Energy Infrastructure Projects of Common Interest (PCI)

PCI

National Implementation of the EU Permitting Rules

Justice and Environment 2017

a Udolni 33, 602 00, Brno, CZ
t/f 36 1 3228462 / 36 1 4130297
fb /justiceandenvironment
e info@justiceandenvironment.org
w www.justiceandenvironment.org
tw JustEnviNet
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1. Introduction

The TEN-E Regulation (Regulation (EU) No. 347/2013) sets out guidelines for streamlining the permitting processes for major energy infrastructure projects that contribute to the integration of the European energy networks. The TEN-E Regulation establishes that PCIs are necessary to take forward EU energy policy and should be given the most rapid consideration in the permitting process that is legally possible. Together with the Regional Groups, the European Commission ensures that every two years a Union list consisting of the most important energy infrastructure projects needed to achieve the implementation of the strategic energy infrastructure priority corridors (=PCIs) is enacted as an Annex to the TEN-E Regulation. To ensure rapid treatment of PCIs the TEN-E Regulation sets an overall timetable of 3,5 years for the permitting process, with an indicative period of 2 years for “pre-application procedures” – e.g. preparation of the necessary schedules, concept for public participation and public consultation on PCI proposals – and 1,5 years for determination of applications for “permits”. Thereby the Regulation intents to facilitate the timely implementation of PCIs by streamlining, coordinating more closely, and accelerating permit granting processes and by enhancing public participation (Art 1/2 c.). The legal requirements for PCI permitting and public participation are stated in Chapter III - permit granting and public participation (Art 7 – 10 TEN-E Regulation). The Regulation is binding in its entirety and directly applicable in all Member States (Art 24).

In spite of the fact that regulations are directly applicable in the Member States (Art 288 TFEU) and do not have to be transposed into the national legal systems to be effective, the Member States are obliged to consolidate their conflicting existing legislation due to the principles of legal certainty and legal clarity. Furthermore rules might have to be issued particularly in the areas of enforcement, the designation of competent public authorities and the applicable procedures.2

In 2015 and 2016 J&E laid considerable emphasis on discovering the implementation of the TEN-E Regulation in different European Member States and to contribute to a transparent and participative energy infrastructure planning and permitting on the EU and national levels. This assessment shall serve as an overview on how Member States guarantee the application of the rules of Chapter III TEN-E Regulation – and help to improve the evidence base regarding transparency and public participation in national PCI permitting procedures.

Therefore a questionnaire was created to present the national legislative and non-legislative solutions for the implementation of the TEN-E Regulation.

Lawyers from the following organizations participated in the research:

- Environmental Management and Law Association (EMLA), Hungary
- Frank Bold Society (FBS), Czech Republic
- Frank Bold Society (FBS), Poland
- ÖKOBÜRO – Alliance of the Austrian Environmental Movement (ÖKOBÜRO), Austria
- Zelena Akcija – Friends of the Earth Croatia (ZA), Croatia

2. The permitting process for Energy Infrastructure Projects of Common Interest (PCI)

2.1 Priority status of projects of common interest

The adoption of the Union list shall establish, for the purposes of any decisions issued in the permit granting process, the necessity of these projects from an energy policy perspective, without prejudice to the exact location, routing or technology of the projects (Art 7 para 1). All authorities concerned shall ensure that the most rapid treatment legally possible is given to the files concerning PCIs (Art 7 para 2). Where such status exists in national law, projects of common interest shall be allocated the status of the highest national significance possible and be treated as such in permit granting processes (Art 7 para 3).

The highest national significance possible relates to the timely treatment of PCI in permitting procedures. The status of the “highest national significance possible” for PCI exists in the Hungarian, Croatian and Polish law. At the same time most of the countries have adopted special provisions regarding PCI permit granting procedures in order to streamline these procedures and speed up the permit granting. The consequence of such a status for the timeliness and quality of national permitting practice in the area of energy infrastructures is not clear so far.

Regarding Hungary it can be concluded that the general number of projects assigned as ‘high priority projects’ is increasing year by year. This might be a consequence of the amendment of the High Priority Projects Act. The conditions for gaining this status are unreasonably low. The project needs to be entirely or partly financed by state or EU budget, the project budget has to surpass a certain investment volume (2016: 300,000 Euros) and the project establishes a certain amount of workplaces (by 2016: 15 workplaces).

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3 Cp. TEN-E Regulation, recital 40
4 Act LIII of 2006 on the Acceleration and Simplification of the Execution of Investments Having Particular Importance in Respect of National Economy
• Austria
So far the Austrian legal framework didn’t dispose of public interest clauses for certain kinds of projects. Neither does the Energy Infrastructure Act\(^5\) (enacted in February 2016) or the EIA-Act\(^6\) (amended together) provide for a legally enshrined priority status for PCI. Only § 10 Energy Infrastructure Act states that the concerned authorities are obliged to treat the PCI project applications timewise as a top priority in permitting procedures.

• Croatia
In Croatia no special implementing legislation has been passed to accommodate the provisions of the TEN-E Regulation into the national legal framework. However, Croatian legislation is familiar with the concept of ‘Strategic Investment Projects’ (SIPs), it would appear at first sight, an institute autonomous to that of 'PCIs' as neither the SIPs Act and its amendments, nor its background documents refer to PCIs.\(^7\) Nevertheless, the ‘priority status’ of PCIs is based directly on Art 7 TEN-E Regulation with regard to the fact that in the Croatian law the status of ‘Strategic investment projects’ exists.

• Czech Republic
Similarly in Czech Republic no special implementing legislation has been passed to accommodate the provisions of the TEN-E Regulation into the national legal framework (per September 2016). In March 2016, the Czech Ministry for Regional Development had proposed an amendment to the Building Act\(^8\) and other acts, especially the Infrastructure Construction Acceleration Act\(^9\), reflecting i.a. the need to introduce the coordination procedure into national law. The amendment suggests combining the environmental assessment, building placement permit and construction permit into one single procedure and for energy infrastructure, it sets deadlines on decision-making but also provisions on public participation.

• Hungary
Similarly to the Croatian situation the ‘priority status’ of projects of common interest (PCIs) is based directly on Art 7 TEN-E Regulation with regard to the fact that in the Hungarian law the status 'high-priority projects in terms of national economic interests’ exists.\(^10\)

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\(^5\) Bundesgesetz zur Durchführung der Verordnung (EU) Nr. 347/2013 zu Leitlinien für die europäische Infrastruktur (BGBl. I Nr. 4/2016)
\(^7\) It was first introduced by the Act on Strategic Investment Projects of the Republic of Croatia (hereinafter: SIPs Act) which came into force on 14 October 2013.
\(^8\) Act no. 183/2006 Coll., on town and country planning and building code (Building Act)
\(^9\) Act no. 416/2006 Coll., on accelerating construction of transport, water an energy infrastructure and the EIA act.
\(^10\) The Governmental Decree No. 111/2014 (IV.1) on Facilitation and Coordination of Projects of Common Interest and their permit granting process relate to the trans-European Energy Infrastructure Network contains reference to the High-priority Projects Act.
**Poland**

On 24th July 2015 a new act on the preparation and implementation of strategic investments in transmission networks was adopted\(^1\) in Poland. It is commonly called a transmission special act and to be applied to the electricity grid PCIs only. The act creates a new category of investment – a strategic investment to the transmission system. The list of 23 such investments constitutes an annex to the act. All of the energy infrastructure PCIs listed on the Union List are integrated, however, additional 17 investments are also covered by the act.

Gas pipelines are developed based on a different special act – act on investments in regasification terminal for liquefied natural gas in Świnoujście\(^2\). Its provisions are rather similar to those of the electricity transmission special act. For oil pipelines there’s no special legislation and the general rules for public interest investments apply.

### 2.2 Streamlining environmental assessment procedures

The EC issued a guidance\(^3\) 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 PCIs. The European Commission has asked Member States to take appropriate measures to ensure adequate and effective environmental assessments (EIA and SEA) within planning and permitting of PCI\(^4\). Further Art 7 para 5 – 7 TEN-E Regulation obliges Member States to take legislative or non-legislative measures in order to streamline the environmental assessment procedures and to ensure their coherent application. It is considered that early planning, adequate timing and complementarity both of environmental assessments and other environmental requirements, as well as of public participation procedures, are essential elements for successful streamlining\(^5\).

The main environmental assessment procedures required by EU legislation are Strategic Environmental Assessments (SEA), Environmental Impact Assessments (EIA) and Appropriate Assessments. One or more of these procedures will be relevant for nearly all PCIs and influence the issuance of their construction and operation permits. The EC Guidance suggests to follow an overall procedure for streamlining Environmental Assessments for PCIs:

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\(^1\) **ustawa o przygotowaniu i realizacji strategicznych inwestycji w zakresie sieci przemysłowych** The act came into force on 15th September 2015.

\(^2\) **ustawa o inwestycjach w zakresie terminalu regazyfikacyjnego skroplonego gazu ziemnego w Świnoujściu**


The research concludes, that so far (per August 2016) Austria, Croatia, Czech Republic, Hungary and Poland have not taken legislative measures nor evident non-legislative measures in order to implement the recommendations provided in the Guidelines.

2.3 Environmental impacts of PCIs

With regard to the environmental impacts addressed in Art 6 para 4 HabitatsDirective16 and Art 4 para 7 Water Framework Directive17 projects of common interest 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 (Art 7 para 8).

Art 7 para 8 seems to suggest that if the competent authority carried out a proper Appropriate Assessment (AA) and no alternatives exist, PCIs are considered to be of overriding public interest and exceptional permitting is allowed provided that compensation measures are implemented.

Anyhow such an interpretation would not be in line with Art 6 para 4 Habitats Directive 4, which states that a project may be carried out only for imperative reasons of overriding public interest. Exceptions may only be applied after appropriate assessment (all of the preceding stages) has been carried out properly\(^\text{18}\) and imperative reasons of overriding public interest exist. Exceptions should be interpreted restrictively and in line with the precautionary principle. When assessing imperative reasons of overriding public interest, competent authorities must decide whether they are more important than the need for site conservation (balancing of interests). Exception may be justified based on two criteria: First, the public interest must be overriding and second the public interest must be long term.\(^\text{19}\)

To conclude, Article 7 para 8 TEN-E Regulation enshrines that PCIs are in public interest from an energy policy perspective. At the same time the provision has to be interpreted in conformity with Art 6 para 4 Habitats Directive. The obligation of competent authorities to balance the interests in order to find out whether imperative reasons of overriding public interest justify the interference with the objectives of Habitats is still valid.

Equally this conclusion applies to the obligation under Art 4 para 7 Water Framework Directive (WFD) for carrying out an interest test when new modifications and new sustainable human development activities hinder the achievement of the WFDs environmental objectives. The WFD additionally requires that in case the interest test allows the interference with the WFDs environmental objectives, the best environmental option, which is not disproportionately expensive or technically infeasible, needs to be taken.

Art 6 para 4 Habitats Directive prescribes that in case a plan or project may have significant adverse effects to the integrity of a site, firstly alternative and safer solutions for achieving the same objectives would have to be sought. In this stage, other considerations (e.g. economic consideration that the alternative solution is much more expensive) cannot overrule ecological considerations (need to preserve integrity of the site). If an alternative solution that would not harm the integrity of the site is found, it must be used.

It seems recommendable to further monitor the national PCI permitting practice with regard to the application of Art 7 para 8 in conjunction with Art 6 para 4 Habitats Directive and Art 4 para 7 WFD by the competent authorities.

\(^{18}\) See cases C-239/04 p 35; case C-404/09, p 156-157.

3. Energy infrastructure authority

Each Member State shall designate one national competent authority which shall be responsible for facilitating and coordinating the permit granting process for projects of common interest (Art 8 para 1).

- Austria
  The competent national authority (energy infrastructure authority) is the Federal Minister for Science, Research and Economics\(^{20}\) (cp. § 6 Energy Infrastructure Act).

- Croatia

- Czech Republic
  The responsible authority is the Ministry of Industry and Trade (under the Manual of Procedures).

- Hungary
  The TEN-E Decree\(^{21}\) designates the Hungarian Energy and Public Utility Regulatory Authority (HEA) as national competent authority.\(^{22}\)

- Poland
  Coordination of the PCI permitting process is established in the Prime Minister’s ordinance of 17 April 2013 on the team ensuring support in the permit granting process and decision making for the energy infrastructure projects of special interest of the EU. According to this ordinance, the Minister of Economy is a chairman of the team (other members are various ministers, voivodes - government officials in the regions, and directors of some central administrative bodies).

Nevertheless the manual states that Ministry of Economy is the one authority coordinating the permit granting process, but the Ministry of Economy no longer exists. The Prime Minister is currently working on a new ordinance, that will establish the Minister of Energy as the competent national authority and the updating of the manual is also in progress, its draft has been sent to the EC for its approval.

\(^{20}\) http://www.en.bmfw.gv.at/Seiten/default.aspx
\(^{21}\) Governmental Decree No. 111/2014 (IV.1) on Facilitation and Coordination of Projects of Common Interest and their permit granting process relate to the trans-European Energy Infrastructure Network in order to implement TEN-E Regulation (hereafter TEN-E Decree)
\(^{22}\) The HEA is the regulatory body of the energy and public utility market, supervising the national economy’s sectors of strategic importance.
4. Permitting schemes

The competent authority shall take actions to facilitate the issuing of the comprehensive decision. The comprehensive decision shall be issued within according to one of three different permitting schemes: the integrated, the coordinated and the collaborative scheme (Art 8 para 3).

The permitting scheme applied in Austria, Czech Republic and Hungary is a collaborative scheme. In Croatia and Poland the coordinated scheme is currently adopted. In Poland by entry into force of the new Prime Minister ordinance the collaborative scheme is the applicable scheme.

The collaborative scheme means a system where a competent national authority is responsible for the coordination of the PCI permitting procedures, the permitting procedures itself are carried out by the respective permitting authorities in accordance with the relevant sectorial legislation. According to Art 8 para 3 TEN-E Regulation the competent authority shall, in consultation with the other authorities concerned, where applicable in accordance with national law, and without prejudice to time limits set in accordance with Article 10, establish on a case-by-case basis a reasonable time limit within which the individual decisions shall be issued. It shall monitor compliance with the time limits by the authorities concerned.

In the coordinated scheme the comprehensive decision comprises multiple individual legally binding decisions issued by several authorities concerned, which shall be coordinated by the competent authority. The competent authority may establish a working group where all concerned authorities are represented in order to draw up a permit granting schedule in accordance with Article 10 para 4 (b), and to monitor and coordinate its implementation.\(^\text{23}\)

- **Austria**

In accordance with Art 8 TEN-E Regulation in Austria the energy infrastructure authority has the right to support the permitting authorities, it may correspond with other authorities to improve permit granting processes or set efficient timelines. Coordination is exercised by the energy infrastructure authority only concerning projects that are not subject to EIA, or cross border projects subject to EIA. Meanwhile EIAs (which do not have a cross border element) are carried out in an integrated permitting scheme by the regional government which is the competent permitting authority for projects which have to undergo EIA. The energy infrastructure authority only takes part in pre-application procedures and is coordinating permitting procedures of cross-border and cross-regional projects. For EIA projects, the energy infrastructure authority’s only competence is to take over coordination of permitting processes of cross-regional or cross-border projects.

\(^{23}\)Cp. TEN-E Regulation Art 8 para 3 (b)
• **Croatia**
Under the strategic investment projects framework the procedures are generally streamlined and aimed at fast and efficient permitting. However, environmental legislation has not been adversely affected by this streamlining. The only difference in relation to the regular procedure is that there is, for SIPs, an obligation to finish screening in 15 days. For all other procedures, most notably for EIA procedure, regular course of action is followed.

• **Czech Republic**
At present, PCIs are being permitted in 2 stages pursuant to Art 10. The amendment\(^{24}\) suggests combining the environmental assessment, building placement permit and construction permit into one single procedure and for energy infrastructure it sets quite tight deadlines on decision-making but also public participation.

• **Hungary**
In order to implement Art 8 TEN-E Regulation there are not any special provisions in the EIA laws. The EIA procedures of PCI are carried out based on the special rules of the High-priority Projects Act and on the general ones. According to the High-priority Projects Act the Government is entitled to allocate projects as ‘high-priority projects in terms of national economic interests’ in its separate Decrees and to lay down the special provisions of the concrete project and its permitting procedures.

• **Poland**
In Poland the implementation of Art 8 para 3 TEN-E Regulation is still incomplete (see above). Currently the coordinated scheme is applicable. In this system the comprehensive decision comprises multiple individual legally binding decisions issued by several authorities concerned, which shall be coordinated by the competent authority pursuant to Art 8 para 3 point b).

In Poland a PCI under the special act regime needs 3 administrative decisions before the commissioning of the project:

1. the decision on environmental conditions issued after the environmental impact assessment is performed – EIA decision
2. the location decision
3. the building permit, after which the promoter may commence construction works

The special act provisions cover mostly the proceedings for the issuance of a decision on location of the investment, it provides a new, simplified and streamlined procedure. The act also changes the EIA law to some extent, however, as a rule the general provisions of the EIA law apply to the PCIs as well. The modifications regarding EIA law are primarily procedural (e.g. shorter time limits, immediately enforceable decisions) in order to streamline EIAs.

\(^{24}\) The amendments to the Building Act and other acts transposing/implementing TEN-E Regulation passed through by the Government, still to be passed by both chambers of the Parliament (September 2016).
5. Transparency and Public Participation

The TEN-E Regulation recognises that transparency and early and effective involvement of the public is essential for complex infrastructure projects to be approved quickly and effectively. With this object the TEN-E Regulation introduces different instruments under the title of Transparency and public participation (Art 9).

5.1 Manual of Procedures

The Manual of Procedures has been published in all countries and in a nutshell this assessment evaluates all of them negatively concerning their quality.

Contrary to the aims of TEN-E-Regulation and Aarhus Convention, no environmental or civil society organization had been consulted for the elaboration of the manual of procedures, e.g. on how transparency and participation could have been designed in PCI permitting procedures. Although this would have been of great use for the design of the manual of procedures. As a result, the implementation on public participation and transparency is inconsistent and confusing.

The manual of procedures is meant to help the public to gain information on energy infrastructure projects of common interest and help them to better orient and participate in the permitting procedures. Member states are obliged to elaborate such a manual, regularly update it and make it available to the public.

It can be concluded that all of the Manuals in these countries are mainly a reproduction of legal requirements from TEN-E Regulation and a simple summary of existing legislation of permitting procedure of any kind of construction. The manuals formally mention the criteria set by Art 9 para 1 in conjunction with Annex VI/1 but they are not fit for purpose.

- Austria

Although Art 9 para 1 TEN-E-Regulation stipulates the necessity for the Member States to prepare a Manual of Procedures until 16th May 2014, the Austrian energy infrastructure authority - the Federal Minister for Science, Research and Economics - just set it up in March 2016, in cooperation with the Federal Minister for Agriculture and Forestry, the Environment and Water Resources.

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25 Cp. Art 9 TEN-E Regulation which stands under the heading „Transparency and Public Participation“.
26 http://www.bmfw.gv.at/EnergieUndBergbau/Documents/03_2016_PCI-Verfahrenshandbuch_Aktuell.pdf
The language used is very technical, too many legal articles and paragraphs are displayed in the text and the editor completely forgot to illustrate the content via using examples. The importance of such a manual would have lied beneath others in providing country and project-specific hints on where to access information on projects, on authorities and stakeholders, on public hearings, timetables. The appearance and the content of the manual make it obvious that the Austrian Energy Infrastructure Authority did not waste a lot of thoughts on its elaboration and correspondingly small will be the added value of the document. In detail:

- The introduction does not hint on for whom the manual is written, what for and how to use it.
- The manual is not easy to read.
- The manual does not exhaustively provide links to relevant websites.\(^27\)
- More information could have been displayed graphically.
- The manual explains how the Republic of Austria has implemented certain obligations established by the TEN-E Regulation.\(^28\) This is not of huge importance for enabling the public to better participate in national permitting procedures.
- No practical information contained.\(^29\)

The requirements of Annex VI 1. a.) to f.) seem not to be fulfilled by the assessed document.

- **Croatia**
  First edition of Manual was published in September 2014, and second in July 2016. The Manual is a basic reproduction of the provisions contained in the TEN-E Regulation. It is addressed to the promoters of the PCI projects (the investors) as an aid in meeting the requirements of the Regulation. After a basic description of the PCI framework it continues to list all applicable legislation, and competent authorities for the investments in Croatia. Since no specific legislation for the implementation of TEN-E-Regulation has been adopted the list is an overview of general investment legislation, applicable for any investment. The Manual further explains the provisions of the Regulation and the provisioned time-line for the issuing of permits.

- **Czech Republic**
  The Manual of Procedures was published in May 2014. The Manual merely paraphrases the text of national laws regulating the individual steps in the process with very little and mostly no reference to the TEN-E Regulation or even PCI whatsoever.

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\(^27\) E.g. websites of project promoters: there is not so many, no high additional workload expected.
\(^28\) Cp. Chapter C. Innerstaatliche Umsetzung der TEN-E-VO, p. 7ff.
\(^29\) E.g. Information on where exactly information on procedure and public hearing is published (links to concrete websites of authorities and personal responsibilities, to central data platform or whatever). No hints towards where authorities will publish their statements and how can public access them. No hints on where to access procedural timetables. No information on participation in administrative procedures in Austria. Like, when can I be party to PCI permitting procedure? Do I need legal representation? Costs? Contentual claims – do I need expert opinions?
• **Hungary**

The HEA published the Manual of Procedures - Permit granting procedures of PCI in Hungary in June 2014.\(^{30}\) Regarding public participation and transparency the Manual is merely an extract of legal requirements in TEN-E Regulation, there are not any additional explanations or guidelines.

• **Poland**

The Manual of Procedures for Poland has been published in August 2014 and is available online on the Ministry of Economy website\(^ {31}\). However, the manual is focused mostly on the Polish law, while the EU part is treaded superficially. It was noted by the Ombudsman in his notification to the Prime Minister from April 2016.\(^ {32}\) The manual hasn’t been updated until mid 2016, and due to adoption of the new special act it became partially outdated. In late April 2016 the Ombudsman sent a notification to the Prime Minister, informing about the lack of proper public participation regulations regarding PCIs including the fact that the Manual is outdated. The ombudsman also noted that although the Manual describes the TEN-E regulation obligations as well as Polish law, the EU law part is superficial and that compliance with the TEN-E Regulation obligations on public participation is insufficiently controlled during the permitting process. The ‘national’ and ‘EU’ part of the proceedings are independent from each other and it is possible to obtain all the required permits without proper application of the TEN-E obligations.

Responding to the Ombudsman’s notification, the government representative expressed the opinion that Polish law provides for a sufficient level of public participation regardless of whether the proceedings are carried out in the regular mode or according to one of the special acts. It seems that most of the Ombudsman’s comments and arguments were simply ignored, including the fact that the Manual should be updated.

5.2 Concept for Public Participation

Pursuant to Article 9 para 3, the project promoter must develop and submit a concept for public participation within three months of the start of the permit granting process to be approved by the competent authority. Development and submission of the concept shall follow the process set out in the manual of procedures. The Concept for Public Participation shall be in line with the guidelines set out in Annex VI of the Regulation:

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\(^{31}\) [http://www.me.gov.pl/files/Podrecznik_PCI.pdf](http://www.me.gov.pl/files/Podrecznik_PCI.pdf)

The concept for public participation shall at least include information about:

- the stakeholders concerned and addressed;
- the measures envisaged, including proposed general locations and dates of dedicated meetings;
- the timeline;
- the human resources allocated to the respective task;

As outlined above, the obligation to elaborate and submit a Concept for Public Participation stems from the TEN-E Regulation and is applied directly in most of the assessed countries. It follows that national legal frameworks usually do not contain provisions on it, only the manuals refer to the submission of the Concept paper among the obligations of the project promoters. Usually the manuals of procedures (mostly only partly) reproduce the requirements for the concept for public participation outlined Annex VI 4. TEN-E Regulation but don’t provide guidance on concrete content and how to best set up the concept.

In Austria the Energy Infrastructure Act mentions the concept for public participation. The legislation makes clear that the confirmation of, inter alia, the concept for public participation by the competent authority is a precondition for the start of the pre-application procedure and thereby facilitates proper enforcement of adequate concepts for public participation before formal procedures start.

- **Austria**
  The Energy Infrastructure Act indicates that in the pre-application stage the project promoter has to submit reports on the main features of the project and the planned routes, assessed alternatives and the reasoning for the used one. Further the promoter has to submit a concept for public participation, including a report on any other public hearings already conducted in advance (cp. § 10 para 2 Energy Infrastructure Act). The concept including the named information has to be submitted to the energy infrastructure authority, which then takes further steps towards a public discussion of the submitted project. Similarly obliges § 31 EIA-Act the project promoter – in the pre-application phase – to submit a concept for public participation, including a report on any information sharing events or consultation with the public already carried out before the start of the pre-application procedure. The confirmation of, inter alia, the concept for public participation by the competent authority is a precondition for the start of the pre-application procedure (cp. § 10 para 2 Energy Infrastructure Act).

- **Czech Republic**
  The Concepts are in practice very short, very formal and not very informative documents.
5.3 Public Consultation

Besides the Concept for Public Participation the project promoter, or, where required by national law, the competent authority, must carry out at least one public consultation before submission of the application file. Furthermore, a report summarising the results of the public participation has to be prepared and submitted together with the application file to the competent authority (Art 9 para 4).

Austria is the only country under the assessed Member States where the Energy Infrastructure Act shifts the obligation to carry out a public consultation in the pre-application stage from the project promoter to the competent authority. The other assessed Member States leave the responsibility for carrying out the public consultation under Art 9 para 4 with the project promoter. In Poland this situation has led to uncertainties on the competences of authorities to assess whether the project promoter properly conducted the TEN-E public consultations (see below).

- **Austria**
  During the pre-application procedure, the concerned parties pursuant to Annex VI/3a TEN-E-Regulation have to be consulted (cp. § 10 para 4 Energy Infrastructure Act). The law does not contain any further explanation on who these concerned parties can actually be. Furthermore § 8 of the Energy Infrastructure Act sets an obligation to publish projects, that have been suggested to a regional group as a candidate project for the list of PCIs, on the website of the infrastructure authority (Ministry of Energy) in order to allow comments. The information are listed in Annex 3/2/1 of the TEN-E-Regulation. The Energy Infrastructure Act indicates that in the pre-application stage the energy infrastructure authority has to carry out a public consultation in terms of Art. 44c para 1 and 2 of the General Administrative Procedure Act (AVG33) in every region (“Bundesland”) affected by the project.

- **Poland**
  There are no separate public consultations for PCIs in the national law. According to the manual the Regulation applies directly. Therefore there are two types of public consultations here – the PCI specific consultations, as stipulated by Annex VI point 5 of the TEN-E Regulation, carried out by the project promoter, and the EIA public consultations carried out by the environmental authority (RDOŚ). However, as it was noted by the Ombudsman, there is a gap between the TEN-E Regulation consultations and the general public consultations as stipulated by the Polish law. It is not clear which authority and when should assess whether the developer properly conducted the TEN-E public consultations.

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5.4 Transboundary consultations

Art 9 para 5 and 6 set out requirements for cross-border public consultation procedures.

There are no separate, specific provisions applicable to PCIs regarding transboundary consultations in Czech Republic, Croatia, Hungary and Poland, they are carried out under EIA laws if required. In Austria the Energy Infrastructure Act contains extra public consultation requirements concerning transboundary PCIs which are not subject to EIA.

- **Austria**
  The energy infrastructure authority has to inform concerned states as soon as possible about significant transboundary effects of projects, where such effects are to be awaited and that are not subject to EIA. The significant cross-border impact shall be evaluated using the criteria established in Annex IV/1 TEN-E Regulation. The information of the concerned state has to take place in any case already in the pre-application stage and latest when the public is informed about the project. The concerned state has to be informed about the project, the permitting procedure and the nature of the possible decision of the competent authority. The concerned state shall be granted a reasonable period to comment the project – this time period shall allow the concerned state to make the document accessible to the public and ask for their comments (cp. § 9 Energy Infrastructure Act). For PCI subject to EIA the Austrian EIA Act contains a separate provision (in § 10) on transboundary consultations.

5.5 Project Website

Pursuant to Art 9 para 7, the project promoter or competent authority shall establish and regularly update a website with relevant information about the PCIs.

In most of the countries project promoters are obliged to set up and regularly update a project website under the directly applicable provisions of the TEN-E Regulation. In Austria there are complementary provisions in the Energy Infrastructure Act containing enforcement actions and penalties. It is unclear how other Member States ensure enforcement of direct obligations for project promoters stemming from the Regulation.

- **Austria**
  § 12 para 3 and § 8 of the Energy Infrastructure Act refer to the website of the energy infrastructure authority. On the energy infrastructure authorities website project related information has to be published. The project promoter is obliged to make the relevant documents available in an electronic, publishable form. With regard to Art 9 para 7 TEN-E Regulation, the project promoter 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. As indicated in § 15 para 5 of the Energy Infrastructure Act, a breach of Art 9 para 7 TEN-E Regulation causes an administrative offence of the project promoter with a fine up to € 10.000.
6. Duration and implementation of the permit granting process

Under the TEN-E Regulation (Art 10), the permit granting process is split into two main phases:

1. **The pre-application procedure**: This procedure covers the period between the start of the permit granting process and the acceptance of the submitted application file by the competent authority. It starts from the date of written acknowledgement by the competent authority of the project notification, submitted by the project promoter. The pre-application procedure shall take place within an indicative period of two years. This procedure shall include the preparation of any environmental report by the project promoter.

2. **The statutory permit granting procedure**: This procedure covers the period from the date of acceptance of the submitted application file until the comprehensive decision is taken. This procedure shall not exceed one year and six months.

The combined duration of the two phases shall not exceed a period of three years and six months, with a possible nine month extension period allowed. This does not, however, include any work done by the project promoter or authorities prior to the start of the pre-application procedure. During this phase, strategic planning, environmental assessment and public consultation can also take place, without any time limit imposed by the Regulation.

The assessed Member States either directly apply Art 10 or have taken specific implementation measures to guarantee compliance. It will have to be seen in practice how enforcement of time limits is guaranteed. The applicable national procedures need to establish proper competences for the competent authorities in order to guarantee an effective implementation of Art 10.

- **Austria**

In the pre-application stage § 10 of the Energy Infrastructure Act indicates several steps and timeframes for each step. The concerned authorities are obliged to treat the PCI project applications as a top priority. They shall make sure that permitting procedures run efficiently. All authorities shall take their formal decision on the project without undue delay, no later than nine months after the confirmation of the applications in the pre-application stage (cp. § 11/2 Energy Infrastructure Act). According to the Energy Infrastructure Act the whole permitting procedure must not last longer than three and a half years, whereby the pre-application stage lasts maximum two years and the formal application stage not longer than one and a half year. The energy infrastructure authority is responsible for to ensure compliance with the timelines through coordination of the PCI permitting procedures considering the principles of simplicity, quickness and cost saving. It has to be noted that the Energy Infrastructure Authority has only a coordinating function. Decision making powers will not pass to the Energy Infrastructure Authority even if timeframes are not met.
• **Croatia**
Provisions of the TEN-E Regulation Art 10 are directly applicable in Croatia. The comprehensive decision is to be issued according to the coordinated permit granting scheme.

• **Czech Republic**
Adequate implementation measures have not been taken yet.

• **Hungary**
The TEN-E Decree lays down that the permitting scheme applied to PCI is the collaborative scheme in Hungary. The Decree contains not any provisions concerning duration and implementation of the permit granting process.

The comprehensive decision is an administrative certification to be issued by the competent authority, provided that the project promoter submitted all relevant permissions and verifications in advance. The comprehensive decision as an administrative certification meets the requirements of EU law, but it can be considered arguable under the Hungarian legislation that the comprehensive decision has been correctly implemented in the Hungarian law by the Manual which is a legally non-binding document.

• **Poland**
The new special act on electricity transmission provides for a speedy, simplified procedure for obtaining decision on location and building permit. The EIA proceedings are also speeded up as the administrative bodies and courts are obliged to consider any appeals and complaints within short periods.

7. **Closing remarks**

The TEN-E Regulation places certain requirements on the permit granting process for PCIs, including time limits for the permit process, a 'one-stop-shop' permit, a single coordinating authority, and a requirement for Member States to assess potential measures to streamline environmental assessment procedures. These requirements are aimed at streamlining the overall permit process through faster and more efficient environmental assessment procedures, including through better and more fruitful public consultation, whilst at the same time respecting the requirements of EU environmental policies and laws.\(^{34}\)

Having assessed the national questionnaires it can be concluded that the Member States involved in our assessment have only partly met the requirements of the TEN-E Regulation. Both in Poland and in the Czech Republic implementation is still in progress. National rules might have to be still issued particularly in the areas of enforcement, the clarification of competences and the applicable procedures in order to ensure proper implementation of the TEN-E Regulation.

The highest national significance possible relates to the timely treatment of PCI in permitting procedures. The consequence of such a status for the timeliness and quality of national permitting practice in the area of energy infrastructures is not clear so far and might have to be under close scrutiny in the years to come. The high number of PCI and the constantly raising number of high priority projects (cp. 2.1 on Hungary) could lead to non-preferential treatment of real top priority projects. If all projects are to be treated as priority in the end none is treated as priority.

So far no effective measures were taken to streamline Environmental Assessments and to ensure their coherent application on energy infrastructure projects of common interest.

The TEN-E Regulation stipulates that PCIs are in public interest from an energy policy perspective. At the same time the provision has to be interpreted in conformity with Art 6 para 4 Habitats Directive. The obligation of competent authorities to balance the interests in order to find out whether imperative reasons of overriding public interest justify the interference with the objectives of Habitats is still valid. Equally this conclusion applies to the obligation under Art 4 para 7 WFD for carrying out an interest test when new modifications and new sustainable human development activities hinder the achievement of the WFDs environmental objectives.

The TEN-E Regulation creates new competences in permitting procedures. Most of the assessed countries have assigned their Ministries (of commerce or energy) with the competence to function as infrastructure authority. None of the assessed countries has opted for an integrated permitting scheme. Given the fact that most of the PCIs have to undergo an EIA where the competences lie with different authorities the designation of competent infrastructure authorities adds an additional layer of authorities to the national permitting frameworks. If this leads to simplified and accelerated procedures needs to be monitored closely in practice.

The TEN-E Regulation recognises that transparency and early and effective involvement of the public is essential for complex infrastructure projects to be approved quickly and effectively. With this object the TEN-E Regulation introduces different instruments under the title of transparency and public participation. The proposed instruments have the potential to enhance transparency and improve public participation. Successfully applied in practice they might well be adopted as good practice to other sectors. The present picture in the assessed Member States shows an inadequate design and implementation of the instruments outlined by the Regulation. The lack of adequate toolkits and guidance to help stakeholders to gain information, to better orient and participate in PCI permitting procedures will most probably undermine effective participation when it comes to national planning and permitting of energy infrastructure projects.

Cp. TEN-E Regulation, recital 40
The published Manuals of Procedures are mostly reproduction of legal requirements from TEN-E Regulation and national sectorial laws. It follows that they have wording of a legal document and they miss practical information.

A lack of proper enforcement mechanisms to be taken by the competent authority has been detected when it comes to the concept for public participation, the public consultation and the maintenance of a project website. It’s unclear how other Member States ensure enforcement of direct obligations for project promoters stemming from the Regulation.

If the time frames for PCI permitting lead to faster permitting has to be seen via assessing the permitting practice in Member States. Nevertheless experience shows that legally set time frames are not the driver for achieving faster permitting procedures. Rather the measures should be taken at the possible causes of delay (e.g. better planned projects via thorough preparation phases, better public acceptance via early and effective public participation etc.).

Contact information:
name: Birgit Schmidhuber
organization: J&E
address: Neustiftgasse 36/3a, 1070 Wien, Austria
tel/fax: +43 (0)1/5249377, +43 (0)1/5249377-20
e-mail: info@justiceandenvironment.org
web: www.justiceandenvironment.org

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