



Citizens, Climate and Environment: Clean Energy for the Benefit of All!

TEN-E

Recommendations

Justice and Environment 2017

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Introduction

Regulation (EU) Nr. 347/2013 (hereinafter: TEN-E Regulation) is to be applied by Member States since 1st of June 2013.¹ The Regulation aims at the timely development of trans-European energy infrastructure while, at the same time, enhancing transparency and public participation in the selection and authorization of energy infrastructure projects.² The TEN-E Regulation establishes that together with the Regional Groups, the European Commission may ensure that every two years a Union list consisting of the most important energy infrastructure projects (Projects of Common Interest – PCI) needed to achieve the implementation of the strategic energy infrastructure priority corridors is enacted as an Annex to the TEN-E Regulation.

These PCI will benefit from more transparent, inclusive and additionally faster permit granting and they are eligible for public funding (Connecting Europe Facility).

Currently the European Commission is carrying out an evaluation to assess the impact of the TEN-E Regulation on Europe's energy networks and the progress of PCI³, including a consideration of how the regulation might evolve in the future. The Commission report will include an evaluation of:

- The progress of PCI
- The evolution of the interconnection between Member States
- The effectiveness of the permit granting and public participation provisions of the Regulation
- The regulatory treatment that PCI receive, and
- The overall effectiveness of the Regulation for market integration and contributing to climate and energy targets

¹ Art 24 TEN-E Regulation.

² Art 1 of REGULATION (EU) No 347/2013 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 17 April 2013 on guidelines for trans-European energy infrastructure and repealing Decision No 1364/2006/EC and amending Regulations (EC) No 713/2009, (EC) No 714/2009 and (EC) No 715/2009

³ Art 17 TEN-E Regulation: „Not later than 2017, the Commission shall publish a report on the implementation of projects of common interest and submit it to the European Parliament and the Council. [...]”

Justice & Environment (J&E) is monitoring the expansion of EU energy infrastructure and the implementation of the TEN-E Regulation since 2013. The network assessed the processes and their quality from an environmental, legal and civil society stakeholder's perspective⁴ we followed up on specific candidate PCI⁵ and provided feedback and recommendations. With the research the network has carried out during the last years and the experience we have collected, we hope to provide a valuable input to the current TEN-E evaluation.

This paper aims to sum up our results and issue recommendations for a better implementation of the TEN-E Regulation as well as the PCI designation process for the years ahead.

A. The overall effectiveness of the Regulation for market integration and contributing to climate and energy targets

Justice & Environment sees the TEN-E Regulation as an important tool to reach the European renewables targets as they help to meet its international commitments of the Paris Agreement. Nevertheless the focus of PCI selection needs to shift more towards electricity, smart grids and cross-border interconnections, in order to break down silos and to allow the creation of a single European Energy Market and integration of renewable energy sources, as well as targeted development of RES in individual Member States.

The majority of greenhouse gases come from the burning of fossil fuels (coal, oil and gas) and consequently it is essential to phase them all out as quickly as possible and to stop encouraging investments in this sector. The PCI list needs to cope with this longer-term vision that the EU should have for its future energy system. The current PCI designation process does not sufficiently weigh the costs gas infrastructures have for our climate and environment as there is still dozens of gas infrastructure projects considered as the highest importance in Europe in the sense of TEN-E Regulation.

Justice & Environment recommends to

- evaluate new infrastructure projects to test their economic viability through their full lifespan under scenarios compatible with European climate and energy objectives;
- carry out stricter assessments of gas infrastructure projects against the overall need.

⁴ J&E PCI Position 2013:

<http://www.justiceandenvironment.org/files/file/2013/CC%20Energy%20Infrastructure%20Position%20Paper%202013.pdf>; J&E/BWN PCI Recommendations 2014:

http://www.justiceandenvironment.org/files/file/2014/JaE_Bankwatch_PCI%20Process%20Recommendations%202014.pdf; J&E PCI Recommendations 2015:

http://www.justiceandenvironment.org/fileadmin/user_upload/Publications/2015/PCI_Recommendations_2015.pdf

⁵ Justice & Environment, With or without us? - Three cases manifesting gaps in designation of EU high priority energy projects. Brno 2014:

[http://www.justiceandenvironment.org/files/file/2014/PCI%20case%20studies%202014\(2\).pdf](http://www.justiceandenvironment.org/files/file/2014/PCI%20case%20studies%202014(2).pdf)

During the compilation of the first and second Union list, the assessment of the candidates suffered from incomplete and insufficient data for the projects provided for the regional draft list. This might turn out a serious problem in terms of controversial projects that could entail severe environmental and social impacts. This seriously harms the credibility of the PCI list and leads to major delays in the implementation of the listed projects.

Justice & Environment recommends to

- urge project promoters to provide proper and full information on the fulfilment of the criteria in Art 4 and on economic, environmental and social viability of candidate PCI to the Regional Groups;
- fully include the assessment of environmental and social impacts of infrastructure projects in the cost-benefit-analysis (CBA) as part of the Ten-Year-Network-Development-Plans (TYNDP)

The TEN-E Regulation states that the designation process shall ensure that the Union list of projects of common interest is limited to projects which contribute the most to the implementation of the strategic energy infrastructure priority corridors and areas. The first Union list consisted of 245 projects. The current Union list consists of 195 projects. The number of projects awarded a PCI label makes it hard to justify and explain the urgency and relevance of each of the project to the communities that are affected by them.

B. The effectiveness of the permit granting and public participation provisions of the Regulation

The TEN-E Regulation places certain requirements on the permit granting process for PCI, including time limits for the permit process, a 'one-stop-shop' permit, a single co-ordinating 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.⁶

In 2016 Justice & Environment's lawyers conducted a research on how legal requirements regarding national permitting procedures and public participation for PCI have been implemented in Austria, Croatia, Czech Republic, Hungary and Poland.⁷ The following remarks are based on the outcomes of this research.

⁶ Cp. European Commission Guidance document: Streamlining environmental assessment procedures for energy infrastructure projects of Common Interest.

⁷ Justice & Environment, Energy Infrastructure Projects of Common Interest – National implementation of the EU permitting rules. Brno 2017:

http://www.justiceandenvironment.org/fileadmin/user_upload/Publications/2017/TEN-E_Implementation_Study.pdf

National implementation of the TEN-E Regulation

Member States involved in our research have only partly met the requirements of the TEN-E Regulation. The TEN-E Regulation entered into force in June 2013. National rules still need to be issued in order to achieve compliance. Particularly in the areas of national enforcement, the clarification of competences and the applicable procedures' clarifications seem to be needed.

Justice & Environment recommends to

- accompany the implementation of the TEN-E Regulation with guidelines on the TEN-E Regulation, trainings and/or Q&A, in order to ensure an effective implementation of the regulation in Member States and a comparable application of its provisions among Europe.
- include the infringements into the list of measures for ensuring effective implementation of Chapter III as a last resort.

Priority Status of Projects of Common Interest

The highest national significance possible awarded to a specific project 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. 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.

Justice & Environment recommends

- the Commission and the Regional Groups to monitor the implementation of this provision⁸ and
- foster cooperation in strategic decision making and planning with the relevant Member States when deciding upon high-priority projects on national level.

⁸ Art 7 para 3 TEN-E Regulation

Environmental Assessment Procedures

The assessed Member States did not take effective measures to streamline environmental assessments and to ensure their coherent application on energy infrastructure PCI.

Justice & Environment recommends to

- foster member states' cooperation with DG ENV in these matters and
- monitor compliance of energy infrastructure plans with the SEA Directive⁹, the WFD¹⁰ and the Birds¹¹ and Habitats Directives¹² and
- ensure compliance (e.g. strategic complaint procedures, communication etc.)

Environmental impacts of PCI

Article 7 para 8 TEN-E Regulation enshrines that PCI are in public interest from an energy policy perspective. At the same time the provision has to be interpreted in conformity with die rules on appropriate assessments of the Habitats Directive. Projects with potential significant impacts on protected sites may only be permitted in exceptional cases (cp. Art 6 Abs 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 Directive 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. J&E did not find enough evidence on the interpretation and application of Art 6 para 4 Habitats Directive and Art 4 para 7 WFD.

Justice & Environment recommends 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;
- provide respective guidance on its proper application to the respective competent authorities if deemed necessary.

⁹ Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment (SEA Directive)

¹⁰ Directive 2000/60/EC of the European Parliament and of the Council establishing a framework for the Community action in the field of water policy (WFD)

¹¹ Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds (Birds Directive)

¹² Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (Habitats Directive)

Transparency & public participation in PCI Permitting

The TEN-E Regulation recognises that transparency, also early and effective involvement of the public is essential for complex infrastructure projects to be approved quickly and effectively. Regarding this objective, 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. When successfully applied in practice they might well be adopted as an example of 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 move around and participate in PCI permitting procedures will most probably undermine effective participation when it comes to national planning and permitting of energy infrastructure projects.

The published Manuals of Procedures are mostly reproduction of legal requirements from TEN-E Regulation and national sectoral laws. The wording of manuals is similar to a legal document and they miss practical information.

Lack of proper enforcement mechanisms to be taken by the competent authority has been detected when it comes to the concept of public participation, the public consultation and the maintenance of a project website.

Justice & Environment recommends to

- support Member States in the review of their Manuals of Procedures and to elaborate on better public participation procedures.

Time frames for PCI Permitting

Whether the legally set time frames for issuing construction permits for PCI will lead to faster permitting procedures is still not clear (lack of practice). . 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.).

C. Transparency and public participation in PCI selection Process on national level

1. With the TEN-E Regulation the expansion of the energy grid became a European priority. The PCI designation process awards certain grid projects with the certificate of being in the “European public interest”. Member states propose PCI contributing to the development of the trans-European energy infrastructure priority corridors and areas. After an evaluation by the so-called regional groups, the decision-making body (= the European Commission and the respective Member State representatives) decides upon the composition of the PCI Union list.
2. PCI should be implemented as quickly as possible. In order to achieve this goal, the regulation provides for certain requirements in the permitting process for these projects, which are aimed at speeding up the procedures through the reduction of administrative burdens and also through better public consultation.

Whereas the TEN-E Regulation intends to improve transparency and public participation in the permitting stage of a project (= point 2. above) it does not address adequate information sharing and involvement in the planning stage (= point 1. above).

The topics relevant for the public – like basic environmental or health issues, doubts about the need or the deployed technique are already decided upon when the permitting stage (= point 2. above) starts. As it is the first real possibility for the public to get involved and have their opinion taken into account, they expect that these issues are touched upon in the permitting procedure of a project. But as said before, that is only partly the case: questions on techniques and the need for power lines are usually dealt with during the planning procedures. These basic topics are not touched upon during the permitting stage anymore.

Although the TEN-E Regulation considerably has improved participation instruments and the timeliness of participation in permitting procedures, more attention has to be paid to transparency and public participation in European (i.e. TYNDP and PCI designation Process) and especially national energy infrastructure planning processes

Furthermore, in accordance with the principles of the Aarhus Convention, accepted and sound decisions can only be taken when the public is allowed to participate “within a transparent and fair framework, having provided the necessary information” and “when due account is taken of the outcome of the public participation”.¹³

The selection of the first PCI list was criticized because the process lacked transparency.¹⁴ In order to promote accepted and sound decisions in the midst of the PCI selection process, Justice & Environment turned to the competent national Ministries and/or designated national authorities with a questionnaire. It was created to present the taken efforts regarding information sharing and guiding public by Ministries/competent authorities and/or project promoters in frame of the PCI designation process in 2014/2015 (second PCI List).

¹³ Article 7 in conjunction with Article 6 of the Aarhus Convention

¹⁴ <https://bankwatch.org/sites/default/files/PCI-environmental-mainstreaming.pdf>
Streamlining environmental assessment procedures for Projects of Common Interest (PCI)

Beyond doubt any form of public participation provides transparency in decision making. In its research Justice & Environment asked about applied forms of public participation on national level in the selection process of the second PCI list.¹⁵

1 Information dissemination during the PCI designation process on national level

Informing the public by providing information to help them understand the issues, namely projects, their background, options, etc. is crucial if the aim is to enhance transparency and public participation regarding TEN-E energy infrastructure projects. J&E asked the competent national Ministries and designated national authorities in PCI issues of 5 countries if and how they disseminated information during the PCI designation process to national stakeholders and NGOs.

Apart from the positive example of Estonia it can be concluded that Ministries and competent authorities did not disseminate relevant information regarding pending PCI projects based on the TEN-E Regulation.

Hungarian Energy and Public Utility Regulatory Authority as the designated national competent authority pointed out that the TEN-E Regulation did not lay obligation on Member States regarding public participation in the selection of projects but the project promoters were obliged to involve public solely in permit granting processes. Hungarian competent Ministry lined up with the Authority, accordingly the selection process of the candidate projects on national level was kept undisclosed. .

In Austria public participation occurred only after adoption of the national Energy Infrastructure Act.

Having assessed the answers of the involved Member States it can be concluded that transparency and early and effective involvement of the public is not ensured based on the TEN-E Regulation. The current practice of the involved Member States does not enhance effective public participation. The affected stakeholders, organizations for environmental protection have little information on PCI projects in their early phase.

In order to speed up the procedures, foster acceptance, achieve an overall understanding of the final decision and 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.¹⁶

¹⁵ Justice & Environment, Transparency and public participation in PCI selection Process on national level. Brno 2017.

¹⁶ J&E Legal Analysis 2013 - Regulation (EU) No. 347/2013 on guidelines for trans-European energy infrastructure
<http://www.justiceandenvironment.org/files/file/2013/CC%20Legal%20Analysis%202013.pdf>

Justice & Environment recommends to

- call on the respective ministries of Member States to take an active role in information-sharing in addition to the efforts undertaken by the European Commission. This could at a minimum level include adding designated pages to their web sites with key data on the designation process as well as information of proposed projects that concern a given Member State;¹⁷
- call on the respective ministries of Member States to make efforts to reach out to the affected stakeholders and environmental organizations in order to raise their awareness of the rationale and meaning of the PCI designation process as well as participation opportunities;
- Content-wise Regional Groups should systematically and transparently engage local stakeholders to discussions about the need of projects as well as about the projects' potential environmental impacts. The regional groups should seek for and make use of relevant stakeholders' knowledge about avoiding harmful impacts.¹⁸

2 Access to information on the merits of the candidate projects and their designation procedures

J&E asked the competent national Ministries and designated national authorities if there was any public information available on the national level (in the national language)

- on the substantive parts of the PCI candidate projects proposed to be put on the PCI List
- on their background, the rationale, pros and cons and
- on the procedural steps of PCI selection process.

Based on the assessments from the involved Member States it can be concluded that the rationale, pros and cons of the candidate projects proposed to add to the PCI list are not published in the midst of the process for identification of PCI. In most cases Ministries' websites show links to the project websites and the information shared by project promoters is quite limited, usually concerns only the definition of the project.

¹⁷ Recommendations for Improving the PCI Designation Process and the Adjacent Public Consultation – Justice & Environment 2015
http://www.justiceandenvironment.org/fileadmin/user_upload/Publications/2015/PCI_Recommendations_2015.pdf

¹⁸ Recommendations for Improving the PCI Designation Process and the Adjacent Public Consultation – Justice & Environment 2015
http://www.justiceandenvironment.org/fileadmin/user_upload/Publications/2015/PCI_Recommendations_2015.pdf

There is lack of available information on the procedural steps of PCI selection on national level. The published Manuals of Procedures refer solely to PCI permit granting, meaning that there is no information on the designation process on national or EU level nor on public participation possibilities.

Justice & Environment recommends to

- present information on sustainability, costs and benefits, security of supply, market integration, environmental and social impacts of PCI candidate projects in a comprehensible format (prior to the public consultation). This will equally foster acceptance: if stakeholders cannot grasp the rationale of a decision taken, the need for this decision will be questioned over and over again by the affected stakeholders. This conclusion is derived from Justice and Environment's own experiences in national planning and permitting procedures of energy projects in general;
- invite project promoters to present their candidate projects also in a comprehensible format for the wide public;
- cooperate in the Regional Groups on this matter. Foster discussion and exchange with the European Commission, promoters, regulators on existing practices and how to best inform and involve on national level.

3 Consultative forms of public participation

Consulting with the public to obtain their feedback on alternatives or decisions is an essential element of public participation. In its questionnaire, J&E asked about the forms of consultations. Based on the replies it can be concluded that public consultations were not carried out adequately) during the designation processes on the national level apart from the Estonian example.

Consultations are an opportunity for the public to give input during the decision-making process and for the decision-makers to receive valuable information about public's attitude, fears etc regarding the given project. If the European Commission, the Regional Groups and the Member States ignore public, the discontent of stakeholders will spread and the decision-makers' goal of high social acceptance will not be achieved.

Justice & Environment recommends to

- Carry out thorough public consultations on the regional and national level (e.g. stakeholder workshops, online/written consultations etc.) so the known and affected public can be directly invited and they can raise comments and concerns on the respective projects in their early phase, while all options are still open;
- call on the respective Ministries and/or competent authorities of Member States to enhance consultative forms of public participation according to the above mentioned conditions;
- discuss and exchange ideas and practices within the Regional Groups.

Justice & Environment (J&E) is a European Network of Environmental Law Organizations. J&E works in Europe and consists of NGOs from twelve different countries dealing with environmental law solely or as one of their activities. J&E aims for a better legislation and implementation of environmental law on the national and European Union (EU) level to protect the environment, people and nature. J&E does this by enhancing the enforcement of EU legislation through the use of European law and exchange of information on the national, cross-border and wider European level. All J&E activities are based on the expertise, knowledge and experience of its member organizations. The members contribute with their legal know-how to and are instrumental in the initiation, design and implementation of the J&E work program.

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The Work Plan of J&E has received funding from the European Union through its LIFE+ funding scheme. The sole responsibility for the present document lies with the author and the European Commission is not responsible for any use that may be made of the information contained therein.

