel agreements. The EIB should pay greater attention to the environmental impacts of the projects that it finances and should not finance projects which ignore the results of environmental impact assessments.

We would be very grateful to receive your reaction and we look forward to hearing from you. Should you require further information, we will be happy to provide it.

Yours sincerely,

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National Motorway Company
European Commission, DG Environment
European Commission, DG Justice, Freedom and Security
European Commission, DG Energy and Transport
European Commission, DG Regional Policy
European Commission, DG Economic and Financial Affairs