

REGULATION (EU) No. 347/2013 on guidelines for trans-European energy infrastructure

Legal Analysis

Justice and Environment 2013

**REGULATION (EU) No. 347/2013 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL
of 17 April 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**

Legal Analysis

1. Background

The EU finds itself currently at a crucial point with regard to energy infrastructure. The more and more imminent threat of climate change has led to EU climate change goals and substantial targets for renewable energy within the European Union. By February 2011 the kick-off for a comprehensive energy infrastructure policy aiming at optimizing network development at EU level in the period up to 2020 and beyond in order to allow the achievement of the EU's core energy policy objectives of competitiveness, sustainability and security of supply was done. In order to reach climate and energy goals Europe's energy infrastructure needs to be modernized, expanded and interconnected across borders. The investment needs in electricity and gas transmission infrastructure from now to 2020 have been estimated at about EUR 200 billion¹

In order to ensure a timely development and the interoperability of trans-European energy networks, the Regulation on guidelines for trans-European energy infrastructure (Regulation (EU) 347/2013) was adopted on 21 March 2013. The Regulation entered into force on 1 June 2013. The Regulation defines 12 strategic trans-European energy infrastructure priorities (Annex I), the implementation of which by 2020 is essential for the achievement of the union's energy and climate policy objectives. These priorities cover different geographic regions or thematic areas in the field of electricity transmission and storage, gas transmission, storage and liquefied or compressed natural gas infrastructure, smart grids, electricity highways, carbon dioxide transport and oil infrastructure.² Member states will propose "Projects of Common Interest" (so called PCIs) contributing to the development of the trans-European energy infrastructure priority corridors and areas. PCIs should be implemented as quickly as possible. In order to achieve this goal the Regulation provides for certain requirements in the permitting process for these projects, which are aimed at speeding up the procedures through the reduction of administrative burdens and also through better public consultation. If the Regulation is likely to provide for faster, better and more efficient permitting procedures and especially fulfilling procedural guarantees and comprehensive public participation – while also not weakening environmental standards and guaranteeing the inclusion of sustainable projects – in practice, is to be assessed in the following analysis. Special focus will be laid on the process of choosing PCIs (sustainability, public participation) and the design of public participation in future permit granting procedures for PCIs.

¹ Cp. Rz 15 Regulation (EU) No 347/2013.

² Cp. Rz 20 Regulation (EU) No 347/2013.

2. Scope (Article 1)

As already mentioned the Regulation lays down guidelines for the timely development and interoperability of priority corridors and areas of trans-European energy infrastructure set out in the Annex I:

- It addresses the identification of projects of common interest (in the following: PCI) necessary to implement priority corridors and areas (Annex I) falling under certain energy infrastructure categories in electricity, gas, oil and carbon dioxide (Annex II).
- It aims to facilitate the timely implementation of PCIs by streamlining, coordinating more closely and accelerating permit granting processes and by enhancing public participation.
- Furthermore the Regulation provides rules and guidance for the cross-border allocation of costs and risk-related incentives for PCIs and determines the conditions for eligibility of PCIs for Union financial assistance.

3. Projects of Common Interest

According to the Regulation PCI means: *“a project necessary to implement the energy infrastructure priority corridors and areas set out in Annex I and which is part of the Union list of projects of common interest [...]”* (cp. Art 2 par 4) In accordance to the goals and scope set out by the Regulation PCIs should be given ‘priority status’ at national level to ensure rapid administrative treatment. Projects of common interest should be considered by competent authorities as being in the public interest.

a) Designation process (Article 3)

To create the Union list of projects of common interest, twelve regional groups, responsible for the selection of PCIs on regional level are established and composed as set out in Annex III. For instance with respect to electricity projects the groups would be composed of representatives of the Member States, national regulatory authorities, the transmission system operators, the Commission, the Agency for the Cooperation of Energy Regulators (ACER) and the ENTSO-for Electricity. In these groups, only the Member States and the European Commission (EC) have decision-making powers (= decision-making body). The decision-making body of the group decides on a regional list of proposed PCIs. Additionally Annex III sets out rules for the regional groups in the decision-making procedure. Basically each group has to assess the proposed projects in a transparent and objective manner. The EC is empowered to adopt Union list of PCIs based on the regional lists. The Union list is established every two years and takes the form of an annex to the Regulation. The first Union list shall be adopted by 30th September 2013. PCIs included into the Union list shall become an integral part of the relevant national 10-year network development plans and other national infrastructure plans concerned.

Basically public consultation was not carried out adequately in the designation process. A stakeholder consultation on the PCI lists was carried out on 5th June 2013 by the European Commission. There was very little information available on the projects put on the regional draft lists. According to our knowledge no consultations have been carried out by the regional groups (the body elaborating the draft lists).

According to Annex III of the regulation *“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”* when elaborating the regional lists 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 (cp. Art 7). 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-making (cp. Art 6 par 3). Early public participation is to be granted, when all options are open and effective public participation can take place (cp. Art 6 par 4). Due account should be taken of the outcome of the public participation (cp. Art 6 par 8) Equally Reg (EC) No 1367/2006 which is applicable to the actions of EU institutions and bodies provides for early and effective participation when all options are still open, explicitly mentioning that public participation should be also provided for in the preparatory stage (cp. Art 9). In order to speed up the procedures, foster acceptance, efficiently promote the goals of the Regulation, it is necessary already in this preparatory stage of PCI designation to carry out adequate public consultations guided by the principles of the Aarhus Convention:

- Public Consultation time frames for the designation process should be widened
- Sufficient information on the proposed lists and projects should be provided and made easily accessible
- Thorough public consultations on the regional level should be carried out (e.g. stakeholder workshops, online/written consultation etc.) so the affected public can raise comments and concerns on the respective projects
- The decision-making body should be obliged to assess these comments and take them into due account when taking the decision

b) Criteria (Article 4)

In order to be designated as PCI and included into the regional lists a project has to meet certain general criteria (cp. Art 4 par 1).

- It needs to be necessary for one or more of the priority infrastructure corridors or areas
- The potential total benefits must exceed the costs, including in the longer term
- The project needs to have significant cross-border effects

PCIs falling within specific energy infrastructure categories have to contribute to further specific criteria set out in Art 4 par 2. As an example, for certain electricity transmission and storage projects the respective project has to contribute either to the market integration (= elimination of energy infrastructure bottlenecks), to sustainability (= supply or transfer of renewable energy) or to the security of supply in order to be designated as PCI.

The fulfillment of the criteria set out by the Regulation indicates that a project is in common interest. The criteria set out in Art 4 are mainly (energy-) economically motivated. Sustainability is not defined as general, but only as specific and optional criteria in Art 4 par 2. If through the processes defined by the Regulation the necessity of a project 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 should be defined.** 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 it seems to be half-baked designating the projects which haven't been even sufficiently concretized (and therefore possible interests are hard to balance) as being in the public interest. Obviously not all common interests are given enough space within the concept of "European common interest". Environmental protection also a public interest aside with economical and energy-economic interests and should therefore be at least considered within this first designation process.

c) Implementation and monitoring (Article 5)

Project promoters have to draw up an implementation plan, for the PCIs enumerated in the already mentioned Union list. This implementation plan includes a timetable for feasibility and design studies, the approval by the national regulatory authority, the construction and commissioning as well as the permit granting schedule. The Regulation provides for close cooperation between all relevant groups (e.g. Transition system operators, distribution system operators and other operators) reporting and respective progress monitoring. Each year the project promoter is obliged to submit an annual report to (among others) the competent authority (see Chapter 4. below) updating on "*(a) the progress achieved in the development, construction and commissioning of the project, in particular with regard to permit granting and consultation procedures;*" (cp. Art 5 par 4 a.) as well as on delays and solution strategies. ACER will – based on the annual reports – then elaborate reports for the regional groups evaluating the progress and providing recommendations on delays and difficulties. Article 5 provides for various mechanisms if the commissioning of a PCI is delayed compared to the implementation plan. As a last resort a European coordinator can be designated (by EC in agreement with member states) for a period of up to one year, responsible for the promotion of the projects, stakeholder consultation and dialogue, the obtainment of all permits and if appropriate providing financial advice to the project promoters (cp. Art 6).

A project of common interest may be removed from the Union list – that can happen in the course of the latter's two-yearly renewal by the EC - if its inclusion was based on incorrect information which was a determining factor for that inclusion, or the project does not comply with Union law (cp. Art 5 par 8). Projects which are no longer on the Union list will lose all rights and obligations linked to its status as PCI (cp. Art 5 par 9).

If only the project promoters, the authorities and other institutionalized bodies participate in implementation and monitoring the information flow will be unbalanced and the Agency may not have been provided with all information needed for elaborating recommendations for the processing of PCIs. It might be recommendable that the monitoring process is carried out in accordance with the principles of the Aarhus Convention and the public is involved:

- Monitoring reports should be published and easily accessible
- The public should get the right to comment the member state reports and to raise objections to the EC with respect to potential infringements of Union law by listed PCIs

4. Permit granting

The following aspects – as outlined in Art 7 of the Regulation – define what the priority status of a PCI means for planning and permitting on national level and identifies processes and instruments to be used and applied:

- ➔ The adoption of the Union list establishes the necessity of these projects from an energy policy perspective
- ➔ Project promoters and all authorities concerned have to ensure that the most rapid treatment legally possible is given to the application files
- ➔ PCIs shall be allocated the status of the highest national significance possible and be treated as such in permit granting processes (also spatial planning), including those relating to environmental assessments
- ➔ The European Commission issues non-binding guidance to support member states in the definition of legislative and non-legislative measures to streamline the environmental assessment procedures and to ensure the coherent application of environmental assessment procedures required under Union law for PCIs.
- ➔ Member States assess streamlining measures and ensure their coherent application, and inform the European Commission of the result
- ➔ Member States take the respective measures identified before

The Regulation explicitly states that with regard to the environmental impacts addressed in the Habitats (Art 6 par 4 Habitats Directive) and the Water Framework Directive (Art 4 par 7 WFD), PCIs shall be considered as being of public interest from an energy policy perspective, and may be considered as being of overriding public interest provided that all the conditions set out in these Directives are fulfilled.

Each member state designates one national competent authority responsible for facilitating and coordinating the permit granting process for PCIs, whereby single tasks can be delegated and carried out by another authority. The competent authority facilitates the issuing of the comprehensive decision³ which has to be issued within 3 years and 6 months latest counted from the beginning of the pre-application period (project stages and concrete timeframes are set out in Art 10 of the Regulation). The comprehensive decision shall be issued according to ONE of the following schemes (cp. Art 8 par 3):

- **Integrated scheme:** The comprehensive decision shall be the sole legally binding decision resulting from the statutory permit granting procedure (other authorities concerned may provide their opinion as input to the procedure which shall be taken into account by the competent authority).
- **Coordinated scheme:** the comprehensive decision comprises multiple individual legally binding decisions issued by several authorities concerned – coordinated by the competent authority. Special mechanisms for delayed decision-making (e.g. decision making powers devolve to another authority)
- **Collaborative scheme:** the comprehensive decision shall be coordinated by the competent authority. The competent authority sets out and monitors compliance with the time limits.

If a PCI requires decisions to be taken in two or more member states they should endeavor to provide for joint procedures, particularly with regard to the assessment of environmental impacts.

The Regulation explicitly refers to the provisions of the Habitats Directive and WFD, which speak of carrying out projects in spite of a negative assessment due to overriding public interests: cp. Art 6 par 4 Habitats Directive: *“If, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, the Member State shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected. It shall inform the Commission of the compensatory measures adopted.”* Although not referring that PCIs are of overriding public interest, the Regulation goes quite far indicating PCIs are in public interest from an energy policy perspective and referring to the exemption clauses due to overriding public interest in the Habitats Directive and WFD although this wouldn't have been necessary. The relevant EU law has to be applied in any way to projects with PCI status. Referral to the overriding public interest in other EU Directives creates rather an ambiguous picture with respect to evaluation of PCIs in different procedures

5. Transparency and Public Participation (Article 9)

The member states or competent authorities shall publish a manual of procedures for the permit granting process applicable to projects of common interest (by 16th May 2014). The manual shall be updated if necessary and made available to the public.

³ „the decision or set of decisions taken by a Member State authority or authorities not including courts or tribunals, that determines whether or not a project promoter is to be granted authorisation to build the energy infrastructure to realise a project without prejudice to any decision taken in the context of an administrative appeal procedure;“ (cp. Art 2 par 2 Regulation)

Without prejudice to any requirements under the Aarhus and Espoo Conventions and relevant Union law all parties involved in the permit granting process shall follow the principles for public participation set out in of Annex VI 3.:

“(a) The stakeholders affected by a project of common interest, including relevant national, regional and local authorities, landowners and citizens living in the vicinity of the project, the general public and their associations, organisations or groups, shall be extensively informed and consulted at an early stage, when potential concerns by the public can still be taken into account and in an open and transparent manner. Where relevant, the competent authority shall actively support the activities undertaken by the project promoter.

(b) Competent authorities shall ensure that public consultation procedures for projects of common interest are grouped together where possible. Each public consultation shall cover all subject matters relevant to the particular stage of the procedure, and one subject matter relevant to the particular stage of the procedure shall not be addressed in more than one public consultation; however, one public consultation may take place in more than one geographical location. The subject matters addressed by a public consultation shall be clearly indicated in the notification of the public consultation.

(c) Comments and objections shall be admissible from the beginning of the public consultation until the expiry of the deadline only.”

The project promoter shall draw up and submit a concept for public participation to the competent authority (within three months of the start of the permit granting process), where the competent authority is entitled to request modifications or approve the concept. Significant changes to the concept must be notified to the competent authority at any stage. 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).

Purpose of this public consultation (Art 9 par 4):

“The public consultation shall inform stakeholders about the project at an early stage and shall help to identify the most suitable location or trajectory and the relevant issues to be addressed in the application file. The minimum requirements applicable to this public consultation are specified in Annex VI”. (= publication of information leaflet giving an overview of the purpose and preliminary timetable, the national grid development plan, alternative routes considered, expected impacts, possible mitigation measures; inform all stakeholders affected through website and other appropriate information means; invite relevant affected stakeholders to dedicated meetings, during which concerns shall be discussed). The project promoter prepares a report summarizing the results of ALL activities related to the participation of the public prior to the submission of the application file. Due account shall be take of these results in the comprehensive decision.

Furthermore for projects crossing the border of two or more Member States, the public consultations in each of the Member State concerned shall take place within a period of no more than two months from the date on which the first public consultation started. With respect to transboundary effects the Regulation indicates: *“For projects likely to have significant adverse cross-border impacts in one or more neighbouring Member States, where Article 7 of Directive 2011/92/EU and the Espoo Convention are applicable, the relevant information shall be made available to the competent authority of the neighbouring Member States. The competent authority of the neighbouring Member States shall indicate, in the notification process where appropriate, whether it, or any other authority concerned, wishes to participate in the relevant public consultation procedures.”*

Regular updates on a website with relevant information about the project of common interest, are to be carried out by the project promoter or where applicable by the competent authority - which shall be linked to the Commission website. Commercially sensitive information shall be kept confidential. Project promoters shall also publish relevant information by other appropriate information means to which the public has open access.

The Regulation provides for detailed information and consultation duties in the permitting procedures for PCIs. Likewise further requirements resulting from Aarhus and Espoo Conventions have to be met. It is to be welcomed that transparency and public participation is given certain importance by the Regulation. Regardless the effectiveness of public participation in planning and permitting procedures has to be still proven. Especially as many European member states have not implemented correctly the obligations arising from the Aarhus Convention it would have been welcomed if the Regulation had gone further by including more comprehensive information, participation and access to justice provisions.

It is important to note that broad participation and transparency is determined for the phase AFTER the projects have been assessed and selected as PCIs, whereas on 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. It is constantly experienced, that 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.

6. Conclusion

The common ('public') interest of a project is defined already on the planning level, where the public does not have sufficient possibilities to participate. Then on project level mostly no criticism regarding the necessity of an undertaking is tolerated, as the overall decision has been already taken before. The public – at least the affected public – should have the possibility to raise and represent interests which are notoriously under-represented by the stakeholders participating in these planning procedures (see above: composition of regional groups) – such as environmental interests and concerns or health interests. In the PCI procedures we find ourselves in such high level strategic planning procedures and it would be highly welcomed if these and the upcoming PCI identification and designation would achieve a high standard of public participation providing adequate instruments, accompanied by a broad stakeholder dialogue as foreseen by the Aarhus Convention.

Indeed it would be useful to apply an instrument similar to the Strategic Environmental Assessment (SEA) also on supra-national level, so environmental concerns are to be assessed already at this stage.

The public should not be only consulted 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 – also in accordance with the motto “two heads are better than one”. These rights should be conceded also for the 2-yearly renewal of the Union list, 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 still all options are open – otherwise the conflict of interests simply moves to another stage in the proceedings. The acceptance and the promotion of decisions within society is fostered through participation in the run of the decision-making process and not after. Therefore it is highly advisable to effectively apply the requirements of the Aarhus Convention as stated above within planning and permitting procedures on European as well as on national level.

Contact information:

name: Birgit Schmidhuber
organization: J&E
address: Volksgartenstraße 1, A-1010 Wien
tel/fax: 43 1 5249377/fax DW 20
e-mail: info@justiceandenvironment.org
web: www.justiceandenvironment.org

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