



## EUROPEAN COMMISSION

### Complaint – Infringement of EU law

Before filling in this form, please read 'How to submit a complaint to the European Commission':  
[https://ec.europa.eu/assets/sg/report-a-breach/complaints\\_en/](https://ec.europa.eu/assets/sg/report-a-breach/complaints_en/)

All fields with \* are mandatory. Please be concise and if necessary continue on a separate page.

#### 1. Identity & contact details

	Complainant 1 *	Your representative (if applicable)
Title* Mr/Ms/Mrs		
First name*		
Surname*		
Organisation:	<b>Integra Construction KZ limited liability company</b>	Advokátska kancelária SEMANČÍN & PARTNERS s.r.o., Law firm
Address*	ul. Kunaeva 12/1 VP-16, district Jesil	Vajnorská 100/A
Town/City *	Astana	Bratislava
Postcode*	010000	831 04
Country*	Republic of Kazakhstan	Slovak republic
Telephone		+421 910 909 919
E-mail		<a href="mailto:jsemancin@semancin.sk">jsemancin@semancin.sk</a>
Language*	English	
Should we send correspondence to you or your representative*:	<input type="checkbox"/>	<input checked="" type="checkbox"/>

	Complainant 2 *	Your representative (if applicable)
Title* Mr/Ms/Mrs		
First name*		
Surname*		
Organisation:	<b>TODINI COSTRUZIONI GENERALI S.P.A.</b>	Advokátska kancelária SEMANČÍN & PARTNERS s.r.o., Law firm
Address*	Via Aurelia 477	Vajnorská 100/A
Town/City *	Rome	Bratislava
Postcode*	00165	831 04
Country*	Italy	Slovak republic
Telephone		+421 910 909 919
E-mail		<a href="mailto:jsemancin@semancin.sk">jsemancin@semancin.sk</a>
Language*	English	
Should we send correspondence to you or your representative*:	<input type="checkbox"/>	<input checked="" type="checkbox"/>

#### 2. How has EU law been infringed?\*

	Authority or body you are complaining about: Slovak republic
Name*	<b>Railways of the Slovak Republic</b>
Address	Klemensova 8
Town/City	Bratislava
Postcode	813 06
EU Country*	Slovak republic
Telephone	
Mobile	
E-mail	

	Authority or body you are complaining about: Slovak republic
Name*	Office for Public Procurement
Address	Ružová dolina 10
Town/City	Bratislava
Postcode	821 09
EU Country*	Slovak republic
Telephone	
Mobile	
E-mail	

## 2.1 Which national measure(s) do you think are in breach of EU law and why?\*

1. Procedure of the Contracting Authority i.e. Railways of Slovak Republic and the Office for Public Procurement within the framework of procurement review procedures in public procurement "Modernization of the Žilina-Košice railway line, section of line Liptovský Mikuláš - Poprad Tatry (outside), 1st stage (Poprad - Lučivná) (The public procurement notice was published in the Official Journal of the European Union on 30 June 2017 under the No. 2017 / S 123-248592 and in Public Procurement Bulletin under the No. 129/2017 dated 3 July 2017, No. 9284-MSP) (hereinafter referred to as "Public Tender Poprad - Lučivná"), and	2. Procedure of the Contracting Authority i.e. Railways of Slovak Republic and the Office for Public Procurement within the procurement review procedures in public procurement "Modernization of the Devínska Nová Ves railway line- SR / ČR state border" (The public procurement notice was published in the Official Journal of the European Union on 1 February 2017 under the No. 2017 / S 022-036648 and in Public Procurement Bulletin under the No. 24/2017 dated February 2, 2017, ref. 1555-MSP) (hereinafter referred to as "Public tender DNV - state border").
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The complainants, as tenderers in the public procurement file this complaint **under Article 3 of Directive 89/665 / EEC** to the Commission to investigate **whether there has been a serious breach of Union law** in the procurement procedure and if the breach has occurred to request the Slovak Republic to remedy it.

Complainants complain of the above-mentioned procedures of the contracting authority Railways of the Slovak Republic since they consider its action as **discriminatory towards Complainant 1 (Integra) as a tenderer from a third country** and thus **violates the basic principles of public procurement stipulated in the Community provisions in the field of public procurement as well as guaranteed to a supplier from the Republic of Kazakhstan under the Agreement between the European Union and its Member States, on one side, and the Republic of Kazakhstan, on the other side.** In addition, the complainants consider actions of the Railways of Slovak Republic and subsequent proceeding of the Office for Public Procurement within the review procedures in contrary to the **principle of transparency**, the principle of **equal treatment** and the related **principle of non-discrimination**, the **principle of proportionality**, the principle of **legal certainty**, and further consider the procedure in the abovementioned public procurement as **violation of the right to good administration of public affairs** and violation of the **principle of economy and efficiency of public procurement. Complainants thus regard the contract awarding process as a serious infringement of Union law.**

## 2.2 Which is the EU law in question?

- Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts;
- Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC;
- Treaty on the Functioning of the European Union (TFEU);
- Regulation (EU) No 1316/2013 of the European Parliament and of the Council of 11 December 2013 establishing the Connecting Europe Facility, amending Regulation (EU) No 913/2010 and repealing Regulations (EC) No 680/2007 and (EC) No 67/2010;
- Enhanced Partnership and Cooperation Agreement between the European Union and its Member States, of the one part, and the Republic of Kazakhstan, of the other part ((Official Journal of the European Union, 4.2.2016 (L 29/3)

### 2.3 Describe the problem, providing facts and reasons for your complaint\* (max. 7000 characters):

The complainants hereby apply to that the European Commission to investigate a breach of the Community provisions in the field of public procurement and request the Slovak Republic for remedy.

The reason for this application is the disagreement with the decisions and procedure of the contracting authority - Railways of the Slovak Republic (in Slovak: Železnice Slovenskej republiky, hereinafter referred to as "ŽSR") and the Office for Public Procurement (in Slovak: Úrad pre verejné obstarávanie, hereinafter referred to as "ÚVO") in the course of the contract awarding process mentioned in point 2.1 of this form, which has led to a serious breach of the Community provisions in the field of public procurement.

Since Complainant 1 is from a third country - the Republic of Kazakhstan with which the European Union has entered into the Agreement between the European Union and its Member States, on one side, and the Republic of Kazakhstan, on the other side, acts of the ŽSR and the ÚVO can at the same time raise concerns about the violation of international law.

It is necessary to point out that the ŽSR is taking actions against the Complainants in each of the tenders in which they have participated. Action of the ŽSR appears to be purposeful in an attempt to exclude a foreign company from Kazakhstan from the abovementioned tenders. The steps of the ŽSR are non-transparent and raise doubts about the real reasons for their conduct, their legality, timeliness, transparency, purposeful use of EU resources and efficiency of public procurement as such.

In the tenders referred to in point 2.1 of this form, we refer to violation of the Community provisions in the field of public procurement, in particular in the following areas:

- Non-equal and discriminatory behaviour of the ŽSR in the process of evaluating the participation conditions and in the process of evaluating the tender, while the evaluation of the conditions of participation has lasted for 2 years. The ŽSR requested repeatedly and for a period of time to submit further evidence in order to prove to the Complainants that they did not meet the conditions for participation in the public procurement. Some of the straightforward evidence has been even completely ignored.
- Complainants are unaware that such behaviour would be applied by the ŽSR and by the ÚVO to other tenderers, even though there is real evidence of the lack of credibility of some of the tenderers.
- The Council of the ÚVO has issued Decision no. 13750-9000 / 2018 which has a substantial impact on Complainants and returns them as the only tenderer to back to the stage of evaluating the fulfilment of the participation conditions. Since this decision has been made based on mere suspicions raised by another tenderer without possibility of the Complainants to make response to such suspicions we consider such a decision as illegal because infringing Complainants right for effective defence.
- We consider the review procedure in the ÚVO and the Council of the ÚVO to be in violation of the concentration principle in order to discredit and hinder foreign Complainants taking part in the public procurement process.
- The decision excluding Complainants apparently violated Section 40 of the Slovak Public Procurement Act. This unlawful conduct of the ŽSR had a serious and substantial impact on the entire course of public procurement and weakened the tender. The conduct of the ŽSR appears to be purposeful, in order to exclude complainants from the public procurement as soon as possible.
- Complainants consider that the ŽSR and subsequently the ÚVO violated the principle of transparency, as they did not convincingly justify their actions in their decisions and procedures, did not base them with on a specific evidence and they did not even refer to some of the evidence.
- ŽSR require from the successful tenderer to submit a C4 certificate, which is not an internationally recognized certificate and its parameters are not regulated by any European or Slovak standard. This is a certificate owned and published by the only company in Slovakia, Gamanet, a.s. and which, in their own words, cannot be replaced by any other certificate in any public procurement in Slovakia related to the line structures.

The problem is described in more details in the attached complaint.

### 2.4 Does the Country concerned receive (or could it receive in future) EU funding relating to the subject of your complaint?

☒ Yes, please specify below      ☐ No      ☐ I don't know

The public procurement contract No. 2015-SK-TM-0207-M will be funded by the European Union Fund within the Connecting Europe Facility. The estimated cost of this project is estimated by the Commission at EUR 273 073 195.

The project should be funded from the Union's resources amounting to 200 440 129 EUR.

The public procurement contract No. 2015-SK-TM-0200-W will be funded by the European Union Fund within the Connecting Europe Facility. The estimated costs of this project are estimated by the Commission at 97 316657 EUR. The project should be funded from the Union's resources of 77 619 766 EUR.

### 2.5 Does your complaint relate to a breach of the EU Charter of Fundamental Rights?

The Commission can only investigate such cases if the breach is due to national implementation of EU law.

☒ Yes, please specify below      ☐ No      ☐ I don't know

Article 21 Non-discrimination (Within the scope of application of the Treaty establishing the European Community and of the

Treaty on European Union, and without prejudice to the special provisions of those Treaties, any discrimination on grounds of nationality shall be prohibited.)

Article 41 Right to good administration

Article 47 Right to an effective remedy and to a fair trial

### 3. Previous action taken to solve the problem\*

Have you already taken any action in the Country in question to solve the problem?\*

**IF YES**, was it: ☐ Administrative      ☐ Legal ?

**3.1** Please describe: (a) the body/authority/court that was involved and the type of decision that resulted; (b) any other action you are aware of.

**3.2** Was your complaint settled by the body/authority/court or is it still pending? If pending, when can a decision be expected?\*

**IF NOT** please specify below as appropriate

☐ Another case on the same issue is pending before a national or EU Court

☒ No remedy is available for the problem

☐ A remedy exists, but is too costly

☐ Time limit for action has expired

☐ No legal standing (not legally entitled to bring an action before the Court) please indicate why:

☐ No legal aid/no lawyer

☐ I do not know which remedies are available for the problem

☒ Other – specify

Since (i) it is a complex problem that goes beyond one single public procurement, (ii) in every public procurement, the complainants have already used all available remedy under review procedures with the Office for Public Procurement, but unsuccessfully, (iii) court proceedings as an extraordinary remedy are absolutely ineffective means of remedy since the average length of court proceedings takes from 3 to 5 years and the court proceedings have no suspensive effect on the evaluation of the public procurement and the conclusion of the contract, we believe, that there is no other remedy as a complaint to the Commission.

In addition, as public procurement contracts are financed from Union resources, the effective and early control and protection of the Union's financial interests is in the Commission's competence to deal with this issue.

4. If you have already contacted any of the EU institutions dealing with problems of this type, please give the reference for your file/correspondence:

- ☐ Petition to the European Parliament – Ref:.....
- ☐ European Commission – Ref:.....
- ☐ European Ombudsman – Ref:.....
- ☐ Other – name the institution or body you contacted and the reference for your complaint (e.g. SOLVIT, FIN-Net, European Consumer Centres)

5. List any supporting documents/evidence which you could – if requested – send to the Commission.

 Don't enclose any documents at this stage.

- GUIDELINES FOR DETERMINING FINANCIAL CORRECTIONS TO BE MADE TO EXPENDITURE CO-FINANCED BY THE STRUCTURAL FUNDS OR THE COHESION FUND FOR NON-COMPLIANCE WITH THE RULES ON PUBLIC PROCUREMENT (final version dated 27 November 2007, COCOF 07/0037/02-EN);
- <https://www.etrend.sk/ekonomika/skanska-podala-pre-tender-staznost-na-europsku-komisiu.html>;
- [http://europa.eu/rapid/press-release\\_MEMO-16-3125\\_sk.htm](http://europa.eu/rapid/press-release_MEMO-16-3125_sk.htm);
- <https://ec.europa.eu/inea/en/connecting-europe-facility/cef-transport/2015-sk-tm-0207-m>;
- Commission Notice No. 2017/C 18/02;
- Decision of the Office for Public Procurement No. 6387-6000/2017-ODI;
- File No. 11516-6000/2018;
- Decision of the Council No. 13750-9000/2018;
- Decision dated 10 October 2013, Manova, C-336/12, EU:C:2013:647. point 37;
- Decision dated 7 December 2000 in the matter C-324/98, point 60, decisions dated 20 October 2005, in the matter C-264/03, Zb. S. I-8831, point 32 and 14 June 2007 in the matter C-6/05, Zb. S. I-4557, point 33;
- <https://www.antimon.gov.sk/amo-sr-welcomes-the-verdict-of-the-constitutional-court-of-the-slovak-republic-which-dismissed-the-complaints-of-construction-companies-as-unjustified/>;
- <https://www.aktuality.sk/clanok/503733/ustavny-sud-zamietol-staznosti-firiem-pre-milionove-pokuty/>;
- [http://ec.europa.eu/competition/national\\_courts/cases/139823/139823\\_3\\_3.pdf](http://ec.europa.eu/competition/national_courts/cases/139823/139823_3_3.pdf);
- Decision 1 Sžpu 1/2009 dated 30 December 2013, finding of the Constitutional Court of the Slovak Republic, File Reference No. II. ÚS 893/2014 dated 17 June 2015, decision of the Antimonopoly Office of the Slovak Republic No. 2006/KH/R/2/116 and decision No. 2005/KH/1/1/137, decision of the Supreme Court of the Slovak Republic 5Sžh/2/2015 dated 2 November 2016;
- [https://sk.wikipedia.org/wiki/Kauza\\_V%C3%A1hostav](https://sk.wikipedia.org/wiki/Kauza_V%C3%A1hostav);
- 2S/131/2011 Decision of the Regional Court in Bratislava ;
- T-637/11 Decision of the General Court of the EU, see also Bayer CropScience and others/Commission;
- The Supreme Administrative Court of the Czech Republic in the decision No.: č.j.5Afs 131/2007-131 dated 12 May 2008;
- Case C-469/99 European Commission against CAS Succhi di Frutta, point 11;
- Decision of the Supreme Court of the Slovak Republic 3Sžf/47/2012;
- Decisions of the first instance courts dated 11 September 2002, Pfizer Animal Health/Council, T-13/99, Zb. s. II-3305, point 411, and dated 9 September 2008, Bayer CropScience a i./Commission, T-75/06, Zb. s. II-2081, point 223 and the quoted literature;
- <https://ec.europa.eu/inea/en/connecting-europe-facility/cef-transport/2015-sk-tm-0200-W>;
- <http://www.crz.gov.sk/index.php?ID=876460&l=sk>;
- <https://crdvo.uvo.gov.sk/index.php?ID=98972>;
- <https://www.etrend.sk/ekonomika/p-v-tendri-zsr-su-opat-najlacnejsi-kazachovia-ale-zeleznice-ich-nechcu.html>;
- <https://www.etrend.sk/trend-archiv/rok-2018/cislo-39/kazasski-dravci-kruzia-nad-slovenskom.html>.

## 6. Personal data\*

Do you authorise the Commission to disclose your identity in its contacts with the authorities you are lodging a complaint against?

☒ Yes      ☐ No

 *In some cases, disclosing your identity may make it easier for us to deal with your complaint.*