



The EU TEN-E Regulation

Evaluation of the First 5 Years of the EU TEN-E Regulation

An alternative view

Justice and Environment 2019

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Introduction

Upon the request of the European Commission, DG Energy, in early 2018 a consortium led by Trinomics B.V. of the Netherlands has issued a report on the overall evaluation of the relevance, effectiveness, efficiency of the TEN-E Regulation¹, as well as its coherence with the rest of EU laws and measures in the related fields of energy, climate and environment and finally its added value to the existing body of the relevant community laws² (hereinafter: Report). The evaluation was based on a systematic literature review and feedbacks (via interviews, workshops etc.) from the relevant stakeholders.

Justice and Environment is a European network of public interest environmental law organisations from 14 EU countries. J&E has been dealing with the interpretation and supporting better practical implementation of the Regulation since the very beginning of its entering into force³. Based on these experiences, in 2017 we put together a package of suggestions on the better implementation and raised level of transparency⁴. In the present paper we offer some alternative interpretations for the facts and phenomena found and analysed by the Trinomics consortium in the Report.

In the focus of our evaluation we put the energy transition that has been experienced in Europe at least in the last decade. As the Report summarizes this systematic and accelerating change very aptly: “The changes brought by the energy transition (including decarbonisation, decentralisation and digitalisation) have important impacts on network planning and operations at both transmission and distribution levels, implying new roles for distribution system operators and transmission system operators.” Unfortunately, this very important statement is just hidden in Chapter 5.23, in a chapter which deals only with a first glance mere technical problem, the interrelationship with the DSOs and TSOs.⁵

As the effects of revolutionary changes in energy production and consumption in Europe, the contradiction between the old legislative goals and the new reality, as well as between the legislative goals and their implementation becomes more and more clear-cut, time is approaching when we might call the Regulation dysfunctional. These tremendous changes in technology, market prices, consumer behaviour etc. are colliding with the once, not too long ago all mighty fossil and nuclear energy industry, science, profession and even political force. We do acknowledge that this conflict is difficult to handle by the national governments of the Member States, let alone the European Commission and the other bodies and institutions governing and organising the European energy networks. Harmonisation of the interests of the “traditional” energy producers with the new realities

¹ Regulation (EU) No 347/2013 of the European Parliament and 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.

² Evaluation of the TEN-E Regulation and Assessing the Impacts of Alternative Policy Scenarios by Trinomics, Technopolis, Enerdata, DNV-GL and Spark Consulting based on Service request No. 13 under the framework contract ENER/A.4/516/2014; Rotterdam, 27 February, 2018

³ Amongst others: in 2013 we have issued a Position Paper, in 2014 a list of case studies „With or without us – three cases manifesting gaps in designation of EU high priority energy projects; in 2015 „Recommendations for improving the PCI Designation Process and the Adjacent Public Consultation” and in 2017 „Transparency and public participation in PCI selection processes on national level”.

⁴ „Citizens, Climate and Environment: Clean Energy for the Benefit of All – Recommendations” 2017 Brno, J&E

⁵ Page 193.

and knowledge about sustainable development, social wellbeing and technological innovation without negative compromises seems to be near the impossible.

In such a difficult situation with the implementation of the substantive legal provisions of the Regulation, procedural guarantees gain special importance. Transparency for all stakeholders, a more important (at least visible) role to be given to the environmental authorities and experts, public participation and the indispensable capacity building for all of the stakeholders, including the authorities, are unfortunately not taken serious enough, although the internal logic of the regulated system would demand it desperately.

The European energy system and its operation is embedded into larger social, economic and ecological systems, which are also regulated by sophisticated set of legal rules. System thinking, better harmonisation of the energy laws and implementation thereof with spatial planning, infrastructure development, transport, heating and other related standards, environmental, nature and landscape protection laws, water management laws and with many other branches will turn out to be the key of further progressive development of the European energy law.

I. Environmental features of the TEN-E Regulation and its implementation

1. „The will of the legislator“

There are at least a half a dozen major political goals that had driven the European legislator to create Regulation 347/2013 on guidelines for trans-European energy infrastructure, including climate and energy policies, energy safety, single market and level playing field for the economic actors and also a wish to enable harnessing the renewable energy potential of the continent without being hampered by the low capacities (and lack of flexibility) of the electric grid in single Member States. The question that we have to put is: are climate and environmental goals in the forefront of the Regulation or they are just secondary issues behind the market and profitability goals?

Recitals of the Regulation are aimed first of all to communicate the aims of the legislator. Therefore, the stresses and subtle differences in mentioning and positioning certain goals, as well as the context of them counts a lot when we interpret the actual provisions of the Regulation. *Recital first* of the Regulation refers first of all to „Europe 2020“ that envisions a more resource-efficient, sustainable and competitive economy, „in particular to integrate renewable energy sources“. It is quite meaningful therefore that the very first recital deals with the sustainable growth document of the Union, which itself is a balanced policy approach of the three branches of sustainable development, while, undoubtedly, gives priority to the ecological background on the basis of which the social and economic goals might be fulfilled, too.

Also, Recital 4 cannot be interpreted otherwise as rendering renewable energy sources with priority if we consider the phrase „to develop renewable energy sources *in competition* with traditional sources“ (emphasis from us). Knowing that renewable energy production and transmission systems are lagging behind the traditional energy sources, a good competition position for RESs cannot be formed otherwise than offering a much more definite support for them, compared to gas and especially to oil.

While various economic and energy security goals are cited with heavy stresses in the Recitals, too, there is a major difference between them and the environmental goals. Environmental goals have a certain inherent rigidity, for instance, reducing greenhouse emissions by 20 or if possible 30 % is a “yes” or “no” type goal with no real alternative if the future of our civilisation on the Earth is taken

seriously. Also, we have to consider the special initiator and example setting role of EU in climate and energy issues. Economic and energy security goals might be more flexible from this angle, allowing for quite different paths of realisation, giving wide scope to innovation and several alternatives. If we compromise the climate and other environmental goals, the result will be an irreversible deterioration of the living conditions of the coming generation in a not too far future. If we decline one energy project or even whole type of energy projects, many viable alternatives offer themselves for achieving the same social and economic goals. Probably, however, slightly different groups will benefit from these social and economic achievements, while some more traditional energy producers would fiercely defend their established positions – but their misfortune is not the end of the World.

2. The actual implementation of the goals of the Regulation

Electricity PCI projects are considered an important (but far not an exclusive) condition of a wider scope of use of renewable energy sources (RES). According to an estimation by the leading European electricity industry groups⁶ the 2016 TYNDP can help avoid a great amount (between 30 and 90 TWh) RES spillage, therefore reducing the wasting of the produced renewable energy to less than 1 %. According to an analysis carried out in the impact assessment accompanying the proposal of the Regulation, the number of PCI projects were forecast at some 100 in the field of electricity and 50 in the field of gas⁷. Unfortunately, the actual numbers turned out significantly different and show a definite shift towards gas and also oil, the latter not even been mentioned in the impact assessment. Furthermore, 60 % of the total financial support from CEF is granted to gas projects.⁸ The general need for revising the ratio of carbon neutral and carbon negative energy sources in the TEN-E system is a recurrent topic in Europe, as the civil society networks and at some places the Report itself, too, emphasize⁹.

The mentioned impact assessment (IA) that accompanied the Commission proposal in 2011 has identified four major arguments that bolstered the need for a new mandatory European legislation:

- long administrative procedures that prevent the investors to respond to the market signals quickly enough,
- public opposition that hinder or even block the investments,
- not enough beneficial regulatory framework and
- inadequate financing that fails to protect the investors from the relatively high economic risks that entail with especially the transboundary network projects.

We see here that none of the actual drivers of the new Regulation was clearly environmental in its nature¹⁰. May actual wills behind the letters and implementation of the Regulation contradict the general and abstract “will of legislator” that is undoubtedly clearly reflects basic climate and

⁶ The estimation quoted on page 55 of the Report was done by the ENTSO-E, the organisation of the representatives of the electricity industry of Europe, therefore some might have some reservations about the unbiased nature of this forecasting, where the selection and weighing of factors is always a matter of an in great part subjective evaluation. Trust is not built up when we see that in the estimation the actual amounts of saved RES move between wide margins, while the same expressed in percent appears in a solid and concrete 1 %. The Report itself later (on the very same page) acknowledges that actually very few studies focus on the quantified impact of PCIs on RES integration.

⁷ Quoted in Recital 23 of the Regulation

⁸ INEA, 2017, quoted by the Report, page 160, analysed on page 160-165. Even if the support of gas projects seems to be exaggerated in the mirror of the overall goals of the TEN-E Regulation, the Report, based on literature and stakeholder interviews establishes: „there is no evidence that the CEF funding eligibility criteria laid down in the Regulation should be changed, as the current criteria effectively lead to supporting the most important projects that need financial aid.”

⁹ „(...) the need for supporting oil and gas transmission projects may merit a revision in the context of the long-term decarbonisation pathway” Executive Summary, page iii.

¹⁰ Approach of the evaluation, page 4.

sustainability goals? This contradiction becomes more understandable if we examine the past of the European energy policy between 1995 and 2013¹¹. The priority at that time was clearly the further strengthening of the Internal Energy Market, the cohesion of the European Union by reducing the isolation of the least developed regions, as well as reinforcing the security of energy supply in Europe. Even if connection of renewable sources, supporting carbon emission targets appeared amongst the goals, the facts were that the 42 projects presented under the TEN-E Guidelines in 2006 were mostly long distance transport routes for natural gas, as well as LNG and gas storage projects, all in order to mitigate the direct and immediate dependence on import. As a contrast, the few existing electricity projects were about rather short links. This is how the Report summarizes the reasons, why actually the mandatory TEN-E regulation targeted administrative and economic goals exclusively, such as the large number of targeted projects, bureaucratic granting processes and methodology problems with financing, while highlighted no environmental or social viewpoints¹².

On the other hand, in the early 2010s new policy context emerged: the energy and climate package and the 2020 targets as well as growing, more serious market position of the renewable energy sources, in connection with a higher level of technical innovation that would exert a positive cumulative effect on other social and economic fields. The double face of the present situation of the TEN-E Regulation and practice can therefore be explained by this historical outlook: the will of legislator as it is expressed in the Preamble, reflects the new realisation of the long term interests of the European nations (with old philosophical terms, a kind of *sollen*), while the reality that can be seen in the detailed rules and the implementation of the Regulation is vastly influenced by the strong professional energy lobbies (*sein*).

The implementation of the Regulation, naturally, follows the actual provisions, rather than the general principles in the Preamble. According to the second Union list, there are altogether 195 PCIs - 111 projects are in connection with electricity, 77 with gas and 7 with oil. However, the overwhelming majority of the electricity PCIs are transmission projects (that might serve all kinds of energy sources, even possibly supporting the more conservative ones) and only 9 storage and 3 smart grids projects (that can be directly connected to renewable energy sources). Moreover, the majority of the gas PCIs are located in Central and South East Europe, therefore contributing to a less environmentally friendly energy development in the less economically developed region of the EU. The TYNDP forecasts about the need for gas infrastructure have to be downgraded regularly as the total gas demand is seen to be further declining by 2030. In a 2016 study E3G estimates that “the dual impact of economy-wide efficiency improvements and electrification trends will sharply reduce the gas demand in Europe – making new gas infrastructure superfluous before the end of its economic life (40 years or more)”¹³.

A more intensive interlinking of the European gas and electricity networks could be part of the solution to the contradiction we tried to highlight here. However, an examination of the effectiveness of the total European energy network and the faithful implementation of the Regulation in Chapter 5.22.2 the authors of the Report inform us that, while the Regulation requires an interlinked electricity and gas market network, both ENTSOs see a lot of work yet to do in order to achieve interlinkages between gas and electricity on a consistent and transparent basis. The interlinked electricity and gas model as it stands at the time being remains inadequate and does not yet properly meet the requirements of the Regulation. Out of this end, a stronger steering and monitoring role for ACER or the European Commission should be envisaged, because of the two autonomous professional organisations on the

¹¹ As it is done in Chapter 3.1 of the Report.

¹² Page 18-19.

¹³ Quoted on page 45.

European level might continue to follow their respective narrower professional interests rather than make effective steps towards a holistic change.

3. Contradictions remaining in the Regulation and in the practice

- a. The priorities set in the Preamble are distorted by the detailed rules and by their implementation

Sustainability seems to be the last of the interests that in the practice prevail in the European energy market. Such contradictions are reflected in the Report, too, sometimes in a quite outstanding manner. In Chapter 4, about the relevance of the Regulation, the authors try to collect the ways it aims to improve the Union's energy and climate policy objectives: the first place is occupied here by competitiveness (to ensure competitive and affordable energy supply by enhancing market integration and increasing competition on energy markets), the second is security of supply, i.e. to enhance secure supply of energy, while sustainability is the last item only, namely to contribute to the EU's environmental and climate goals, in particular by facilitating RES integration.¹⁴ This line of order is in contradiction with the "will of the legislator" as it is reflected in the Preamble. An even greater problem is the lack of consistency between these goals that are established by the Regulation and the practical data. As the Report highlights, RES installations (PV, biomass and the usually more widespread smaller windparks) use low and medium voltage. Smart grids that are able to handle this variability, however, remain within the national borders in smaller regions, with no hope to become a part of a PCI project, because they would not meet the eligibility criteria.

The same is true to the alternative solution of harnessing renewable energy sources, the storage capacity¹⁵. The conclusion is that the present European energy network is not sufficient to face the 2050 (not even the 2030) low carbon economy goals, moreover it hinders the further development of renewables, because once the grid is unable to accept them, their production will have to be curtailed. We need to put the question: whose interest is that, and how much this situation fits to the fair competition on the energy market? We do agree with the conclusion of the Report that a possible enlargement of the eligibility criteria could be considered and further assessed. This will not have to lead to a larger number of PCIs (as a counter argument sounds), but rather to a major shift towards the sustainable transformation of the European energy market.

- b. Smart grids are handicapped (the TSO and DSO connection)

Another outstanding contradiction that becomes more and more striking as time goes on and the energy market transition evolves, is the unbalanced situation of TSOs and DSOs, as well as the different position of the large high voltage European energy highways and the small or medium voltage smart grid systems. Originally the Regulation aimed to support the first, while the fast historical changes rapidly enhance the importance of the second. Soon enough the Regulation might become a hindrance in the healthy and organic development of the European energy systems. Even if it is a real danger, the Report tries to reveal some positive outcomes, too. Amidst the new energy developments "DSOs will host more (intermittent) generation, thus requiring properly integrated network planning with TSOs, in order to be able to opt for macro-economically and technically appropriate design and development of grids, and in order to allow optimal integration of RES into the grids. TSOs, on the other hand, will host less centralised power generation, but long distance transport across EU will gain importance. (...)

¹⁴ Page 29.

¹⁵ Smart grids and storage capacities are described as the main conditions of reaching the Union's long term low carbon ambitions in Chapter 5.1 („Contribution to Energy and Climate Goals”), page 70.

Greater cooperation between DSOs and TSOs is required to ensure the most efficient solutions are implemented; while a coordinated approach to system development can optimise network development costs.”¹⁶ This is in strong correlation with the faith of smart grids. While the specific criteria determined by Article 4(2) c) for electricity smart grid projects would support them to become a PCI, the general criteria of Article 4(1) almost totally excludes them from this European priority circle. Furthermore, the cooperation between DSOs and TSOs has no mandatory regulation at the time being¹⁷.

c. Market failures healed, except the failure of the markets to solve environmental problems

When the Report surveys the market failures that justify TEN-E and CEF, it highlights the following features that might not be optimally produced solely by the markets: the correct cost and benefit allocations in the cross-border projects, quick and effective dissemination of technical innovations, the information asymmetry between certain investors, ownership and profit realization problems at multinational companies and national interest that might contravene to the EU level benefits of the energy networks¹⁸ - these are indeed heavy social and economic arguments, but environmental viewpoints are strikingly missing from the list. No wonder that there is no proper institutional representation for the environmental authorities in the TEN-E decision-making bodies on regional and union scale either. We wonder how the future sustainable development challenges will be met this way. The 2030 Climate and Energy Policy Framework, as amended in 2016 set an energy efficiency target at least 30 % by then as part of the Commission’s Clean Energy for All Europeans package. The Framework, furthermore, requires by 2030 a 27 % of renewables in final energy consumption and 40 % greenhouse gases emission reduction compared to the 1990 level. The energy market will most likely not be able to solve these tasks without additional, directed efforts.

While the environmental goals clearly enjoy a priority according to the Preamble of the Regulation, in the detailed rules we experience a definite advantage of gas related investments ahead of electricity ones. The actual dissemination of priority corridors in Annex I of the Regulation reflects less emphasis on electricity corridors than on gas and oil corridors. Especially the oil projects seem to contradict to the aims of the legislator, if we see for instance the Paris Agreement and the EU undertakings and long term sustainability and clean energy plans.

d. Green washing does not help

Editing sometimes betray the reality better than outspoken stakeholders. Chapter 5.1 is titled: “Contribution to Energy and Climate Goals (Article 17.f)”. Right below it, the title of the sub-chapter reads: “How effective has the Regulation been in contributing to the goals for market integration by 2014?” And, indeed the chapter starts to analyse the beneficial economic effects of the slightly growing interconnectivity of the energy market to the energy prices, as well as the Regulation’s features that can be viewed as a useful promoter of a positive climate (...) for investing in interconnectors¹⁹. Actually, the following question in Chapter 5.1 is really about the 2020 climate and energy targets, but the hierarchy of importance of the two sides of the Regulation in their implementation is still clearly visible by this editing solutions.

¹⁶ A CEER Position Paper on the Future of DSO and TSO Relationship, quoted on page 193.

¹⁷ What is available is „General Guidelines for Reinforcing the Cooperation between TSOs and DSOs” issued in 2015 by EDO, ENTSO-E and Eurelectric.

¹⁸ Page 35-6.

¹⁹ Page 66.

e. The stakeholders' attitude

This situation will become more and more contradicting as the price of the RES keeps lowering and the EU natural gas demand keeps getting lower, compared to the peak levels between 2005 and 2010.²⁰ The stakeholder consultations the Trinomics consortium has performed for its Report prove that the stakeholders are fully aware of the situation and they stand up for a major increase in the scale and pace of investment in electricity interconnections and highways necessary to reach the RES targets and enable market integration in this respect, as well as a similar enhancement in investing in smart grids. Furthermore, the stakeholders call for a turn in the TEN-E policy in order to prioritize RES, for reaching the European climate targets and all the secondary social and economic benefits entailing with the most innovative renewable energy production. The remaining oil infrastructure projects should be phased out, while there should be more coordination between electricity and gas projects. Gas projects can be more in harmony with the sustainable energy requirements by accepting biogas and other similar sources, for instance from waste landfills (biomethane) and they can be a useful bolstering for the RES projects if properly harmonized.

f. Critical views of the stakeholders

A really positive feature of the Report is that it includes a line of critical comments from the stakeholders. We share the majority of their opinion when they establish that the TEN-E Regulation should not only envisage large-scale projects between countries, it should look further than its mainly socio-economic (political) aspects and target environmental benefits, too, especially when on longer run such targets bolster the socio-economic goals, as well. Critics warn that the remaining and even newly installed fossil fuel-based infrastructure is incoherent with long term EU objectives, especially if we consider the at least 40-50 years lifespan of them²¹. How are we going to have a totally decarbonised energy system by 2050, hardly 30 years ahead?

The time dimension of this problem is clearly seen if we examine from one side the overall TEN-E goals that have more than two decades long history, originating from times when renewables seemed only fragile experiments. The other side could be for instance the 2014 Connecting Europe Facility whose main objective is "to increase the share of renewables through new electricity lines". However, the line continues, the second part of the sentence is as follows "and replace the use of more carbon intense fuels (e.g. fuel-oil, oil products or LPGs) by natural gas". The pro-environment stakeholders interviewed by the Trinomics consortium highlight in this respect: the high number of gas PCIs undermine the benefits from electricity PCIs which encourage the installation of more RES projects, let alone that the financial and political support the gas projects receive, should rather be allocated to RES.²²

g. Weak procedural guarantees

After analysing the contradictions of substantive legal nature, we shortly refer to some procedural contradictions, too. We see no direct role for environmental authorities neither an early and informed public participation in the PCI selection procedures, as we are going to highlight in the following chapter.

²⁰ Page 30 of the Report, referring to an ACER study from 2017.

²¹ Page 57-58.

²² Page 68 and footnote 164.

While the Preamble and other places of the Regulation clearly reflects the goal of protecting the environment and ensure sustainable development, not even the environmental authorities have an obligatory statutory role in the regional and Community level decision-making procedures on the PCIs. Neither the composition of Regional Groups (Art. 3(1)), nor the decision-making body within the Commission (Art. 3(4)), not even the Agency (Art. 3(5)b) seems to have environmental officials or environmental experts as a rule in these procedures. The Report itself points out the conflict of interest situation in the PCI selection processes and approvingly quotes such suggestions that aim at a bigger role for authorities with no direct link to the economic actors in the cases being discussed²³.

Furthermore, we see inadequate legal guarantees of early and informed public participation in the decision-making procedures under Article 10, even if Article 9 correctly and progressively sets down the principles of public participation (we come back to this issue later in our analysis).

4. Multiplication effects of environmentally friendly solutions – a mostly unused opportunity

We have established that with the new age of energy production and consumption, the wording and practice of the Regulation are quickly becoming outdated. The future belongs to win-win solutions, where environmentally friendly, as well as socially sustainable energy projects offer numerous additional benefits in the technical and economic side, too. Innovation is found by the Report as a positive externality of certain electricity PCIs, especially smart grids and electricity storage projects. Even gas projects are said to bring innovative solutions, while the Report fails to give typical and widespread examples. Unfortunately, in Chapter 5.19 (“Innovative solutions to Infrastructure needs”) very small number of the actual PCI projects were found as carrying innovative elements as deciding features. The energy market seems to be rather conservative in that respect, too²⁴. Lack of transparency might be responsible for this negative development mostly, as the Report says in a positive form: “(...) it is unclear to what extent the TEN-E Regulation stimulates project developers to opt for innovative solutions rather than for standard equipment. An improved framework for measuring, monitoring and reporting PCI benefits would allow a better understanding of this in the future.”²⁵

Smart grids involving digital communication, interactive and intelligent management and monitoring of electricity generation, transmission, distribution and consumption are the other outstanding examples of possibilities of mutual benefits on the side of the social-economic actors and the environment. The International Energy Agency’s 2017 report “Digitalisation and Energy” describes smart grids as breaking down the boundaries between energy generation and consumption and enabling four interrelated opportunities: smart demand response, integration of variable renewables, smart charging technologies for electric vehicles and developing innovative energy resources. Furthermore the Agency’s study points out that the markets have made up their minds, investments in digital energy infrastructures and software has been growing by 20 % in the latest years – annually²⁶. As the Report adds: “Digitalisation will play a key role to a low carbon, cost efficient, secure and consumer-centric energy system.”

²³ In Chapter 5.22, “Network Modelling and CBA within TYNDP and PCI Processes”. However, the text is not generally about all the organisations with vested economic interests, but only “asset owners” that might allow a narrower, less progressive interpretation, too (page 184).

²⁴ Conclusions of the chapter, page 153.

²⁵ Page 155.

²⁶ Quoted by the Report on page 156. We have to add, that this figure is a global one, therefore Europe is at the risk of lagging behind if the laws and the investors respond slowly to this trend.

Moreover, smart grids bring upon a kind of energy democracy, decentralisation of the systems and empowerment of the consumers, especially if they form small, flexible local communities in small cooperatives or on simple contractual basis or with no formalities at all. Unfortunately, the Report has to establish that these opportunities are still largely unexploited at the present. Only three smart grid projects are part of the second Union list of 2015. One can wonder, why. Probably, we can get closer to the answer if we consider that smart grids can reduce peak demand and hence limit the need for investments in additional grid or generation capacity, they can improve the management of power generation from both variable and dispatchable sources and reduce potential increases in conventional infrastructure costs.²⁷

II. Procedural guarantees of the due implementation of the goals of the Regulation

1. The “will of legislator” concerning the procedural guarantees

Transparency is mentioned first only in the 21st Recital, however, later several indents in the Preamble deal with public participation and access to information matters. Although referring to the Aarhus Convention (Recital 31), the Preamble underlines that “despite the existence of established standards for the participation of the public in environmental decision-making procedures, *additional measures* are needed to ensure the highest possible standards of transparency and public participation for all relevant issues in the permit granting processes for projects of common interest” (emphasis by the author of this paper). This means first of all that the legislator acknowledges the overriding common interest in its true sense in potential PCI projects, especially the interests of the future generations²⁸ of the concerned communities that are otherwise quite frequently overlooked by the promoters of energy projects. Also, designing, planning and permitting energy projects have a line of specialties that need public participation regimes specifically tailored to such procedures. Capacity building has an elevated importance in this respect²⁹.

Environmental impact assessment is the other major procedural guarantee for sustainable projects, while commenters note that PCI projects lack a proper climate impact assessment.³⁰ An old problem of superficial and/or biased handling of the *tiered administrative procedures* can be detected in this situation. Promoters and energy lobbyist and others who consider fast-tracking of the PCI permitting procedures a goal above almost all, frequently state that an EIA in the PCI decision-making procedure would be a superfluous repetition of the EIAs that are mandatory anyway (in the majority, but not all) projects that are subject to the PCI processes. Such projects, however are long and multifaceted ones, decisive connecting interests, technical feasibility, as well as the legal background might change significantly during those at least 5-6 years long procedures, therefore it is incorrect to refer to an EIA somewhere in that long process as making all the other examination of the environmental and other connecting social and economic interests unnecessary.

²⁷ Page 156.

²⁸ See Article 1 of the Aarhus Convention: „In order to contribute to the protection of the right of every person of present and future generations (...)”

²⁹ While Recital 31 mentions capacity building only in a more restrictive sense, as capacity building for the administrative bodies in respect to effectively manage impact assessment and public participation regimes established in the EIA, SEA, Aarhus- and Espoo-related European and Member State legislations.

³⁰ Page 58.

2. Timeliness and public participation

The very Recital of the Regulation that focusses on streamlining and improving permit granting processes (Recital 32) stipulates: “time limit should stimulate a more efficient definition and handling of procedures, and should under no circumstances compromise the high standards for the protection of the environment and public participation”. This clear message, however is hardly heard in the administrative practice of the PCI projects. In many cases, public participation is the major hindrance of quick and effective processing of their energy project planning and permitting procedures in the mind of promoters and administrative officials. The environmental lawyers of J&E experiences show the opposite: lack of transparency and correct conditions of substantial participation leads to longstanding conflicts and additional legal challenges – the latter can be more time consuming than a well-executed public participation in itself.

The impacts of the Regulation that had been expected by the regulated community, first of all the energy industry in Europe was first of all an “improved public participation” that had to be understood as an even more streamlined, restricted participation that is not anymore able to hinder or even block major energy investments in Europe. This logic ensues from the major findings of the 2011 preliminary Impact Assessment, where public opposition was introduced as the major reason of the difficult market position of the European energy sector³¹.

Public opposition of the PCI plans and lengthy and complex permitting procedures go hand in hand in the view of the authors of the Report, too³².

Even if so, the authors of the Report are right when say this in a more elaborated way: “Article 9 of the TEN-E Regulation introduces requirements on transparency and public participation. The purpose of these requirements is to improve the quality, consistency and transparency of public engagement and thereby to reduce public opposition.” Actually, as we are going to discuss in the following point, such ambitions of Article 9 seem to be futile, rather, there must be problems with the ambitions themselves: reducing public opposition is not a legitimate goal when an energy project does not meet the long term sustainability goals (for which we see poor guarantees at the time being). Public opposition has a function itself: prevent or remedy those energy project which are not in harmony with these long term sustainability requirements.

3. The pre-application phase of the PCI process

Article 10 (especially Paragraph (1) and (4)) describes a pre-application process of approximately 2 years duration, in order to determine if the project is mature enough for entering into the actual permit granting procedure and if it is, what should be the professional content of the request and the procedural steps of the permitting procedure. This approach closely reminds us the screening and scoping phase of the environmental impact assessment processes for individual projects within the Member States. There is a major difference, however: no public participation is prescribed in the PCI pre-application procedure. This means that the whole project is formulated for 2 years without any possibility of the concerned communities and environmental NGOs to express their opinion on the location, trajectory, technical solutions, timing etc. of the project. This might lead to major conflicts in later stages and can result in significant delays or even failure of the planned projects or to project versions which are far from the ideal in the sense of not being in harmony with the long term interests

³¹ This becomes clear when we compare the major findings of the IA under Point 2.1.1 and the planned impacts of the Regulation in 2.1.5 (pages 4 and 7, respectively).

³² The summary of Chapter 4.1 on the relevance of the TEN-E Regulation, page 33.

of the concerned communities and, as a rule, the interest of the environment and sustainable development in broader social-economic terms, either. Even if there is an EIA procedure later in the process, this will not be able to remedy these failures and missed opportunities either because the major features of the project are already decided or because the EIA will have a different content and scope of possible decisions by the environmental authorities (themselves excluded from the PCI procedures at large).

It is also true that the provisions of the Regulation put the picture into a different light. Article 9(3) of the Regulation requires to submit a concept for public participation within three months of the start of the permit granting process, while Article 9(4) requires the promoter (or the competent authority if the national law opts for this solution) to carry out at least a public consultation in the pre-application stage (before submission of the application file). But let us examine it a little from bit closer: the first requirement refers to only a plan that will be evaluated and finalized in the permit granting process and will be implemented later. The second requirement is substantial, especially that the Regulation underlines that it shall not be identical with the EIA participation³³, it shall happen in an early stage and shall help to identify the most suitable location or trajectory and other relevant issues.

Unfortunately, practice shows that the legal guarantees are too weak to ensure that any actual public involvement takes place in the decision-making on and planning of the basic features of the (historically quite secretive) energy projects. This is hidden partly in the structure of the Regulation, too: the public participation chapter raises some requirements, but the permit granting provisions fail to reinforce them. Once the proper public involvement is not a clear condition of permit granting (or rather: of entering into the second stage of it), promoters will tend to overlook or just formally fulfil the requirements of Article 9.

The conclusions of this short legal analysis are reinforced by the findings of Chapter 5.4.2 of the Report, where no mention is made on public participation or even on any interference of the environmental authorities into the PCI projects. Later the authors acknowledge: "(...) on the basis of the available information it is not possible to determine the extent to which the regulation has contributed to improving public acceptance of the PCIs and more specifically, which aspects have been most helpful. It is also not clear to what extent the Regulation has encouraged project promoters to engage with the public earlier in the process."³⁴ The reasons of the poor results were most frequently mentioned by the interviewed stakeholders, was that public awareness is of low level about the needs and nature of the planned infrastructure projects in general and in case of individual PCI projects in particular. The stakeholders from the side of the energy industry are mistaken when they misunderstand and underestimate the motivations of the local communities. According to them, public opposition seems mostly related to a project's local impact and the absence of benefits for the local community³⁵. Experience of the several dozens of public interest environmental lawyers in the J&E network, who have been working with local communities not seldom for decades already, is different. In our opinion, community dynamics, such as deliberative procedures, community coherence and value systems, ethics and mutual control in individual instances would as a rule prevent these communities to arrive at short-sighted, selfish opinion. They would rather represent the long term interests of their narrower communities and the broader geographical areas, taking into consideration societal and general sustainable development viewpoints, as well.

³³ Based on the literature, the Report informs us that some Member States interpret this clear meaning in a different way, not surprisingly alleging that one public consultation within the frames of the EIA procedure is enough to meet the requirements of the Regulation, too (page 94).

³⁴ Page 94.

³⁵ Page 96-7.

In Chapter 5.21, the Report surveys the whole PCI selection process which starts with the preparation of TYNDP by the ENTSOs. After that the project promoters notify PCI candidate projects, NRAs check the eligibility criteria, the regional groups assess and rank the projects and agree in the regional lists. Thereafter ACER gives an opinion on the regional lists and only in the sixth phase, when a public consultation is organised by the EC, right before the adaptation of the final PCI list³⁶. In the same chapter it becomes clear that the large majority of stakeholders raises the problem of lack of transparency during the PCI selection process.

However, some sporadic good practices with positive results are also reported. For instance in France, the multiple and earlier consultation at local level is accepted generally by the stakeholder as not leading to an increase in the opposition, in the contrary, promoters benefit from it by getting earlier and more substantial feedback. With similar considerations and results, the earliest possible consultations are widespread in Germany, too, such as early stage town hall meetings to create trust and establish the spirit of transparency and openness.³⁷ An ENTSO-E handout on the Energy Infrastructure Forum raises the possibility to monitor the implementation and evaluate the results of the project together with the local stakeholder seem to be also a step into the right direction.

4. Transparency in the PCI selection processes

Quality of the available data about the plans and operation of PCI projects is an indispensable condition of transparency. That is why we can agree very much with the proposal of the Report to quantify the climate impacts of the PCIs, furthermore, not only the negative impacts of the oil and gas PCIs, but the more positive effects of the electricity projects should be quantified, too.³⁸

Transparency starts with producing quality data, which is, in harmony with the careful survey of the Report is really scarce in the field of the PCI projects. Transparency then continues with correct professional analyses on the data and fair and equitable distribution of the results. Unfortunately, in the case of the PCI projects, usually this second aspect of transparency is also missing. Lack of proper data and careful, unbiased analysis of them might easily lead to miscommunication, misunderstandings and false public opinion on certain topics. One example can be that many professionals (including the authors of the Report at many places thereof) tend to handle the electricity, gas and oil PCI projects as separate, but more or less equal branches. Let alone their quite dramatic differences in the field of sustainability, their ratio in the energy mix of several European regions is still quite different, also their political, legal and administrative support differs a lot.

The energy sector is historically powerful and secretive, these two features are strongly interrelated: major energy producers and transmitters have enough power to allow themselves to exclude others from vital information, while they keep and gain more power through their information monopoly. A typical feature within the European energy system is that even those project promoters that are not member of their respective ENTSO are also able to have access to certain relevant data.³⁹

³⁶ Page 166.

³⁷ Page 97 and 100.

³⁸ The original text goes as: „Regarding PCI contribution to climate objectives, further transparency and awareness could be facilitated by a more cohesive approach to quantify climate impacts of oil and gas PCIs” (Report, page ii.) Notably, the Report mentions this suggestion within the context of coherence, rather than transparency and public participation.

³⁹ This statement was done by an interested stakeholder and is quoted in Chapter 5.24 about PCI selection process, page 198.

Right after this, the authors of the Report themselves underline that it is an issue of concern to ensure additional and more transparent information especially regarding the environmental, social and climate impacts of PCIs.

5. Capacity building

Capacity building is an indicator of the seriousness of a government about public participation. If an administration is willing to ensure that concerned communities and civil organisations are motivated enough and have the means and abilities to actually use the legal and procedural possibilities to participate in the decision-making procedures of planning and permitting major energy projects, we might say that, indeed, they think genuinely that participation of all the stakeholders will simplify and shorten the procedures because of less contradictions in them⁴⁰. Unfortunately, we do not see any significant efforts from the Member States to build the capacities of the concerned communities and the civil society organisations in PCI matters, in order to bring them into better position in the procedures. Usually, not even the basic information about the procedures in general and specifically in connection with individual PCIs are given to them. Neither the Report pays more attention to the necessity of capacity building in connection with the detailed discussion of public participation (the quoted statement is just a general comment about “EU added value”).

The real attitude of the decision-makers towards public participation is more generally described by the statement of the Report concerning the effectiveness of the TEN-E Regulation: “public consultations can be further improved to properly mitigate public opposition to such projects”⁴¹. J&E lawyers would urge to think about public participation more widely: through the willing and able participation of the concerned communities and environmental NGOs the quality of the decisions will be enhanced, more and more, balanced information will be brought to the attention of the decision-makers and other stakeholders and more diverse set of interests will be taken into consideration, not only the narrow and short-term economic interests of certain investors.

Only remote hints appear in the Report that might contain some elements of capacity building. In Chapter 5.7.1 where best practices of stakeholder involvement is surveyed, a Milieu Consult study is quoted where “facilitating public participation” and use of electronic information systems are mentioned as desirable methodological tools. Also the group called Friends of the Supergrid’s Energy Education program is mentioned where the civil/professional organisation deals with promoting energy education and communication among people with elements to better understand the nature and role of energy in the world⁴². However, we should not mistake real and independent capacity building from information dissemination carried out by organisations that are strongly involved with the interest of the energy industry. Furthermore, if we take into consideration that the chapter we refer to here, has collected as many as 54 so called best practices of involving stakeholders during permit granting and project implementation of PCIs, this result with two, at least remotely capacity building efforts, is definitely poor.

⁴⁰ „(...) further work needs to be done to engage the public in infrastructural planning and development, to simplify procedures to reduce administrative burdens and to ensure higher consistency between the procedures for PCI and non-PCI infrastructure investments”(Introduction of the Report, page ii).

⁴¹ Executive Summary, page ii.

⁴² Page 100-101.

III. Coherence with EU legislation relevant for environmental protection

One of the most outstanding legal problems of the implementation of the Regulation is its application in a way that respects the requirements of the Habitats Directive and the Water Framework Directive where the environmental features of certain investments and operations are to be supervised in legally determined regimes. While the TEN-E Regulation allocates special social, economic and at the same time legal importance to projects that achieved the PCI status, Recital 28 leaves no doubt about the effect of this label to these other fields of law, when saying “Authorisation should be given to projects which have an adverse impact on the environment, for reasons of overriding public interest, when all conditions under Council Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora and Directive 2000/60/EC establishing a framework for Community action in the field of water policy are met.” This provision clearly sets out that the PCIs are not to be permitted without further deliberation, but all the additional environmental legal preconditions, including those of nature protection and water management/protection must also be met. Yet, the Report has collected data about a contrary legal practice from the Member States where seemingly the priority status given to PCI projects are handled as automatically providing with the condition “overriding public interest” under the mentioned two environmental directives. The Report itself handles this issue as an ambiguous one.

Recital 33 stipulates that energy policy decisions and granting energy permits should be harmonized with the relevant branches of civil and administrative law, too, namely property rights, spatial planning and land use (land protection) laws and also laws and strategies relating to other infrastructural elements such as highways, railways, public buildings. Yet, hardly any practical data can be seen into these directions: power surplus of the energy lobby and energy administration, as well as energy planners and operators and general limitations of successfully handling interdisciplinary relationships hinder the actual realization of these progressive ideas of the legislator.

Article 9(2) of the Regulation makes clear that Aarhus and Espoo Conventions are also highly relevant in TEN-E matters. Actually, not only Article 7 of the Aarhus Convention on public participation in strategic decision-making is relevant, but Article 4(4) about business secret and other types of secrets considering third person interests. Also the accompanying sub-exemptions in the chapeau and tail of Article 4(4) in terms of restrictive interpretation of the exemptions and the unconditional openness of environmental and public health data (taking into consideration Art. 2(2) of the Convention, too) and Article 4(5) about the separation of the secret parts and making the rest of the information available. All capacity building provisions in Article 3, 4 and 6 and especially the active information servicing in Article 5 are highly relevant here, too, as we pointed out capacity building as a vital, but at the time being quite neglected element of public participation under the Regulation.

As we have pointed out earlier, the most important features of Article 7 of the Aarhus Convention, guarantees for *early and informed* participation are not properly represented in the text of the Regulation. The single mandatory consultation is the one that the project promoter (or the competent authority) can organise right before the complete application file is ready to be issued to the competent authority. How early is early, shall be interpreted by the same Article 9(4) of the Regulation which later stipulates “The public consultation shall inform stakeholders referred to in Annex VI. 3(a) about the project at an early stage and shall help to identify the most suitable location or trajectory and the relevant issues to be addressed in the application file.” An early consultation therefore means a consultation when the alternatives for location or trajectory, as well as all the other issues significant from the angle of environmental protection and sustainability are open. Unfortunately, this clear provision has not come through to the everyday practice of the implementation of the Regulation.

As we have referred to, also, an earlier study by Milieu (2016)⁴³ had to establish that the majority of the Member States have not properly implemented Article 9(4) and the related details in Annex VI. Justice & Environment 5 country field research (2014) has established the same failure with ensuring public participation: no websites were found, primarily, neither at the authorities, nor the promoters, the only information source was the specific website of the Commission in the PCI matters.

Apart from these outstanding issues, harmonisation with the tissue of the relevant European laws and strategic documents will deserve more attention in the future. These are, *inter alia*

- the 2030 Framework for Climate and Energy Policies,
- the Renewables Directive,
- Clean Energy for all Europeans (2016),
- Investment Plan for Europe (2014),
- EU Regional Policy,
- European Neighbourhood Policy.

There are data about lack of proper coherence with basic environmental strategies and laws. NGO stakeholders, such as EEB and Birdlife International pointed out that promoting the gas and oil infrastructure through the TEN-E Regulation is in conflict with the sustainability and especially with the climate objectives of these documents as well as with the objectives of the Paris Agreement.⁴⁴

The authors of the Report lead back the coherence problems to the leading topic of the contemporary energy systems in Europe: “The presumed lack of coherence of TEN-E, mainly concerns future changes in the energy system where stakeholders feel that energy efficiency, demand response, storage and small scale local renewables should get a more important role in the infrastructure planning process. It appears that these criticism are based on differing views about the speed and nature of the energy transition. In long term it might be the case that some of the TEN-E investments are not (or less) needed.”⁴⁵ In the opinion of Justice and Environment, the Regulation should not be only a passive spectator of the “match” between the new, progressive developments in the energy systems in Europe and the old, not sustainable solutions, but should actively support the progressive side in a much more intensive way than it does now. The Report is absolutely right when establishing that one of the best ways to make the Regulation to play a progressive role would be to pay much more attention to its better, more organic fitting to the rest of the European environmental programming and legislation.

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⁴³ Referred to on page 27 of the Report.

⁴⁴ Page 214.

⁴⁵ Page 218.