

Regulation on European Energy Infrastructure

Climate Change

Position Paper

Justice and Environment 2013

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The Association Justice & Environment (J&E) is a European Network of Environmental Law Organisations, working in Europe and consisting of organisations from different countries dealing with environmental law². For five years, J&E has been working on climate change-related issues, tackling and analysing the problem from different legal perspectives.

Summary of the research

Energy transition is needed, but has to comply with EU law

Energy Transition has influenced EU policies for the last several years. In 2013, J&E turned its climate related legal research focus toward the sustainable use and production of energy as one of the key aspects of EU environmental policy. Energy Transition inter alia requires the establishment of smart grid networks - being able to transfer and store energy produced by renewable sources -, as well as the development of infrastructure for bridging technologies that are less polluting than coal and oil. With this necessity in mind, J&E analysed the regulation on guidelines for trans-European energy infrastructure (hereinafter referred as Regulation) and its compliance with existing environmental and public participation rules at the European level.

Lack of transparency and public participation

The Regulation creates the legal framework for the development and interoperability of trans-European energy infrastructure. While the development of an effective and sustainable trans-European energy infrastructure is important for the future development of Europe, designating the projects of common interest (PCI) working toward this goal must occur in an open and transparent environment where effective participation of the public concerned is fundamental.

The Aarhus Convention³ requires that the public be allowed to participate in planning procedures, including providing the public with adequate information and reasonable timeframes to allow for the development and presentation of opinions. However, in J&E's point of view, real public participation has been absent from the PCI designation process.

Illegitimated and controversial projects have to be removed

Our researches also stated that the designation process is illegitimated further by the inclusion of immature and controversial projects on regional lists. To improve the PCI designation process, the regional groups should ensure that projects meet not only the criteria of the Regulation (Art. 4) but also the relevant rules on public participation.

Early involvement of the public is legally required

Since many European Member States have failed to correctly implement the Aarhus Convention obligations, the effectiveness of current public participation measure are hard to calculate. With this in mind, we claim that the Regulation should have included stronger protections for access to information, participation, and access to justice, including protecting and requiring public participation in early stages of PCI designation as well as at the implementation and monitoring stages of PCIs.

¹ Regulation (EU) No 347/2013 on guidelines for trans-European energy infrastructure and repealing Decision No 1364/2006/EC and amending Regulations (EC) No 713/2009, (EC) No 714/2009 and (EC) No 715/2009

² <http://www.justiceandenvironment.org/>

³ Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies

The survey and key findings

The Regulation lays down guidelines for the timely development and interoperability of priority corridors and areas of trans-European energy infrastructure and addresses the identification of necessary priority corridors and areas falling under certain energy infrastructure categories in electricity, gas, oil and carbon dioxide.

Special focus was laid on the process of choosing the PCIs - in terms of sustainability and public participation - and the design of public participation in future permit granting procedures for PCIs.

Based on our legal analysis⁴, on the information collected from J&E countries and environmental NGOs working also on EU level, we consider the followings as the most problematic points of the Regulation and the designation process of PCIs.

Failures in designation of PCIs – public participation

In order to ensure broad consensus, - in accordance with the Regulation - the regional groups in charge of drafting PCI lists should ensure close cooperation between Member States, national regulatory authorities, project promoters, and relevant stakeholders.

However, **public consultation has not been carried out adequately in the designation process of PCIs**. The Aarhus Convention states that public participation in planning procedures should be enabled within a transparent and fair framework by having provided the public with the necessary information. The public participation procedures shall include reasonable time-frames for the different phases, allowing sufficient time for informing the public and for the public to prepare and participate effectively during the environmental decision-making⁵.

However, we found that there was very little information available on the projects put on the regional draft lists and, according to our knowledge and research no consultations have been carried out by the regional groups in spite of the provisions laid down in the Annex III of the Regulation⁶ and in the Articles of the Aarhus Convention.

As an example, the case from the Czech Republic regarding the substation connection with over-head lines (OHL) Kocin – Mirovka where the PCI designation process concerning projects submitted by Czech project promoters cannot be considered as transparent and inclusive for potentially affected public. The Czech national law restricts access of the broader public to the process of creating electricity and gas network development plans; there was no stand-alone consultation procedure on the list of potential PCIs on the national level. Therefore, no or insufficient opportunity had been provided for the public to comment on the list of potential PCIs at the regional or at the EU level⁷.

Further failures in designation of PCIs

Beside the shortcomings of involvement of the public and the transparency of the process, our criticism shall concern **the inclusion of immature and also highly controversial projects in the regional lists**. We found that **the selection of some projects as PCIs must be strongly rejected, since they do not meet the criteria of Art. 4 of the Regulation and are, simultaneously, likely harmful to the environment**.

⁴ Legal analysis on the EU Regulation No 347/2013 on guidelines for trans-European energy infrastructure and repealing Decision No 1364/2006/EC and amending Regulations (EC) No 713/2009, (EC) No 714/2009 and (EC) No 715/2009 written by Birgit Schmidhuber; 5 July 2013.

http://www.justiceandenvironment.org/_files/file/2013/CC%20Legal%20Analysis%202013.pdf

⁵ Art 7 and Art 6 par 3 of AC

⁶ *Each Group shall consult the organisations representing relevant stakeholders — and, if deemed appropriate, stakeholders directly — including producers, distribution system operators, suppliers, consumers, and organisations for environmental protection. The Group may organise hearings or consultations, where relevant for the accomplishments of its tasks.*

⁷ The Union list designation – evaluation of the process in the Czech Republic written by Jan Srytr; 15 July 2013
http://www.justiceandenvironment.org/_files/file/2013/PCI%20Czech%20Republic.pdf

According to Art 4 of the Regulation, if a project fulfils the - mainly (energy-) economically motivated - criteria set out by that article, it is considered to be in the (public) common interest. Sustainability is not defined as a general, but only as a specific and optional criteria in Art 4., par 2. **If, through the processes defined by the Regulation, the project's necessity is already defined and legally fixed, this necessity and consequently its public interest should be defined by 1. a broader and transparent stakeholder consultation and 2. more detailed criteria for the evaluation of a project.**

Public interest as a legal concept is to be evaluated on a case-by-case basis thereby enabling the consideration of the concrete circumstances and necessities of a case. Generally, designating projects that are sufficiently concrete as being in the public interest seems half-baked because without a sufficiently concrete project balancing potential interests is difficult. Obviously, not all common interests are given enough space within the concept of "European common interest". **Environmental protection stands beside economic and energy-economy interests as a public interest and should therefore be at least considered within this first designation process.**

- *Power Plant in Kaunertal, Austria*⁸

The draft PCI lists currently include the project of extension of the pump-storage power plant Kaunertal in the North-South electricity interconnection corridor.

The Kaunertal project does not contribute to the security of supply to market integration due to the project's little capacity. Neither energy infrastructure bottlenecks will be reduced, nor isolation of Member States lifted, nor competition and system flexibility enhanced.

Furthermore, the project - located in a Natura 2000 area - in its current form is likely to breach the provisions of the Birds and Habitats and the Water Framework Directives as well as principles on sustainable hydropower development in the Danube Basin, as confirmed by the preliminary environmental impact assessment study.

- *Substation connection with OHL Kocin – Mirovka, Czech Republic*⁹

In case of the Czech project proposed to the regional list, it is highly questionable whether the project fulfils the requirements of Art. 4, para 1 (a) of the Regulation. Based on the justification of the project promoter, no evidence exists that the project is necessary to complete the internal market or it will allow the integration of energy generation from renewable sources (Annex I para 1 (3) of the Regulation). The project will only allow the integration of a new nuclear energy source into the domestic transmission network.

The project allow the planned nuclear units in Temelin and **the project potential will probably be „consumed“ by operation of the NPP and the effect of project -in terms of enhancing capacity and flexibility of transmission network - will be rather insignificant with regard to the criteria indicated in Art. 4, para 2 of the Regulation.**

Not crossing the border of two or more Member States or at least one Member State and a European Economic Area country, the project does not fulfil the requirements of Art. 4, para 1 (a) of the Regulation and no proof exists **that the project increases the cross border grid transfer capacity at the border of the Czech Republic by at least 500 MW compared to the situation without the commissioning of the project.**

⁸ Letter from ÖKOBÜRO, GLOABL 2000, Greenpeace, BirdLife Österreich, WWF to Ms Catharina Sikow-Magny, Head of Unit, DG Energy, European Commission, Vienna 25 June 2013, available at <http://www.oekobuero.at/images/doku/letterfromaustriasngos.pdf> (15 July 2013).

⁹ The Union list designation – evaluation of the process in the Czech Republic written by Jan Stry; 15 July 2013 <http://www.justiceandenvironment.org/files/file/2013/PCI%20Czech%20Republic.pdf>

- *LNG Terminal in Muuga and Paldiski, Estonia*

Procedural and serious environmental problems appear in the case of the Estonian LNG Terminal projects included in the PCI list. As the state government has not initiated a county spatial plan covering one or several counties and evaluating alternative locations for projects at a wider level, there are currently three administrative proceedings regarding the LNG terminals on-going in different local municipalities. In each of these proceedings only alternative locations within that municipality have been considered, as municipalities are not legally entitled to consider possible locations outside their territory. This has led to a situation where no public authority has actually considered different alternative locations across the country and made a decision on which one is most suitable. Consequently, Muuga and Paldiski terminals are found in PCI list as alternative projects. Furthermore, in case of Paldiski, the port would lie in a bay that is a Natura 2000 area. The assessment according to the Habitat Directive was stated by national NGOs as insufficient and superficial and was found to breach the EU environmental legislation as – inter alia - it was not adequately proven that the project would not harm the only habitat of endangered species in Estonia. NGOs have also challenged the project in national courts.

Public participation in permit granting

According to the Regulation, all parties involved in the permit granting process shall follow the principles for public participation set out in of Annex VI 3. At least one public consultation is to be carried out by the project promoter, or where required by the competent authority before submission of the final and complete application file (without prejudice to any public consultation to be carried out after submission of the request for development consent according to the EIA Directive).

Regardless, the effectiveness of public participation in planning and permitting procedures has to be still proven. Especially as many European Member States have not correctly implemented the Aarhus Convention obligations, the Regulation should have gone further by including more comprehensive access to information, participation and access to justice provisions.

It is important to note that broad participation and transparency is determined by the phase after the projects have been assessed and selected as PCIs, whereas during the strategic level where the necessity, the interests, the potentials and deficiencies of the project as such is discussed, the public does not have a proper say. The lack of public participation on strategic and planning level gives rise to a higher potential for conflict and controversies at the project permitting stage – a factor considerably slowing and sometimes even hindering the implementation of certain undertakings.

Furthermore, once a project is designated as a PIC, the overwhelming public interest in having the project realized will be used as a strong argument by the decision-makers and there will be no formal opportunity to dispute the PCI status per se. Therefore, setting PCI status is a very important moment where effective public participation and transparency must prevail otherwise it may lead to unbalanced assessment of public or private interests later, during the project implementation.

Public participation in implementation and monitoring

We believe that provisions of Art. 5 requiring that project promoters draw up an implementation plan for the PCIs enumerated in the Union list may result in an unbalanced information flow. Furthermore, the Agency for the Cooperation of Energy Regulators (ACER) may not be provided with all necessary information for elaborate recommendations on the processing of PCIs if only the project promoters, the authorities and other institutionalized bodies participate in the implementation and monitoring of PCIs.

Recommendations

Based on our findings we recommend the followings:

- The public – at least the public concerned – should have the possibility to raise and represent interests which are notoriously under-represented by the stakeholders participating during the designation of PCIs- such as environmental interests and concerns or health interests. It would be useful to apply an instrument similar to the Strategic Environmental Assessment (SEA) on supra-national level, so environmental concerns will be assessed at this stage.
- The public should be consulted not only on the planning and permitting stage, but should have also given the right to be informed and to be consulted in the course of monitoring. These rights should be conceded also for the 2-yearly renewal of the Union list, as well, where PCIs are evaluated and can be removed from the Union lists.
- In order to have all interests represented in planning and permitting of huge infrastructure projects, comprehensive participation needs to take place when all options are still open – otherwise the conflict between differing interests will simply be postponed to another stage in the proceedings. Therefore, it is highly advisable to effectively apply the requirements of the Aarhus Convention as stated above within the designation of PCIs on national and EU, as well as, in planning and permitting procedures on national level.
- The decision-making bodies on a European and on a national level should be obliged to assess the comments of the public and take them into due account when making decisions.
- The current process of designation of PCIs should be halted, and candidate projects should be addressed in a new round of assessments in order to ensure transparency and wide public participation in the process and to exclude the projects likely endangering the environment.

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