

Request for Internal Review

EUROPEAN COMMISSION

Günther Oettinger
DG Energy
B-1049 BRUSSELS
Belgium

Dear Mr. Oettinger,

Justice & Environment represented by the undersigned **Thomas Alge** as Chair hereby submits to the European Commission the following

r e q u e s t f o r i n t e r n a l r e v i e w

pursuant to Article 10 of the **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** against the following European Union legal act:

- C(2013) 6766 – Commission Delegated Regulation (EU) of 14.10.2013 concerning amending Regulation 347/2013/EU of the European Parliament and of the Council on guidelines for trans-European energy infrastructure as regards the Union list of projects of common interest

Justice & Environment believes that the aforementioned Commission Delegated Regulation is **unlawful**.

Detailed reasoning to the request for internal review:



A)

The Applicant

Justice & Environment (hereafter J&E) is a network of public interest environmental law organizations based in the EU member states and beyond (see:

www.justiceandenvironment.org).

J&E is legally registered as an association according to the respective domestic law under the file number **75141892** by the Czech Republic Ministry of Interior and Czech Statistical Office.

The statutory seat and the center of operation of J&E are in Brno (Czech Republic) at Udolní 33, Brno 60200, CZ.

The current members of J&E are:

- Association for Environmental Justice (AJA, Spain)
- Bankwatch Association Romania (BWA, Romania)
- Environmental Management and Law Association (EMLA, Hungary)
- Estonian Environmental Law Center (EELC, Estonia)
- Frank Bold Society (FBS, Czech Republic)
- International Institute for Law and the Environment (IIDMA, Spain)
- ÖKOBÜRO (ÖB, Austria)
- Legal Information Centre (PIC, Slovenia)
- VIA IURIS (VI, Slovakia)
- Zelena Akcija (ZA, Croatia)

Front 21 /42 (FYR Macedonia), Independent Institute for Environmental Issues (UfU, Germany) and Milieukontakt International (MKI, the Netherlands) are associate members of J&E.

Environmental Action Alliance – Ireland (EAA-I, Ireland) is a partner of J&E.

J&E aims to use law to protect people, the environment and nature. Its primary goal is to ensure the implementation and enforcement of the EU legislation through the use of European law and exchange of information.

J&E is a non-partisan independent NGO.

B)

Criteria set by the Regulation (EC) No. 1367/2006 of the European Parliament and of the Council

J&E meets the criteria set by the Regulation (EC) No. 1367/2006 of the European Parliament and of the Council required from a non-governmental organization to be able to submit a request for internal review. The aforementioned criteria are set in two articles:

Article 10 Paragraph 1

“any non-governmental organization”

J&E clearly and undoubtedly falls under the category of a non-governmental organization which is demonstrated by the fact that it is registered as an association by the Czech Republic Ministry of Interior and Czech Statistical Office.

Article 11

“(a) it is an independent non-profit-making legal person in accordance with a Member State’s national law or practice;”

J&E is independent from both governmental and business interests which is demonstrated by the fact that its full and voting membership only includes non-profit non-governmental organizations registered in European Union Member States such as Austria, Croatia, Czech Republic, Estonia, Hungary, Romania, Slovakia, Slovenia, Spain.

J&E is also a non-profit-making entity which is demonstrated by the respective provisions of its statute.

J&E is a legal person which is demonstrated by the fact that it is registered as an association by the Czech Republic Ministry of Interior and Czech Statistical Office.

J&E is registered in accordance with the national law of the Czech Republic, the latter being a Member State of the European Union (Community) since 2004.

“(b) it has the primary stated objective of promoting environmental protection in the context of environmental law;”



J&E aims to use law to protect people, the environment and nature. Its primary goal is to ensure the implementation and enforcement of the EU legislation through the use of European law and exchange of information.

J&E works on the EU and national levels. Internationally, J&E focuses on implementation and transposition of horizontal as well as sectoral legal issues. The strong grass roots contacts of its members encourages J&E to concentrate on horizontal problems with the Aarhus Convention and related legislation, Environmental Impact Assessment, environmental liability, pollution, waste, GMOs, Natura 2000, transport and the like.

“(c) it has existed for more than two years and is actively pursuing the objective referred to under (b);”

J&E has been established informally in 2003 and subsequently officially incorporated in September 2004 in the Netherlands, then in 2008 in the Czech Republic.

J&E has been registered by the Dutch Chamber of Commerce on 30 September, 2004.

J&E has been registered by the Czech Republic Ministry of Interior and Czech Statistical Office on 25 April 2008.

J&E has been operational since its incorporation.

J&E has been granted operational funding by the Commission under the LIFE+ NGO grant scheme between 2006 and 2009 and between 2011 and 2013.

“(d) the subject matter in respect of which the request for internal review is made is covered by its objective and activities.”

The subject matter of the Commission Decisions in respect of which the present request for internal review is made concerns the delegated regulation on guidelines for trans-European energy infrastructure as regards the Union list of projects of common interest. J&E has dealt with energy and climate policy in the previous years in numerous aspects, such as

- J&E produced legal analyses, case studies and position papers relating to climate policy in Member States of the EU

<http://www.justiceandenvironment.org/publications?category=3&docType=&year=>

European Network of Environmental Law Organisations

- J&E analyzed the UK Climate Change Act and has monitored the adoption of similar domestic legal instruments throughout the EU
- J&E examined the regulation of Carbon Capture and Storage, of energy efficiency, etc.
- J&E analyzed the process within the UNFCCC from the point of view of access rights
- J&E has been more and more active in the field of energy issues, see here our Publications under the following link:

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

C)

Criteria set by the Commission Decision of 13 December 2007 laying down detailed rules for the application of Regulation (EC) No 1367/2006 of the European Parliament and of the Council on the Aarhus Convention as regards requests for the internal review of administrative acts (2008/50/EC)

J&E meets the criteria set by the aforementioned Commission Decision especially those defined in the Annex thereof as follows:

- statute or by-laws, etc.: J&E has submitted the required documents in December 2007 when submitting its request for internal review against three Commission Decisions
 - o 2007/701/EC – Commission Decision of 24 October 2007 authorizing the placing on the market of products containing, consisting of, or produced from genetically modified maize NK603xMON810 (MON-ØØ6Ø3-6xMON-ØØ81Ø-6) pursuant to Regulation (EC) No 1829/2003 of the European Parliament and of the Council (notified under document number C(2007) 5140)
 - o 2007/702/EC – Commission Decision of 24 October 2007 authorizing the placing on the market of products containing, consisting of, or produced from genetically modified maize 59122 (DAS-59122-7) pursuant to Regulation (EC) No 1829/2003 of the European Parliament and of the Council (notified under document number C(2007) 5141)
 - o 2007/703/EC – Commission Decision of 24 October 2007 authorizing the placing on the market of products containing, consisting of, or produced from genetically modified maize 1507xNK603 (DAS-Ø15Ø7-1xMON-ØØ6Ø3-6) pursuant to Regulation (EC) No 1829/2003 of the European Parliament and of the Council (notified under document number C(2007) 5142)
- annual activity reports: J&E attaches its annual activity report on the use of the LIFE+ NGO operational grant for 2012 to this Request for Internal Review
- copy of the legal registration: J&E attaches the required document to this Request for Internal Review
- documentation that the non-governmental organization has previously been acknowledged by a Community institution or body as being entitled to make a request for internal review: see the response of the Commission dated 26 May 2008 under **SANCO/E1/CV/al D(2008) 510302** available under the following link:
http://ec.europa.eu/environment/aarhus/pdf/title_iv/Reply%20to%20J_E.pdf

D)

Requirements of the request for internal review

Article 10 Paragraph 1 of the Regulation (EC) No. 1367/2006 of the European Parliament and of the Council sets formal as well as material requirements for the request for internal review in order to be eligible for consideration by the respective European Union institution or body. These are

“to the Community institution or body that has adopted an administrative act”

The present request for internal review is addressed to the Commission of the European Union. The Delegated Regulation requested to be reviewed was adopted by the Commission on 14.10.2013.

“an administrative act”

It follows from Article 10 of the regulation that only acts which fall within the definition of “administrative act” set out in Article 2(1)(g) of the Regulation may be subject to internal review.

Article 3(4) and Article 16 of Regulation 347/2013 empowers the Commission “to adopt delegated acts referred to in Article 3” of the Regulation. According to Article 290 TFEU a “legislative act may delegate to the Commission the power to adopt non-legislative acts of general application to supplement or amend certain non-essential elements of the legislative act”.

Article 2(1)(g) defines administrative acts as “any measure of individual scope under environmental law taken by a Community institution or body, and having legally binding and external effect”.

Since Article 10(1) of Regulation 1367/2006 limits the concept of “acts” that can be challenged by NGOs to “administrative acts” as defined in Article 2(1)(g) of Regulation 1367/2006 as “measures of individual scope”, it is not compatible with Article 9(3) of the Aarhus Convention.¹

¹ Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, 25 June 1998.



The General Court decided in cases T-338/08 and T-396/08 that “...Article 9(3) of the Aarhus Convention cannot be construed as referring only to measures of individual scope”.² Consequently, the General Court has annulled the decisions of the Commission of 1 July 2008 and 28 July 2009, in which the Commission declared inadmissible the respective requests for internal review.

However, as a subsidiary argument, even if this condition had still to be fulfilled, which is not the case, the Delegated Regulation should be considered as being of individual scope for the purpose of Article 10(1) of Regulation 1367/2006.

The administrative act is adopted under environmental law – see below.

The administrative act is taken by a European Union institution or body – see above.

The administrative act is having legally binding and external effect.

The Delegated Regulation

- uses a legal language that is used for having a mandatory effect (e.g. “This Regulation shall be binding in its entirety and directly applicable in all Member States”), therefore it is undoubtedly legally binding;
- contains provisions that relate to a private legal entity not being European Union institutions or bodies, therefore it is clearly having an external effect.

“under environmental law”

The Delegated Regulation that is requested to be reviewed falls under environmental law according to Article 2 Paragraph 1 Point f of the Regulation (EC) No. 1367/2006 of the European Parliament and of the Council: “Community legislation which, irrespective of its legal basis, contributes to the pursuit of the objectives of Community policy on the environment as set out in the Treaty: preserving, protecting and improving the quality of the environment, protecting human health, the prudent and rational utilization of natural resources, and promoting measures at international level to deal with regional or worldwide environmental problems;”

The Regulation on guidelines for trans-European energy infrastructure 347/2013 and the therein delegated Regulation (adoption of the Union list) fall under the scope of

² Case T-338/08, paras 71-79, case T-396/09, paras 58-59.



European Union environmental law as they aim towards the achievement of the Europe 2020 Strategy – resource–efficient and sustainable economy and the faster integration of renewable energy sources (Preamble para 1) – and addresses the identification of projects of common interest necessary to implement priority corridors and areas (Annex I) necessary to achieve this goal. In consideration of these aims the projects identified have to be in line with Union law (cp. Art 5 (8)) and to fulfill certain criteria (beneath others: sustainability, mitigation of environmental risks...). Furthermore the Regulation wants to make sure PCI planning and permitting is in compliance with EU environmental legislation as it provides for streamlining environmental assessments, coordinating more closely and enhancing public participation and transparency in accordance with the aims of the Aarhus Convention. So the Regulation and the delegated Regulation definitively contribute to the pursuit of the objectives of Community policy on the environment.

Furthermore – inter alia – the following provisions of the Regulation refer to the environmental dimension of its purpose:

Preamble

(5) Decision No 1364/2006/EC of the European Parliament and of the Council (5) lays down guidelines for trans– European energy networks (TEN–E). Those guidelines have as objectives to support the completion of the Union internal energy market while encouraging the rational production, transportation, distribution and use of energy resources, to reduce the isolation of less– favoured and island regions, to secure and diversify the Union’s energy supplies, sources and routes, including through cooperation with third countries, **and to contribute to sustainable development and protection of the environment.**

(27) The planning and implementation of Union projects of common interest in the areas of energy, transport and telecommunication infrastructure should be coordinated to generate synergies whenever to do so makes sense from an overall economic, technical, environmental or spatial planning point of view and with due regard to the relevant safety aspects. Thus, when the various European networks are being planned, preference could be given to integrating transport, communication and energy networks in order to ensure that as little land as possible is taken up, whilst ensuring, where possible, that existing or disused routes are reused, in order to reduce to a minimum any negative social, economic, environmental and financial impact.



(34) This Regulation, in particular the provisions on permit granting, public participation and the implementation of projects of common interest, should apply without prejudice to international and Union law, including provisions to protect the environment and human health, and provisions adopted under the Common Fisheries and Maritime Policy.

Article 7(4) By 16 August 2013, the Commission shall issue non-binding guidance to support Member States in defining adequate 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 projects of common interest.

“request must be made in writing”

The present request is made in writing and addressed to the European Commission.

“within a time limit not exceeding six weeks after the administrative act was adopted, notified or published, whichever is the latest”

Commission Delegated Regulation was adopted on 14 October 2013. A delegated act adopted enters into force if no objection has been expressed by the European Parliament or the Council within a period of two months of notification of that act to the European Parliament and the Council or if, before the expiry of that period, the European Parliament and the Council have both informed the Commission that they will not object. Thus, the six-week deadline of submission expires no earlier than on 25 November 2013 before which date the present request is submitted to the European Commission.

“The request shall state the grounds for the review.”

See below.

E)

Grounds for the review

Delegated Regulation C(2013) 6766 is unlawful due to the following reasons:

Failure to ensure effective public participation during the designation process

The Aarhus Convention was signed by the European Community on 25 June 1998 and the Council ratified it on 17 February 2005.³ Afterwards, it became part of the EU environmental law and the Community declared that EU institutions would apply the Convention within the framework of their existing and future rules on access to documents and other relevant rules of EU law in the field covered by the Convention. Regulation 1367/2006 sets out detailed rules on the application of the provisions of the Aarhus Convention in Environmental Matters to Community institutions and bodies.

Pursuant to the Aarhus Convention, each Party shall make appropriate practical/and or other provisions for the public to participate during the preparation of plans and programmes relating to the environment, within a transparent and fair framework, having provided the necessary information to the public. Within this framework Article 6, para. 3, 4 and 8 of the Convention, shall be applied.⁴

According to Article 9 Regulation 1367/2006 “Community institutions and bodies shall provide, through appropriate practical and/or other provisions, early and effective opportunities for the public to participate during the preparation, modification or review of plans or programmes relating to the environment.”

Plans and Programmes

We are convinced, that Commission Delegated Regulation falls within the scope of the definition of plans and programmes under Article 7 of the Aarhus Convention and Article 9 of the Regulation 1367/2006.

According to Article 2(1)e of the Regulation 1367/2006

³ Pursuant to the Treaty on the functioning of the European Union, Article 216 (2) „Agreements concluded by the Union are binding upon the institutions of the Union and on its Member States.“

⁴ Aarhus Convention, Article 7, Public participation concerning plans, programmes and policies relating to the environment,



“plans and programmes relating to the environment” means plans and programmes, (i) which are subject to preparation and, as appropriate, adoption by a Community institution or body;

(ii) which are required under legislative, regulatory or administrative provisions; and (iii) which contribute to, or are likely to have significant effects on, the achievement of the objectives of Community environmental policy, such as laid down in the Sixth Community Environment Action Programme, or in any subsequent general environmental action programme.

General environmental action programmes shall also be considered as plans and programmes relating to the environment.

This definition shall not include financial or budget plans and programmes, namely those laying down how particular projects or activities should be financed or those related to the proposed annual budgets, internal work programmes of a Community institution or body, or emergency plans and programmes designed for the sole purpose of civil protection;

The Delegated Regulation in question has been adopted by a Community institution, the European Commission, on 14 October 2013 according to Article 3(4) Regulation 347/2013 and Articles 172 and 290 TFEU. The Sixth Community Environment Action Programme ended in 2012 whereas the Commission continues to pursue its environment policy, which is now an integral part of the Europe 2020 Strategy for smart, sustainable and inclusive growth. The Regulation on Grids explicitly aims for the implementation of the Europe 2020 Strategy and consequently does the Delegated Regulation.

Preamble (1) of the Regulation 347/2013 explicitly refers to the Europe 2020 Strategy:

“The European Council agreed to the Commission’s proposal to launch a new strategy ‘Europe 2020’. One of the priorities of the Europe 2020 strategy is sustainable growth to be achieved by promoting a more resource-efficient, more sustainable and more competitive economy. That strategy put energy infrastructures at the forefront as part of the flagship initiative ‘Resource efficient Europe’, by underlining the need to urgently upgrade Europe’s networks, interconnecting them at the continental level, in particular to integrate renewable energy sources.”

Consequently Article 3(6) of the Regulation 347/2013 sets out that



“Projects of common interest included on the Union list shall become an integral part of the relevant regional investment plans, the relevant national 10-year network development plans and other national infrastructure plans. Those projects shall be conferred the highest possible priority within each of those plans”.

Therefore, Delegated Regulation in question falls within the scope of the preparation and change of plans and programmes according to the Aarhus Convention and Regulation 1367/2006.

Public participation

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 (Art. 7). 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 (Art. 6 par. 3). Early public participation is to be granted, when all options are open and effective public participation can take place (Art. 6 par. 4). Due account should be taken of the outcome of the public participation (Art. 6 par. 8).

Article 9 Regulation 1367/2006 determines those requirements to Community institutions and bodies:

- (1) Community institutions and bodies shall provide, through appropriate practical and/or other provisions, early and effective opportunities for the public to participate during the preparation, modification or review of plans or programmes relating to the environment when all options are still open. In particular, where the Commission prepares a proposal for such a plan or programme which is submitted to other Community institutions or bodies for decision, it shall provide for public participation at that preparatory stage.*
- (2) Community institutions and bodies shall identify the public affected or likely to be affected by, or having an interest in, a plan or programme of the type referred to in paragraph 1, taking into account the objectives of this Regulation.*
- (3) Community institutions and bodies shall ensure that the public referred to in paragraph 2 is informed, whether by public notices or other appropriate means, such as electronic media where available, of:*
 - (a) the draft proposal, where available;*



- (b) the environmental information or assessment relevant to the plan or programme under preparation, where available; and*
- (c) practical arrangements for participation, including:*
- (i) the administrative entity from which the relevant information may be obtained,*
 - (ii) the administrative entity to which comments, opinions or questions may be submitted, and*
 - (iii) reasonable time-frames allowing sufficient time for the public to be informed and to prepare and participate effectively in the environmental decision-making process.*
- (4) A time limit of at least eight weeks shall be set for receiving comments. Where meetings or hearings are organised, prior notice of at least four weeks shall be given. Time limits may be shortened in urgent cases or where the public has already had the opportunity to comment on the plan or programme in question.*
- (5) In taking a decision on a plan or programme relating to the environment, Community institutions and bodies shall take due account of the outcome of the public participation. Community institutions and bodies shall inform the public of that plan or programme, including its text, and of the reasons and considerations upon which the decision is based, including information on public participation”.*

Also Regulation 34/2013/EU on guidelines for trans-European energy infrastructure provides for detailed information and public participation duties:

Article 9(2) requires that “*without prejudice to any requirements under the Aarhus and Espoo Convention and relevant Union law, all parties involved in the permit granting process shall follow the principles for public participation set out in Annex VI.3.*”

Article 9(4) establishes, that “*at least one public consultation shall be carried out by the project promoter, or, where required by national law, by the competent authority, before submission of the final and complete application file to the competent authority pursuant to Article 10(1)(a).*”

[...]

“*The public consultation shall inform stakeholders referred to in Annex VI.3(a) 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*”.

According to para. 7 “*The project promoter, or where national law so provides, the competent authority, shall establish and regularly update a website with relevant*

information about the project of common interest, which shall be linked to the Commission website and which shall meet the requirements specified in Annex VI.6.”

To create the Union list of projects of common interest, 12 regional groups, responsible for the selection of PCIs on regional level have been established and composed. In these groups only the Member States and the European Commission had decision making powers. The European Commission was empowered to adopt the Union list of PCIs based on the regional lists.

During this designation process public consultation was not carried out adequately and the public did not have the opportunity to participate during this process. According to our knowledge no consultations have been carried out by the regional groups and the public did not have a real opportunity to review and assess the Union list of projects of common interest.

With regard to the timing of the public consultation, it was not provided in the time when all options were open and the public could effectively provide its views and comments on the Regulation in question.

The preparatory process ran already since early 2012 and it is reasonable to expect that during that period an appropriate opportunity for an effective public consultation existed. The project promoters were invited to submit their proposal until July 2012⁵, however, without any opportunity for the public to participate. A stakeholder consultation on the PCI lists was carried out by the European Commission only on 5 June 2013. It is obvious that the one month period in June 2013 is insufficient for the public to learn about the consultation process and the projects proposed and subsequently to provide the comments.

Public participation procedures shall include reasonable time-frames allowing sufficient time for informing the public. However, there was not sufficient information available on the proposed lists and necessary information has not been made easily accessible. This is clearly in breach with the requirements the Aarhus Convention stating that the public shall be provided with necessary information.

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 interest, the potential and deficiencies of the project as such is

⁵ European Commission, DG ENER UNIT B1, Identification of Projects of Common Interest in European Electricity Infrastructure, Final Report, 18 May 2013, page 1.



discussed the public does not have a proper say. 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.

Even if it would have been the primary duty of the Member States to comply with the provisions of the Aarhus Convention, we suppose that certain obligation rests in this respect also on the Commission. It was confirmed in the Recommendation of the Aarhus Convention Compliance Committee ACCC/C/2010/54⁶. In the Regional groups, responsible for the selection of PCIs, decision-making power is restricted to Member States and the Commission. Therefore, in time of the designation process it was also the Commission's duty as an active player in the preparation process to take into consideration the requirements of the public participation.

From all the available information the process could be seen only as a "pro forma" public consultation not the real opportunity to effectively participate. It could be concluded that the Commission did not provide evidence and information that it evaluated the Delegated Regulation in the light of the requirements of Article 7 of the Aarhus Convention and Article 9 of Regulation 1367/2006.

⁶ [http://www.unece.org/fileadmin/DAM/env/pp/compliance/C2010-54/Findings/ece mp.pp c.1 2012 12 eng.pdf](http://www.unece.org/fileadmin/DAM/env/pp/compliance/C2010-54/Findings/ece_mp.pp_c.1_2012_12_eng.pdf)



F)

Claim

For the above mentioned reasons, J&E respectfully asks the Commission to

- consider the legality of Commission Delegated Regulation as cited above
- remedy the unlawfulness of the Commission Delegated Regulation if found in breach of the respective European Union environmental law as cited above
- inform J&E about its decision in the aforementioned matter.

Done at Vienna, 20 November 2013

For Justice & Environment
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