APPLICATION

lodged on behalf of the applicant

Name of Applicant:	Justice & Environment
Address of Applicant:	Udolni 33, Brno 60200, Czech Republic
Representative of Applicant:	**dr. Csaba Kiss** private attorney 1172 Budapest, Teréz u. 7. Hungary
Defendant:	**European Commission** DG ENERGY B-1049 BRUSSELS Belgium
Method of service:	The Applicant hereby declares pursuant to Article 44(2) of the Rules of Procedure that it chooses as a method of service acceptance by email to the following **single email address**: **drkiss@emla.hu**

General Court of the European Union
Rue du Fort Niedergrünewald
Luxembourg
L-2925

The Honorable Court,

Justice and Environment (hereafter: Applicant)

- according to **Article 263** of the Treaty on the Functioning of the European Union (hereafter: TFEU)

- pursuant to Article 12 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 (hereafter: Aarhus Regulation)

- in conformity with **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) (hereafter: Aarhus Regulation Implementing Decision)

- according to the **Rules of Procedure of the General Court** (1-7-2011)

hereby submits the following

APPLICATION FOR ANNULMENT

against the European Commission (hereafter: Defendant or Commission) as follows.

I. Type of Action

1. The Applicant requests pursuant to Article 264 TFEU the Honorable General Court to declare the following concerned acts null and void:

   Commission Delegated Regulation (EU) No 1391/2013 of 14 October 2013 amending Regulation (EU) No 347/2013 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;

   Answer of the European Commission to the Request for Internal Review of Justice and Environment **No. ener.b.1/AR/1b(2014)s290675** by way of DG Energy dated 7 February 2014.

2. In the Applicant's understanding, the aforementioned **Commission Delegated Regulation (EU) No 1391/2013** and the response of the Commission are unlawful by infringing the Aarhus Convention as approved by the 2005/370/EC Council Decision of 17 February 2005 on the conclusion, on behalf of the European Community, of the Convention on access to information, public participation in decision-making and

access to justice in environmental matters and by infringing the aforementioned Aarhus Regulation.

II. Statement of Facts

3. The Defendant has adopted the aforementioned Commission Delegated Regulation on 14.10.2013.

4. The Applicant, conforming to the requirements of the Aarhus Regulation as well as the Aarhus Regulation Implementing Decision, has submitted a Request for Internal Review pursuant to Article 10 of the Aarhus Regulation dated 20 November 2013 within the statutory deadline of six weeks.

5. The Defendant has considered the Request for Internal Review of the Applicant procedurally inadmissible, as in its view, the Commission Delegated Regulation cannot constitute a valid subject of the request for the internal review under the Aarhus Regulation. The Defendant argued that the contested Commission Delegated Regulation is not an act of individual scope, and therefore, it does not qualify for the definition of an administrative act within the Aarhus Regulation. The Defendant further argued that contested Commission Delegated Regulation also cannot be considered as adopted under environmental law. It follows that the Defendant has not examined the request for internal review in the merits. Only as a subsidiary argument on the substance the Defendant explained, that Commission Delegated Regulation is neither a plan nor a program within the meaning of Article 9 of the Aarhus Regulation

and that public consultation has been ensured and all relevant information has been disclosed to the public.

III. Legal Background

1. Eligibility of the Applicant to submit a Request for Internal Review

The Applicant claims that it was eligible to submit a request for internal review to the Defendant due to the following reasons:

6. The Applicant meets the criteria set by Article 10 and 11 of the Aarhus Regulation.

7. The Applicant is a non-governmental organization which is demonstrated by the fact that Justice & Environment 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.

8. The Applicant is "(a) [it is] an independent non-profit-making legal person in accordance with a Member State's national law or practice". The Applicant "(b) [it] has the primary stated objective of promoting environmental protection in the context of environmental law". The Applicant "(c) [it] has existed for more than two years and is actively pursuing the objective referred to under (b)". The Applicant deals with the matter of the application on a professional basis and "(d) the subject matter in respect of which the request for internal review is made is covered by its objective and activities".

9. The Defendant found compliant the Applicant with all the eligibility criteria laid down in Article 11 of the Aarhus Regulation.

10. Article 12 (1) of the Aarhus Regulation states that the NGO "which made the request for internal review pursuant to Article 10 may institute proceedings before the Court of Justice in accordance with the relevant provisions of the Treaty".

2. Admissibility of the Request for Internal Review submitted in the case

11. The applicant is convinced that the Decision on request for internal review is flawed. Firstly, the Applicant demonstrates that the Commission Delegated Regulation does qualify for the definition of an administrative act within the Aarhus Regulation. Secondly, the Applicant demonstrates that Commission Delegated Regulation has been adopted under environmental law. Therefore, the request was admissible under the Aarhus Regulation and by rejecting to review it the Defendant did not comply with the relevant provision of the Aarhus Regulation.

2.1. Administrative act

12. According to the Defendant the Commission Delegated Regulation cannot be considered an administrative act within the meaning of Article 2(1)(g) of the Aarhus Regulation being a regulatory act as defined by Article 290 TFEU as it is to be regarded of general application addressed to all operators.

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

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

15. The General Court decided already 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. In the Applicant's view, since this is the judgment of the General Court that has not yet been amended by the Court of Justice, this is the leading case law in the matter that has to be taken into due account by the Defendant.

16. In the present case, the Commission acted as a public authority pursuant to Article 2 (2) of the Aarhus Convention. Therefore, the Commission should meet its obligations

[1] Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, 25 June 1998.
[2] Case T-338/08, paras 71-79, case T-396/09, paras 58-59.

under Article 9 (3) and (4) of the Aarhus Convention and provide for adequate and effective remedies to members of the public, including the Applicant.

17. The applicant claims that nevertheless it has legal standing before the Court according to the combined interpretation of Article 263 TFEU, the United Nations Economic Commission for Europe Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters adopted by the European Union on 17 February 2005 by Decision 2005/370/EC (hereafter Aarhus Convention) and of the Aarhus Regulation.

18. Pursuant to Article 9(3) of the Aarhus Convention "*each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment*." With regard to the European Union, as a Party to the Aarhus Convention, the reference to "national law" should be interpreted as referring to the domestic law of the EU (ACCC/C/2006/18 (Denmark), ECE/MP.PP/2008/5/Add.4, para 27).

19. We also wish to highlight that according to the judgment of the Court in case C-240/09, Lesoochranárske zoskupenie VLK v Ministerstvo zivotneho prostredia Slovenskej republiky it is for the Court "*to interpret, to the fullest extent possible, the procedural rules relating to the conditions to be met in order to bring administrative or judicial proceedings in accordance with the objectives of Article 9(3) of that convention and the objective of effective judicial protection of the rights conferred by*

the European Union law, in order to enable an environmental protection organization, such as the Lesoochranárske zoskupenie, to challenge before a court a decision taken following administrative proceedings liable to be contrary to European Union environmental law."

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

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

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

23. The administrative act is having legally binding and external effect. The Commission 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.

2.2. Adopted under environmental law

24. According to the Defendant the Commission Delegated Regulation cannot be considered as adopted under environmental law as Regulation (EU) 347/2013 cannot be considered environmental law.

25. Pursuant to Article 10(1) "Any non-governmental organisation which meets the criteria set out in Article 11 is entitled to make a request for internal review to the Community institution or body that has **adopted an administrative act under environmental law** or, in case of an alleged administrative omission, should have adopted such an act. According to Article 2 (1)(f) "'environmental law' means **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 utilisation of natural resources, and promoting measures at international level to deal with regional or worldwide environmental problems;

26. The Regulation (EU) 347/2013 and the therein delegated Commission Delegated Regulation (adoption of the Union list) fall under the scope of 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 Commission Delegated 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 (EU) 347/2013 and the Commission Delegated Regulation definitively contribute to the pursuit of the objectives of Community policy on the environment.

27. Furthermore – inter alia – the following provisions of the Commission Delegated 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."

28. The Defendant lists three major reasons why the contested Commission Delegated Regulation does not fall under environmental law: a) the Commission Delegated

Regulation has been adopted on the basis of Art. 172 TFEU that is a legal basis for Union measures for energy networks, etc.; b) the contested Commission Delegated Regulation aims at developing trans-European energy networks; and c) the contested Commission Delegated Regulation gives explicit priority to energy policy over environment policy. These however are not valid counterarguments against the opinion of the Applicant that the Commission Delegated Regulation does belong to environmental law. a) The Aarhus Regulation is clear that Community legislation can belong to environmental law "irrespective of its legal basis" therefore reference by the Defendant to Art. 172 TFEU is unsubstantiated; b) While the primary aim of the Commission Delegated Regulation can be energy-related, it does not exclude that at the same time it also contributes to the pursuit of the objectives of Community policy in the environment, especially because the requirement is **contribution** only; c) While there can be explicit priorities spelled out by the contested Commission Delegated Regulation, even over environmental policy, the latter can still be promoted as is the case with the Commission Delegated Regulation. In addition, Art. 194 TFEU is clear that energy related decisions (which the Defendant never challenged that the PCI list would not be energy related) have to take into account also environmental concerns ("the need to preserve and improve the environment"). It reads as follows:

TITLE XXI

ENERGY

Article 194

1. In the context of the establishment and functioning of the internal market and with regard for the need to preserve and improve the environment, Union policy on energy shall aim, in a spirit of solidarity between Member States, to

(a) ensure the functioning of the energy market;

(b) ensure security of energy supply in the Union;

(c) promote energy efficiency and energy saving and the development of new and renewable forms of energy; and

(d) promote the interconnection of energy networks.

3. Substance of the claim – unlawfulness of the Commission Delegated Regulation

29. The Defendant in its response to the Applicant has found the Request for Internal Review inadmissible, and for this reason has not investigated the merits of the Request. On page 3 of its response, the Defendant states that

"only as a subsidiary argument on the substance, I would like to explain that …"

30. In light of this, the Applicant would like to sum up its arguments in favor of its original Request for Internal Review, however, we would like to reserve the right to present additional arguments in these matters once the Commission responds to our claims in the merits.

31. The Commission Delegated Regulation is unlawful due to the failure to ensure effective public participation during the designation process.

32. 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. The Aarhus Regulation sets out detailed rules on the application of the provisions of the Aarhus Convention in Environmental Matters to Community institutions and bodies.

33. 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]

34. According to Article 9 of the Aarhus Regulation, *"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."*

3.1. Plans and programmes

Plans and programmes

35. According to the Defendant the Commission Delegated Regulation is neither a plan nor a program.

[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."

36. Neither the Aarhus Regulation nor the SEA Protocol, nor the Aarhus Convention define the words 'plans' and 'programmes'. These terms do have common-sense and sometimes legal meanings throughout the ECE region, however.[5] Nevertheless, Article 3(6) of the Regulation (EU) 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".

37. The projects of common interest included in the Union list become an integral part of the plans mentioned above and, moreover, the projects shall be conferred the highest possible priority within each of those plans. If the Union list is not considered to be a plan, the preparation, modification or review of the plans mentioned above must be subject to public participation as soon as the Union list becomes an integral part of them (Article 9(1) of the Aarhus Regulation). However, if a public participation procedure is carried out as regards one of those plans it would – most probably – not have any effect on the legality of the plans and public participation would not be effective. Since the projects included on the Union list do not become an integral part of one single plan, but of several plans, the PCI list must be regarded as a plan or programme itself.

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

Plans and programmes relating to the environment

38. Pursuant to Article 2(1)e of the Aarhus Regulation

"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;

39. The Commission Delegated Regulation in question has been adopted by a Community institution, the European Commission, on 14 October 2013 according to Article 3(4) Regulation (EU) 347/2013 and Articles 172 and 290 TFEU. The Sixth Community Environment Action Programme ended in 2012 whereas the Commission continues to

[5] Aarhus Convention Implementation Guide, Second Edition, 2013, p 188, available at

pursue its environment policy, which is now an integral part of the Europe 2020 Strategy for smart, sustainable and inclusive growth. The Regulation (EU) 347/2013 explicitly aims for the implementation of the Europe 2020 Strategy and consequently does the Commission Delegated Regulation.

40. Preamble (1) of the Regulation (EU) 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."

41. Therefore, the Commission Delegated Regulation in question falls within the scope of the preparation and change of plans and programmes according to the Aarhus Regulation.

42. However, as a subsidiary argument, the Commission Delegated Regulation falls also within the scope of the United Nations Economic Commission for Europe Convention on Strategic Environmental Assessment to the Convention on Environmental Impact

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http://www.unece.org/env/pp/publications/aig.html .

Assessment in a Transboundary Context adopted by the European Union on 21 May 2003 (hereafter SEA Protocol).

43. The SEA Protocol refers to plans and programmes, that **"are likely to have significant environmental, including health, effects".**

44. According to Article 2(5) of the SEA Protocol plans and programmes

"*means plans and programmes and any modifications to them that are:*
(a) Required by legislative, regulatory or administrative provisions; and
(b) Subject to preparation and/or adoption by an authority or prepared by an authority for adoption, through
a formal procedure, by a parliament or a government."

45. Pursuant to Article 4(1) each Party shall ensure that a strategic environmental assessment is carried out for plans and programmes referred to in paragraphs 2, 3 and 4 which are likely to have significant environmental, including health, effects.

46. It goes without saying that the Union list including projects of common interest is likely to have significant environmental, including health, effects and fall therefore within the definition of 'plans and programmes' of the SEA protocol.

47. Furthermore and as already mentioned above we wish to stress again, that the EU is a party to the Aarhus Convention and therefore required to provide for "*public participation concerning plans, programmes and policies*" as required by the Aarhus

Convention. The Aarhus Convention refers to "*plans and programmes relating to the environment*". According to Article 7 of 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, paragraphs 3, 4 and 8, shall be applied. The public which may participate shall be identified by the relevant public authority, taking into account the objectives of this Convention. To the extent appropriate, each Party shall endeavour to provide opportunities for public participation in the preparation of policies relating to the environment."

48. Notwithstanding the fact that the Union list – in our opinion – is covered by the Aarhus Regulation as well as the SEA protocol it is in any way covered by the wide definition of environment under the Aarhus Convention. Since the EU is a party to the Convention we wish to stress again, that EU legislation is being interpreted in compliance with the Convention.

3.2. Failure to ensure early and effective public participation

49. The Applicant claims that public participation has not been ensured in an early and effective way.

50. 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).

51. Article 9 of the Aarhus Regulation 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".

52. The Defendant claims that public consultation has been ensured by means of six dedicated events, referred to below, and that public consultation took place at the earliest possible stage.

- **Open public consultation between 20 June and 4 October 2012**
- **Information day on the process of identifying PCIs on 17 July 2012**

- **The European Gas Regulatory Forum (Madrid Forum) meeting on 18 April 2013**
- **The Electricity Regulatory Forum (Florence Forum) meeting on 16 May 2013**
- **The Environmental Stakeholders meeting on 5 June 2013**
- **Consultations with relevant environmental stakeholders in June 2013**
- **Written consultations with environmental Stakeholders in July 2013**

Information about the consultation was announced on the "Your Voice in Europe" website.

53. 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 – and as part of them environmental NGOs – did not have a real opportunity to constantly review and assess the draft lists elaborated by the regional groups which finally got incorporated into the Union list of projects of common interest.

54. A public consultation taken place between June and October 2012 on the former draft lists as indicated by the European Commission cannot be considered as neither as timely nor effective – as there was constant change of projects which have been taken

on and off the list in the long run of the PCI designation process, the public was not able to consider projects which have not been on the List of projects submitted to be considered as potential Projects of Common Interest published for public consultation between June and October 2012. (Example: 2.18 PCI capacity increase of hydro-pumped storage in Austria - Kaunertal, Tyrol was not to be identified on the list for public consultation in 2012[6].) Furthermore only limited information was published about the submitted projects by then, allowing the public just an ineffective review of the list. In many cases it was even difficult to properly identify the submitted projects in order to look for additional information.

55. European Gas and Electricity Regulatory Fora by mid/end of May 2013 were meant for the participation of Gas and Electricity stakeholders – and not for public participation in planning and programming pursuant to the Aarhus Convention. Anyways these fora did not take place when still all options where open – as already in July 2013 final regional lists have been adopted.

56. An environmental stakeholder consultation on the PCI lists was carried out by the European Commission only on the 5 June 2013 in Brussels. The meeting was announced on very short notice – so environmental stakeholders could not even adequately consult with each other (on EU and regional level) on pros and cons of proposed PCIs (there were 248 projects in the final regional lists) or inform other national/regional NGOs to arrange for their participation in the consultation meeting in Brussels. There is no indication, that the comments and concerns of the public has been taken into due account while establishing the Union list – neither the regional

[6] http://ec.europa.eu/energy/infrastructure/consultations/doc/pci_list_electricity.pdf

groups, nor the member states nor the European Commission clearly deal with those comments in the run of the proceedings.

57. 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.

58. 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.

59. 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 discussed the public does not have a proper say. In order to speed up the procedures, foster acceptance, efficiently promote the goals of the Commission Delegated 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.

60. 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/2010/54[8] and lately reconfirmed in its Recommendation ACCC/C/2012/70[9]. 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.

61. 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 Commission Delegated Regulation in the light of the requirements of Article 7 of the Aarhus Convention and Article 9 of the Aarhus Regulation.

[8] http://www.unece.org/fileadmin/DAM/env/pp/compliance/C2010-54/Findings/ece_mp.pp_c.1_2012_12_eng.pdf
[9] http://www.unece.org/fileadmin/DAM/env/pp/compliance/C2012-70/Findings/C70_CzechRep_Findings_advancededited.pdf

IV. Summary of the claim, date and signature by attorney

The Applicant requests the Honorable General Court to declare the contested measures (Commission Delegated Regulation (EU) No 1391/2013 of 14 October 2013 amending Regulation (EU) No 347/2013 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 and the Response of the Commission No. ener.b.1/AR/1b(2014)s290675 made by the Defendant) null and void.

Done in Budapest, Hungary, on 4 April 2014 on behalf of the Applicant, signed by dr. Csaba Kiss licensed private attorney at law.

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dr. Csaba Kiss
on behalf of the Applicant