

The European Energy Infrastructure Package and Its Implications for the Environmental Impact Assessment Regime: The Case of Austria

A Master's Thesis submitted for the degree of
"Master of Science"

supervised by
Dr. Klaus Rapp

Mag. Michaela Aumann

0705595

Vienna, 28.05.2014



diplomatische
akademie **wien**
Vienna School of International Studies
École des Hautes Études Internationales de Vienne

Affidavit

I, **MICHAELA AUMANN**, hereby declare

1. that I am the sole author of the present Master's Thesis, "THE EUROPEAN ENERGY INFRASTRUCTURE PACKAGE AND ITS IMPLICATIONS FOR THE ENVIRONMENTAL IMPACT ASSESSMENT REGIME: THE CASE OF AUSTRIA", 58 pages, bound, and that I have not used any source or tool other than those referenced or any other illicit aid or tool, and
2. that I have not prior to this date submitted this Master's Thesis as an examination paper in any form in Austria or abroad.

Vienna, 28.05.2014

Signature

Abstract

The European Strategy 2020 aims for high goals for European energy consumption, efficiency and the reduction of greenhouse gas emissions by 2020. At the same time, energy networks essential to achieving these targets are unfit for the challenge and outdated. In order to tackle this problem, the European Union has issued the Energy Infrastructure Package to identify priority corridors and areas for network improvement and enable project developers to realise projects within that frame that encounter difficulties. One source of such difficulties is often the mandatory environmental impact assessment such networks projects have to undergo. Therefore, the Energy Infrastructure Package (EIP) introduces a number of changes and adjustments of the assessment for these projects.

This paper examines both the environmental impact assessment regime in Austria and the Energy Infrastructure Package and outlines the relationship between the two instruments. Moreover, consequences for project developers as well as the public are analysed in a comparison of the different regimes.

One of the significant findings emerging from this research is that the EIP offers considerable benefits to both project developers and the public. While developers profit from shorter permit granting procedures and financial assistance, the public enjoys more rights regarding transparency and early involvement in the project planning. On the other hand, additional requirements in time scheduling increase the administrative burden on project developers. In general, thus, the EIP brings advantages as well as drawbacks and only the actual application by developers and authorities will show the real value of the package's introduction.

Key words: Energy Infrastructure Package; projects of common interest; environmental impact assessment.

Contents

ABSTRACT	I
CONTENTS	II
LIST OF ABBREVIATIONS	IV
ACKNOWLEDGEMENTS	V
1 INTRODUCTION	1
2 THE ENVIRONMENTAL IMPACT ASSESSMENT DIRECTIVE AND ITS IMPLEMENTATION	3
2.1 DEVELOPMENT	3
2.2 MAIN PRINCIPLES	3
2.3 THE PROCEDURE FOR APPROVAL UNDER THE EIA DIRECTIVE	8
2.4 THE AUSTRIAN EIA REGIME UNDER THE UVP-G 2000	9
2.4.1 <i>Parties to the Procedure</i>	12
2.4.2 <i>Course of Proceedings</i>	14
2.4.3 <i>Cross-Border Cooperation</i>	18
2.4.4 <i>Analysis of the UVP-G</i>	18
2.5 SHORTCOMINGS OF THE EIA DIRECTIVE AND NEW DEVELOPMENTS	20
3 THE EUROPEAN ENERGY INFRASTRUCTURE PACKAGE	24
3.1 DEVELOPMENT AND BACKGROUND	24
3.2 GOALS AND TARGETS	26
3.3 REGULATION 347/2013 ON GUIDELINES FOR TRANS-EUROPEAN ENERGY INFRASTRUCTURE	28
3.3.1 <i>Projects of Common Interest</i>	28
3.3.2 <i>Treatment of PCIs</i>	31
3.4 THE CONNECTING EUROPE FACILITY	41

3.5	STREAMLINING RECOMMENDATIONS	43
4	ANALYSIS	47
4.1	ANALYSIS OF THE LEGAL RELATION	47
4.2	ANALYSIS OF CONSEQUENCES FOR PROJECT DEVELOPERS	48
4.3	ANALYSIS OF CONSEQUENCES FOR THE PUBLIC	50
5	CONCLUSION	52
	BIBLIOGRAPHY	53
	LIST OF FIGURES AND TABLES	57
	APPENDIX	58

List of Abbreviations

ACER	Agency for the Cooperation of Energy Regulators
BMLFUW	Bundesministerium für Land- und Forstwirtschaft, Umwelt und Wasserwirtschaft
CEF	Connecting Europe Facility
EIA	Environmental Impact Assessment
EIP	Energy Infrastructure Package
ENTSO	European Network Transmission System Operator
EU	European Union
PCI	Project of common interest
RBMP	River Basin Management Plan
SEA	Strategic Environmental Assessment
TEN-E	Trans-European energy networks
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TSO	Transmission System Operator
UVP-G	Umweltverträglichkeitsprüfungsgesetz

Acknowledgements

I would like to express my appreciation and thanks to my supervisor, Dr. Klaus Rapp from Verbund Umwelttechnik GmbH, for his guidance and support in writing this thesis. His encouragement and input have been invaluable in the process and contributed significantly to the completion of the present paper.

My gratitude also goes to Angelika Watzl and Mario Bandarra for proofreading the work and offering their advice. I honestly appreciate your help!

I wish to thank my parents for their financial support during the past two years and for enabling me to pursue an academic education. A special thanks to my aunt Hedda and uncle Robert, who supported my wish to study in the ETIA programme from the very beginning and without whose help it would not have been possible. I will forever be grateful for your belief in me.

I further want to thank Prof. Dr. Gerhard Loibl LL.B, Prof. DI Dr. Hans Puxbaum and the TU Continuing Education Center for offering the ETIA programme and thereby supporting a stronger connection between environmental issues and their international solution.

1 Introduction

Environmental protection has been at the heart of the European Union's policies for a long time. The Treaty on European Union, which has to be signed by every new Member state, stipulates in its Article 3(3) explicitly that the Union aims at "a high level of protection and improvement of the quality of the environment". In accordance with this, a directive was issued in 1985 establishing a scheme of environmental impact assessments for projects that potentially have negative effects on the environment. Member states followed their obligation to implement the regime into national legislation and environmental impact assessments became state of the art in dealing with possibly harmful projects.

On a different page, the European Union saw its action required when their Strategy 2020 for future energy supply and energy efficiency threatened to fail. In 2013, the European Union decided for a new approach to reach their plans of energy security and compliance with international obligations such as the Kyoto Protocol and issued the "European Energy Infrastructure Package". The main motivation behind this was to offer a new and improved plan on how to achieve synergies and build networks that were initially not feasible and thus not realised until then but necessary for a well-performing infrastructure.

However, this new regime shows a tendency to interfere with the existing environmental impact assessment scheme in some respects – its provisions for public participation, time frames and coordination between competent authority and project developer differ significantly from the EIA regime. For legislators as well as project developers, the question arises of how the scheme they have to follow will change and how they have to adapt. As the Infrastructure Package was released only recently, there are no guidelines or experience so far on how the two instruments will go together or whether the promised advantages will be realisable.

This thesis critically examines both regimes and aims at defining the future relationship between the two. Differences as well as advantages and disadvantages between the old and the new system are analysed to give a clear picture of what to expect under a situation where both regimes are in place.

The first section of the thesis focuses on the Environmental Impact Assessment Directive and its implementation in Austria. Main principles, the course of proceedings as well as shortcomings are outlined. Next, a detailed analysis of the Energy Infrastructure Package is done including an overview of the development and goals, procedure for public participation and specific requirements in terms of financial assistance. Finally, advantages and disadvantages for project developers and the general public are outlined and a conclusion of the findings of the research is given.

2 The Environmental Impact Assessment Directive and Its Implementation

2.1 Development

The first environmental impact assessment regimes were developed in the 1970s in Canada, Australia and France (Glasson et al., 2012: 40). Some time later, in 1985, the European Union followed, issuing the Environmental Impact Assessment Directive 85/337/EEC. The Directive regulates the approval requirements for public and private projects which could have a significant effect on the environment and should therefore be monitored by state authority. In 1997, 2003 and 2009, the Directive was amended to comply with the Espoo Convention on EIA in a Transboundary Context, the Aarhus Convention on Public Participation in Decision-Making and Access to Justice in Environmental Matters and to add new types of projects (European Commission Directorate-General for Environment, 2014a). It was codified in 2011 and is now cited as Directive 2011/92/EU.

As a consequence of the Directive, all Member states of the European Union who had not introduced an EIA scheme before, implemented the rules into national legislation. Due to the leeway the Directive allows in certain aspects, the national instruments vary quite significantly (European Commission, 2001: 1). Nevertheless, the general procedure and framework are the same. For this reason, a general description of the process is given before the Austrian implementation of the EIA Directive is examined in detail as an example of application.

2.2 Main Principles

The EIA Directive sets out a number of principles to which the Member states should look for guidance when implementing and using their national instruments of EIAs. In 16 articles, the Directive sketches a structure for the procedure explaining who has to be involved and how the most important steps have to be organised. It aims at securing a high level of environmental protection among European states while allowing the necessary development of projects ranging from infrastructure to energy production and waste disposal. Also mentioned are the aims to contribute by means of a better environment to the quality of life, to ensure maintenance of the diversity of species and to maintain the reproductive capacity of the ecosystem as a basic resource for life (recital 14). The way to achieve that is via screening

beforehand whether a project will have significant negative impacts on the environment and if so, oblige it to undergo a strict procedure to assess and mitigate these effects as effectively as possible. For this purpose, the Directive distinguishes between two categories of projects listed in Annex I and Annex II. While projects of Annex I have to be subject to an environmental impact assessment in all cases, Member states can decide whether Annex II projects should be assessed or not. This is done via a case-by-case examination or based on certain thresholds and criteria for which the selection criteria of Annex III have to be taken into account. These are for instance the size of the project, the production of waste, or the existing land use in the area concerned. The distinction of project types made in Annex I and Annex II are obligatory and have to be complied with in national legal instruments.

Concerning the goods to be protected, the EIA Directive names several on which direct and indirect effects have to be identified: human beings, fauna and flora, soil, water, air, climate and landscape, material assets and cultural heritage as well as the interaction between these factors (Article 3). These are the areas of concern during an assessment according to the Directive.

On a different note, the Directive strongly emphasizes the importance of public participation and transparency during the assessment procedure. In the preamble, under recital 16, it is pointed out that

“effective public participation (...) enables (...) the decision maker to take account of (,) opinions and concerns which may be relevant (...) thereby increasing the accountability and transparency of the decision-making process and contributing to public awareness of environmental issues and support for the decisions taken.”

Thus, a positive effect of public participation on an assessment in terms of transparency as well as acceptance by the public later on is expected and desired. Member states are expected to view the need for involving the public therefore as an asset and not as an unwanted burden that complicates the process.

To specify the forms public participation should take, the Directive gives some details and leaves other measures to be decided by the Member states. Articles 6, 9 and 11 ensure the involvement of the general public into the assessment from an

early stage on. Member states have to inform the public via appropriate means about the EIA, details of the planned project and specifics on how to participate (Article 6(2)(a)-(g)) among other things. According to Article 6(3), Member states have to ensure that “within reasonable time-frames” any data is made available to the public that the authority received from the project developer on the description of the project, the expected negative effects and measures against them and possible alternatives to the project. The public also has the right to access reports and advice issued to the competent authority. Explicitly mentioned in paragraph 4 is the right of the public concerned to express opinions and comments at a point in time where all options are still open and no decision has been taken yet. This shall allow the competent authority to consider the public’s concerns and views and guarantee the public’s effective participation in the process. Paragraph 6 furthermore stipulates the need for reasonable time frames scheduled for the different phases of the assessment to allow enough time for the public to be informed as well as for them to prepare and participate sufficiently. This provision aims at hindering national schemes within which the public only has a formal right to participate but practically does not have the opportunity to effectively take part due to stringent time requirements.

Corresponding to the information about the start of an assessment, there is also an obligation to share information when a decision has been taken (Article 9). The content of the decision, considerations and reasons and, if applicable, main measures to avoid or reduce negative effects are to be published. The decision also has to elaborate on the public participation process and how the authority examined and dealt with the concerns and opinions expressed by the public (Article 9(1)(b)).

Article 11 finally stipulates the right of the public concerned to access to justice. If sufficient interest or the impairment of a right can be proven, a review procedure regarding the decision has to be open to the public to challenge the legality. The Directive emphasizes in this respect the importance of a broad access to justice and thus states that any non-governmental organisation promoting environmental protection and meeting any requirements under national law can claim sufficient interest as required by Article 11. To allow for even easier access to justice, the Directive further provides for this review procedure to be “fair, equitable, timely and not prohibitively expensive” (Article 11(4)).

By incorporating the principle of public participation, the Directive also complies with the EU's obligations under the UNECE Aarhus Convention which it ratified in 2005. The Aarhus Convention establishes the rights to information on environmental issues, active participation and access to justice. Directive 2011/92/EU directly points to these obligations and the aim to "contribute to the protection of the right to live in an environment which is adequate for personal health and well-being" under recital 19. This desire is shared by the EIA Directive itself.

Another important principle of the Directive is cross-border consultations in case of transboundary negative effects of a project. In Article 7, it is stated how a Member state shall proceed if another Member state is likely to be affected. Firstly, relevant information has to be sent to the state to allow them to decide whether they want to participate in the assessment. Then, both the state authorities as well as the public concerned in that state have the right to express their opinion within a reasonable time frame. Generally, the two Member states are advised to enter into consultations on the potential negative impacts and possible measures to be taken. The details of these bilateral relations are however left up to the concerned states in question.

These provisions on a cross-border context of environmental impact assessments are covering the obligations arising from the European Union's ratification of the UNECE Espoo Convention ("Convention on Environmental Impact Assessment in a Transboundary Context"). This convention stipulates that parties should assess the impact of certain activities at an early stage and notify and consult each other if a project is likely to have a significant effect on other states' territories. As the European Union ratified the convention in 1997, it was necessary to bring the EIA Directive in line with the new obligations which was done by the amendments of Directive 97/11/EC.

As it lies in the nature of a directive, some points are left to the discretionary power of the Member states. For instance, Article 6(1) allows the national legislation and national practice to decide on how other authorities concerned with a project should be informed and how consultations should take place. Further, the mentioning of "reasonable time-frame" allows Member states to measure what they deem reasonable within justifiable limits. Another example is Article 11(2) where the Directive only provides for the basic right to challenge a decision but it is the Member states' judgment as to at what stage in the procedure this shall happen.

The above mentioned items illustrate how much leeway in decision-making is offered to the Member states and explains why the specific EIA procedures show significant differences in details.

2.3 The Procedure for Approval under the EIA Directive

Figure 1 shows the main stages in a procedure under the environmental impact assessment. The pink stages are required by the Directive, the white ones are common in some Member states and are considered to be good practice (European Commission, 2001: 2)

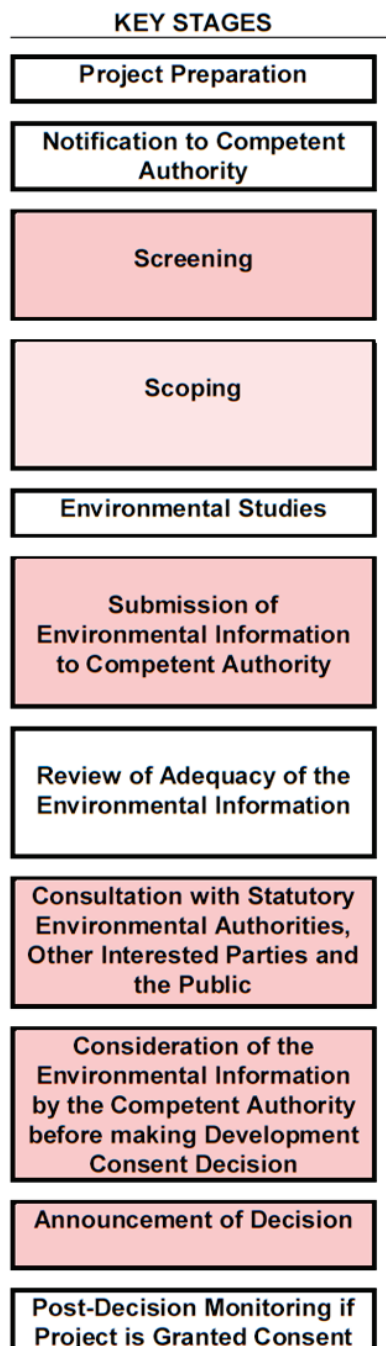


Figure 1: Key stages of an EIA.
Source: European Commission, 2001: 11.

To start with, the project developer prepares his proposal for a project to be presented to the competent authority. Then, in some Member states, he is required to inform the authority of his upcoming application whereas in other Member states, there is only an informal option for this. The screening stage involves the authority examining the proposal and deciding on whether an EIA has to take place. According to Article 4(4), this decision has to be published. During scoping, which is mandatory in some states but not in all as the Directive allows to choose here, the competent authority defines the scope of the assessment and which information the project developer has to provide for them to come to a decision. In accordance to Article 5 of the Directive, the project developer then collects and prepares the data he needs to supply the authority with in the so-called “environmental studies”. Afterwards, the information together with an application for an EIA is submitted to the authority. In some Member states, it is common practice for the authority to examine the completeness of the information whereas in

other Member states, this is done by an independent body. Then, the project information and submission details are made public for interested parties and other authorities and organisations to review (Article 6). Article 7 stipulates the obligation to also inform any other Member state that might be significantly affected if transboundary effects are likely. Only after all interested parties had the possibility to comment and give their input on the project, the authority can proceed to decide on the matter while taking the results of the consultations into account (Article 8). When a decision has been made, it has to be published again together with the reasons leading to it and, in case it is supportive of the project, has to include the measures mitigating possible negative effects. As common in some Member states, it is considered good practice to do post-decision monitoring on the development and effects of the project if that is deemed necessary by the competent authority (European Commission, 2001: 3).

2.4 The Austrian EIA Regime under the UVP-G 2000

To illustrate how an environmental impact assessment regime according to the EIA Directive works, this chapter analyses the Austrian UVP-G 2000. The first transposition of the Directive into national law was done in 1993 with several adaptations in the following years. Overall, the EIA regime in Austria is seen as a success but with potential for improvement (BMLFUW, 2011: 1).

The competent authority in Austria is the Landesregierung (federal state government) of the concerned state (Article 39 UVP-G). Since 2014, the second instance is the Bundesverwaltungsgericht (Federal Administrative Court) which took over pending appeal procedures from the former Umweltsenat (Independent Environmental Tribunal) and is now the only appeal body (Verwaltungsgerichtsbarkeits-Ausführungsgesetz, BGBl I 2013/33).

Like the EIA Directive, the UVP-G separates projects into different categories. What is listed under Annex I in the Directive is part of column 1 in the UVP-G Annex. These projects always require an environmental impact assessment due to their potentially harmful effects. However, the UVP-G sets even stricter limits than required in the Directive by establishing EIAs already at lower capacities or megawatt. Column 1 projects are, for instance, waste treatment plants with a load of at least 35,000 tonnes per year, thermal power plants of minimum 200 megawatt, overhead power lines with at least 220 kilovolt and 15 kilometres length or more,

hydropower plants of at least 15 megawatt, surface mining of mineral resources on a scale of at least 20 hectare and many others.

Column 2 lists projects that are subject to a simplified procedure of an EIA (Article 3(1)) and include for example dump sites for scrap metal with a capacity of at least 30,000 tonnes, wind turbines with a capacity of at least 20 megawatt, leisure parks on an area of 10 hectares at minimum or with at least 1,500 parking spaces, hydropower storage plants which hold more than 10 million m³ water, accommodating establishments with at minimum 500 beds or 5 hectares and others. In a simplified procedure, the competent authority does not have to provide a full environmental impact report but only a summarising assessment of environmental impacts. This summarising assessment, contrary to a report, is not published for inspection at the authority's office. Furthermore, citizens' initiatives do not have full party rights but only have stakeholder position that includes the right to access and inspection of the files. Also, no post-control has to be executed in this case.

Projects listed in column 3 of the UVP-G include for example wind turbines located in a special protection area and with a capacity of at least 10 megawatt, skiing slopes of at minimum 1,050 metres length in special protection areas, already affected areas in terms of air pollution or residential areas, paper mills in water protection and conservation areas with a capacity of more than 100 tonnes per day and others. For this category of projects, Article 3 stipulates that the authority has to conduct a declaratory procedure following paragraph 7 to determine whether an EIA is necessary or not. Paragraph 4 lists the criteria the authority has to consider when making this decision, among them the size of the project, cumulative effects with other projects in the area, waste production, the environmental sensitivity of the geographical area and the complexity and severity of the adverse impacts. These criteria cover the same areas as prescribed in Annex III of the EIA Directive, thus a combined approach of case-by-case examination and criteria dependence was chosen when implementing Article 4(2) of the Directive. If the authority decides that an EIA is due, it is performed in a simplified procedure as described above.

Further, Article 3(7) provides for a declaratory procedure at the request of a project developer, a cooperating authority or one of the *Umweltanwälte* (Environmental Ombudsmen of the federal states) on whether a planned project requires an EIA and if so, under which column it has to be subsumed. However, the competent authority can also act *ex officio* without an application if facts become known to them

that indicate an EIA obligation to guarantee a gapless supervision. Within six weeks, a decision has to be made for which the cooperating authorities as well as the Water Management Planning Body are to be heard. Neighbours and citizens' initiatives do not play a role during this procedure. The decision can be appealed by the project developer, the Umweltanwalt and the concerned municipality. Only in case of a negative decision, a recognised environmental organisation pursuant to Article 19(7) can appeal the decision at the Bundesverwaltungsgericht to review the necessity of an EIA. In general, this declaratory procedure is not used much whereas the same paragraph 7 acts as a provision for case-by-case examinations on a regular basis (Ökobüro - Koordinationsstelle österreichischer Umweltorganisationen, 2012: 18).

Changes made to existing projects also lead to a determination procedure and in case of a positive decision, a simplified EIA procedure. Only if it is a column 1 project and the change exceeds the initial capacity threshold by 100%, an EIA is obligatory (Article 3a). The specific provisions are rather complicated and convoluted and are therefore not elaborated on in this context.

To ensure a timely flow of the procedure, the Landesregierung is obliged to set up a time schedule. When doing so, they should take into account all procedural steps and the respective time frames while also considering necessary inquiries and examinations (Article 7). The time schedule is to be published online. If the time schedule is exceeded significantly, the authority has to justify these transgressions in the final decision. This provision is aimed at helping to keep procedures within an acceptable time frame and to not prolong proceedings at the cost of project development or environmental protection.

The UVP-G further establishes an Umweltrat (Austrian Environmental Council) for the observation of the enforcement consisting of 22 members and 22 substitutes. These members are elected among representatives of the political parties to the parliament, social partners, the federation, federal states, the Umweltanwälte and environmental organisations. According to Article 25, the Umweltrat is authorised to demand reports and information about EIAs from the competent authorities and to make suggestions for improvement regarding the status of environmental protection. Furthermore, the Umweltrat supplements the report of the Ministry of Agriculture, Forestry, Environment and Water Management to the National Council with its observations of how the implementation of the UVP-G and other legal instruments

influence environmental protection in Austria. For this purpose, the final decisions made in an EIA have to be delivered to the Umwelttrat (Article 25(4)).

To document the performed EIAs, the Umweltbundesamt GmbH (Environment Agency Austria) is commissioned to collect and provide information about the declaratory procedures done, environmental impact statements of project developers, the most important facts of the environmental impact reports or the summarising statements, content and substantiation of the final decisions, the results of post-controls performed as well as an account of the number of EIAs done, their type and duration. The Umweltbundesamt thereby is helping to enhance transparency of the EIA procedure for the general public to allow a deeper understanding of the process and fulfil the requirement of access to environmental information as established by the Aarhus Convention.

Moreover, Article 44 stipulates that the Ministry of Agriculture, Forestry, Environment and Water Management has to report to the National Council every three years regarding the enforcement of the UVP-G. This requirement intends to give the members of the National Council an overview of the experiences so far with implementing the UVP-G and other laws dealing with EIAs (Bundesminister für Land- und Forstwirtschaft, Umwelt und Wasserwirtschaft, 2012: 5). Additionally, the development on an international and a European level is outlined so the legislators are as knowledgeable as possible regarding the status of environmental protection.

2.4.1 Parties to the Procedure

Article 19 stipulates who has the right of being a party to the procedure: firstly, the neighbours who are defined as persons who could be at risk or disturbed by the construction or the operation of a project or whose *rights in rem* could be at risk. Further, owners of establishments where other people regularly reside temporarily are considered potential parties. Neighbours residing across the border in a different country are regarded as parties if their country belongs to the European Economic Area or, based on the principle of reciprocity, if their country also accepts Austrian neighbours as parties in an EIA procedure. Further, anyone given the rights of a party in an administrative regulation applicable in the concerned procedure shall be a party in the environmental impact assessment. The Umweltanwalt of a federal state also has the rights of a party with special provisions given in Article 19(3) that allow the Umweltanwalt to appeal a decision with the Administrative High Court.

Other parties are the Water Management Planning Body according to the Water Statute 1959, the affected municipalities, citizens' initiatives and recognised environmental organisations.

Overall, the UVP-G thus provides for a wide range of parties allowing many different views to be heard during an EIA. However, the mentioned persons cover different interests. While the Umweltanwalt has the task to safeguard the interests of environmental protection, the Water Management Planning Body represents the interests of water management towards other authorities and planning units. Citizens' initiatives are defined in paragraph 4. They are formed by collecting signatures for a formal comment to an environmental impact report of the authority stating name, date of birth and address of the supporter. If the number of supporters living in the affected municipality or a neighbouring municipality exceeds 200, the list constitutes a citizens' initiative and receives full party rights including the right to appeal to the Administrative High Court and the Constitutional Court.

Finally, the rights of a party are bestowed upon recognised environmental organisations. These are associations or foundations that have declared their main aim to be the protection of the environment, which pursue social or public-spirited ends according to Articles 35 and 36 of the Austrian Fiscal Code and which were founded more than three years before applying for recognition. The Minister of Agriculture, Forestry, Environment and Water Management together with the Minister of Science, Research and Economy decide whether these criteria are fulfilled and in which federal states the environmental organisation is authorised to appear as a party. In a specific EIA procedure, an environmental organisation gains the status of a party if they raise objections in writing during the display period of Article 9.

Since the EIA Directive also provides for a cross-border cooperation between states in case an EIA might have significant effects on the other state's territory, the UVP-G stipulates in Article 19(11) that foreign environmental organisations can also play a part in an Austrian EIA process. They enjoy the same rights as a recognised Austrian environmental organisation if the other state affected has been informed about the EIA, the organisation's aims are directed towards the affected areas and the environmental organisation would have party rights if the EIA was conducted in their own state. In this case, foreign environmental organisations are entitled to the

same legal position as Austrian ones which is intended to broaden the access to justice for environmental protection agendas.

2.4.2 Course of Proceedings

According to Article 5 UVP-G, the assessment procedure is started by the submission of an application for approval, all necessary documents and the environmental impact statement. The environmental impact statement gives a detailed description of the project including the physical properties, the production processes involved, expected level of emissions, the duration of the project, the energy demand itemised to the individual machines or devices, measures of aftercare and other particulars (Article 6). It also comprises an overview of the alternatives to the project and the reasons why this specific option was chosen. A characterisation of the affected environment is done describing the state of the protective goods given in Article 3 of the EIA Directive, namely human beings, fauna and flora, soil, water, air, climate and landscape, material assets and cultural heritage as well as the interaction between these factors. Then, an assessment of probable negative impacts due to the existence of the project, the use of natural resources and the production of emissions has to be made. The project developer also has to explain the mitigation measures he intends to take to reduce or avoid these impacts and finally has to give a non-technical summary of the above mentioned topics. The environmental impact statement should also elaborate on possible difficulties with collecting data, knowledge gaps or uncertainties of the statement to allow a decent evaluation.

Next, the competent authority makes these documents available for inspection at the local municipality affected and the authority itself for at least six weeks (Article 9(1)). Additionally, the planned project has to be announced in two daily newspapers or in the editorial of a newspaper that is widely read in the federal state and another periodical that is prevalently read in the municipalities concerned. According to Article 9(5), everyone has the right to comment on the project and the environmental impact statement to the competent authorities during these six weeks.

Following these steps, in case of a column 1 project, the authority commissions appropriate experts to draft an environmental impact assessment report (Article 12). If the project is listed in column 2 or 3, it is sufficient to supply a summarising assessment of environmental impacts. The EIA report evaluates and completes the

environmental impact statement of the project developer and prognosticates the effects on spatial development especially considering a sustainable use of natural resources. Additionally, suggestions on conservation of evidence and on measures for aftercare are included. The report, like the environmental impact statement, has to conclude with a non-technical summary to enable non-experts in the public to understand and interpret it as well.

The EIA report is then available for inspection for four weeks (Article 13(2)) after which an oral hearing takes place if the authority deems it necessary. The hearing's aim is to collect opinions and statements regarding the project so the authority gains a comprehensive understanding of the different views and angles to the undertaking and can reach a decision based on full account of the facts of the case (Article 16(1)). According to Article 7, after a maximum of nine months calculated from the date of application, or six months if it is a simplified procedure, a decision has to be made. In the decision, the authority decides not only on behalf of environmental protection laws but on all substantive matters regarding the approval of the project. Additionally to the legal requirements in other laws, the following factors are listed in Article 17 as prerequisites for approval:

1. Emissions have to be limited to an unavoidable amount in accordance with the most recent state of the art.
2. Immissions on subjects of protection are to be kept to a minimum. They have to be avoided altogether if they
 - a. threaten life or health of human beings or the property or other *rights in rem* of neighbours,
 - b. cause substantial and permanent adverse impact on the environment, or
 - c. cause unacceptable disturbance to neighbours as provided for in Article 77(2) Gewerbeordnung 1994 (Industrial Code).
3. Waste has to be avoided in accordance with the most recent state of the art or to be utilised, or, if otherwise not commercially feasible, orderly disposed of.

The competent authority also has the possibility to order the project developer to comply with certain conditions, obligations or time limitations as well as modifications of the project to pursue and ensure a high level of protection for the environment (Article 17(5)).

If the overall consideration of all facts leads the authority to the conclusion that significant negative impacts are to be expected from the realisation of the project that cannot be mitigated by measures and modifications, the motion has to be rejected. The final decision, whether positive or negative, is published for inspection for at least eight weeks at the office of the authority and at the local municipality.

Article 40 stipulates that an appeal against the decision can be filed with the Bundesverwaltungsgericht (Federal Administrative Court) within four weeks of publication of the decision. The Bundesverwaltungsgericht then has to decide on the appeal within six months. In case of an assessment decision according to chapter 1, the time frame is six weeks, or for assessment decisions according to chapter 3, eight weeks. To appeal the decision of the Bundesverwaltungsgericht, a party can lodge an appeal on points of law with the Verwaltungsgerichtshof (Administrative High Court) or an administrative appeal with the Verfassungsgerichtshof (Constitutional Court) according to Article 19.

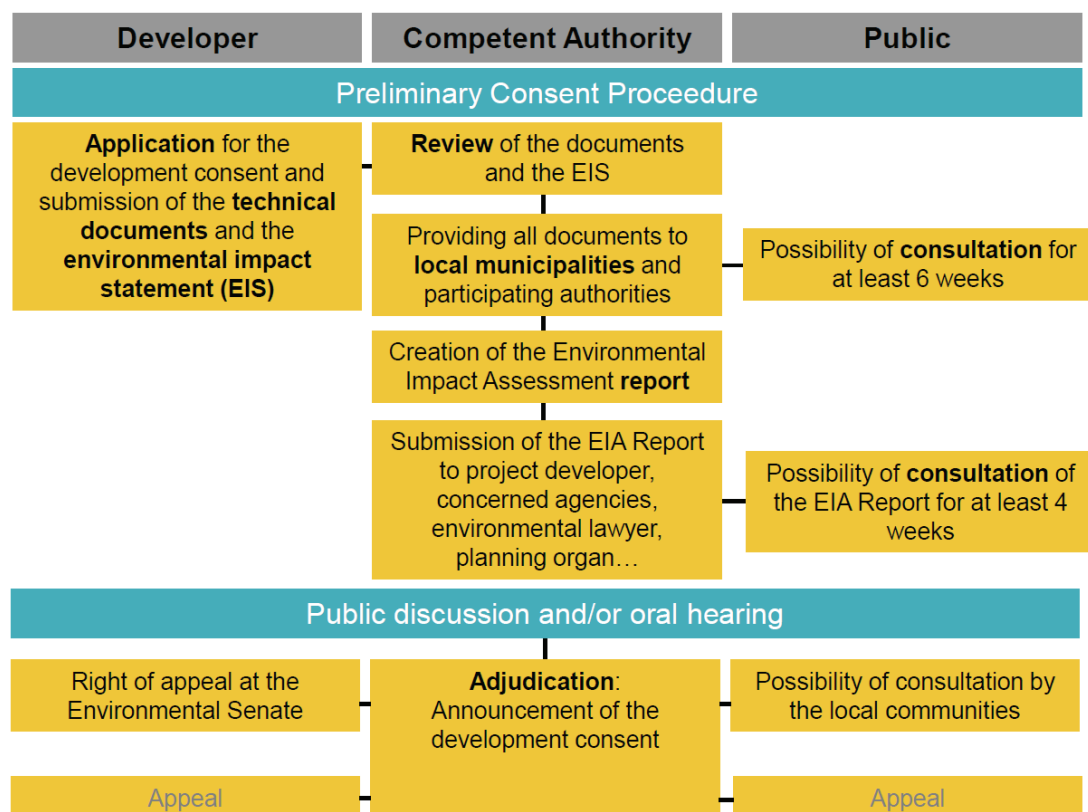


Figure 2: EIA procedure. Source: Verbund Umwelttechnik GmbH, 2014.

In case of a positive decision by the competent authority and if no appeal is lodged, the project developer is allowed to start with the installation and construction of his

project. After construction and before the operation phase is started, the completion of the work has to be announced to the Landesregierung. The authority then inspects the project on whether it fulfils the requirements for approval stated in the initial decision and issues an inspection decision. For column 1 projects, the inspection decision also includes a date until when the post-control has to take place (Article 20(5)). If the authority detects any deviations from the approved circumstances, it can order the elimination of these in the inspection decision and verify the actual removal and changes during post-control. In accordance with Article 22, post-control for column 1 projects has to take place at least three years and at maximum five years after the authority has been notified of the completion of the project works. Post-control contains the examination whether the approval has been adhered to and whether the projections for impacts on the environment were correct. Any defects which are disclosed have to be remediated at the authority's request. Finally, the results of the post-control are submitted to the Federal Ministry of Agriculture, Forestry, Environment and Water Management (Article 22(2)).

As a means to expedite the EIA procedure, Article 4 offers a form of preliminary proceedings where the project developer can submit the main features of his project and a concept for the environmental impact statement. The competent authority then comments on the documents within three months especially focussing on potential deficiencies and highlighting missing data of the impact statement. The performance of a preliminary proceeding usually yields significant benefits for the project developer as it allows for an early contact making and exchange with the authorities. Thereby, key areas for examination as well as relevant stakeholders are identified and the possibilities for involving the public are discussed. Although it is an extra effort, the exchange at this early stage can enhance the quality of the later assessment greatly.

Additionally, as a special service for investors, the authority can on request supply information which the project developer needs for the preparation of the documents he has to submit. This particularly supports projects concerning areas where the authority has access to information the project developer does not whereby the protection of business secrets and other sensitive data is to be considered at all times. This investor service can be offered without remuneration, however, it results in the obligation to use the information obtained only for the concrete project and no other activities.

2.4.3 Cross-Border Cooperation

Article 10 of the UVP-G provides for a cross-border cooperation as required in the EIA Directive. If the impacts of a project planned on Austrian territory have the potential to affect another state, or if another state so requests, the Austrian competent authority has to inform the state about the course of proceedings and the type of decision to be made as soon as possible but at the latest when the general public is informed. It is advisable to do this information exchange at a very early stage to avoid any delays later on caused by bureaucratic processes (Umweltbundesamt GmbH, 2012: 123). The state is given a time limit to announce whether they want to take part in the EIA procedure or not. If so, all relevant documents, for instance the environmental impact statement, the environmental impact report and the application, are delivered to allow the state to form an opinion on the project. The time limit to state their opinion has to be adequate so that the public of the other state can be informed properly and has the opportunity to a statement as well. If necessary, bilateral consultations about the impacts and mitigation measures should be held for which existing bodies like the transboundary water commissions or other relevant bodies can be used.

The results of the EIA, namely the decision, its justifications and a description of the public participation of the process are to be delivered to the foreign state. These provisions however only apply if the state is part of the European Economic Area or based on the principle of reciprocity. On the other hand, if Austria might be affected by a foreign project, the Landesregierung has to publish any documents forwarded according to Article 9. The time limit for inspection is set following the laws in the home state of the project. Austrian authorities whose area of responsibility is touched by the impacts have the right to comment so their opinions are represented in the foreign EIA.

2.4.4 Analysis of the UVP-G

The Umweltbundesamt regularly evaluates the EIA procedures and UVP-G implementation in Austria. In its findings, there is unanimous agreement on the fact that the UVP-G and the EIA in general strengthen environmental protection and have resulted in a higher level of protection for the protective goods than the respective substantive laws alone (Umweltbundesamt GmbH, 2006: 154). Furthermore, the UVP-G has a compensatory function where other protection laws,

for instance regarding air or nature conservation, are unclear and require interpretation. With the principle of concentration of the approval procedure on a single authority and process, a comprehensive examination is enhanced while at the same time allowing for an integrative assessment of cumulative effects and the interaction between projects.

The parties concerned generally also stressed a positive impact of the EIA on the behaviour of all persons involved leading to a more constructive, solution-oriented approach (Umweltbundesamt GmbH, 2006: 68). Additionally, public acceptance of new projects is heightened by the performance of an EIA. The risk of ensuing conflicts is reduced due to an early involvement of the public as well as sufficient information about positive and negative effects of a planned project. The EIA allows for an optimisation of a project at an early stage with the help of many parties and their different views and opinions. The public can introduce new perspectives and interesting views that help improve the project while at the same time lead to a better identification with the project and stronger mutual trust. It is also perceived as a strength of the UVP-G that public participation is “institutionalised”, thereby enabling a good communication and interaction between the interested public and the project developer which again avoids costs caused by conflicts (Sommer and Bergthaler, 2000: 72).

On the other hand, it has been criticised that half of the environmental impact assessments are performed as a simplified procedure where citizens’ initiatives have only restricted rights, for example, no right to appeal the decision according to Article 19(2) (Ökobüro - Koordinationsstelle österreichischer Umweltorganisationen, 2012: 18). Further, instead of an environmental impact report, only a summarising impact statement is due which is not necessarily published. Some NGOs argue that all this restricts the public participation in contradiction to the Aarhus Convention obligations.

Moreover, environmental organisations find fault with the late involvement of the public in the assessment and criticise the tight time limit of six weeks to react to the announcement of a project which does not allow for a proper assessment of the project planned. Additionally, financial and time investments discourage the public to take part in EIAs (BMLFUW, 2011: 1).

Another point of criticism is the length of EIAs. According to the evaluation report of the Umweltbundesamt of 2006, an average EIA takes 13 months until a decision is made. This is significantly longer than the 9 months stipulated by Article 7 but still an improvement since the last evaluation of 2000 where 50% of EIAs took longer than that (Umweltbundesamt GmbH, 2006: 148). Planned paths for railways or roads even take 20 months to complete. Not surprisingly, a simplified procedure lasts on average 8 months thus contributing to a speedy implementation of a project as the aim of the simplified procedure is. The Umweltbundesamt suggests that the highest potential for optimisation of time use lies at the stage between application and the issuance of the environmental impact report which takes nine and a half months averagely (Umweltbundesamt GmbH, 2006: 149).

2.5 Shortcomings of the EIA Directive and New Developments

In the almost 30 years of its existence, the EIA has proven to be a useful tool in environmental protection (European Commission, 2012: 2) while at the same time revealing its flaws concerning an efficient assessment and swift procedure. According to Article 11 of the Directive before the last amendment, every five years a report from the Commission was due to review the effectiveness of the EIA Directive. Reports were published in 1993, 1997, 2002 and 2009 so far. In the last report of 2009, the Commission highlighted a number of areas where the Directive should be improved or where practice in Member states should be changed in order to achieve a higher level of protection for the environment. Among them was the need to simplify the screening procedures as some Member states currently overstep their margin of discretion when applying only some of the selection criteria of Annex III or excluding some types of projects altogether in advance (European Commission, 2009: 5). Other states do not take into account cumulative effects of several projects resulting in considerable differences in the numbers of EIAs carried out in the different Member states. In order not to compromise the aim of the EIA Directive – to achieve a common high level of protection – the Commission suggested to simplify the screening by specifying the criteria of Annex III and by introducing common thresholds and triggers.

Another point of criticism was the lack of harmonised practice regarding the participation of the public. There are, for example, many different commencement points for the first consultation of the public, ranging from early stages like screening

to only when it is required by Article 6(2), namely after the necessary information about the project has been submitted by the project developer. Furthermore, the time frames vary greatly from 10 to 60 days for scoping and consultation of the EIA documentation (European Commission, 2009: 7) which can impair the effectiveness of public participation. Other obstacles include a restricted access to the environmental information or high costs for review procedures. Therefore, the Commission suggested common minimum time frames for each stage to guarantee an effective consultation with the public that allows for an appropriate discussion of the project.

In terms of transboundary procedures, the Commission saw problems regarding the differences between Member states' implementations such as different time frames or sequence of stages and language barriers. If more than one state's jurisdiction is triggered, there are further difficulties with inconsistencies and duplication of work. To remedy these, it was proposed to improve both formal and informal consultations between the states by establishing joint EIA procedures or even considering a single procedure for the whole project in one state only.

Following intense research and consultation with interested parties, in 2012, the Commission issued a Proposal for an Amendment of the EIA Directive. Beforehand, the Commission had identified three major groups of problems with EIAs in the Member states: (1) the screening stage, (2) quality and analysis of the EIA and (3) risks of inconsistencies both within the EIA and in relation to other legal obligations (European Commission, 2012: 3). In this proposal, the Commission stressed again the need to simplify the screening and suggested a modification of Annex III to ensure small scale projects without significant effects on the environment were not subject to an EIA anymore.

To improve the quality and analysis of the EIA procedure, the introduction of mandatory scoping was suggested as well as a control mechanism of the quality of the environmental information submitted. Further, the EIA report of the competent authority was specified to obligatorily include an assessment of the alternatives to the project plan, a justification of the final decision and post-controls.

Finally, it was recommended that the EIA procedure would be adapted to additional challenges in terms of climate change, disaster risk and biodiversity. Moreover, time frames were suggested as useful for the main stages of the procedure. The

proposal also recommended a so-called one-stop-shop to guarantee a coordinated and joint assessment of the environmental impacts as well as impacts that have to be assessed pursuant to other relevant legislation (European Commission, 2012: 4).

Recently, in April 2014, the European Parliament and the European Council have adopted a compromise version of the proposal leading to a new EIA Directive. The new text includes many of the provisions already existing in the proposal but also shows some new details and omissions. For instance, the provision for mandatory scoping has been deleted from the final text as has been the obligation of the competent authority to identify alternatives for the project. On the other hand, the EIA report now has to be prepared by “competent experts”, the meaning of which is to be defined within Member states’ legislation. A new Annex II.A has been introduced that sets up requirements for a new screening report to be submitted by the project developer. Based on this report, the authority has to decide and explain their screening decision and, in case the project is not subjected to an EIA, give concrete requirements for the realisation.

Moreover, developers can request a scoping report from the competent authority where it states its opinion on the scope and the level of detail of the environmental information that the developer has to submit (recital 30). This provision aims to improve the quality of the procedure as well as simplify and streamline the process of decision making. Also, new topics have been added to be considered during an EIA: human health, biodiversity, land and vulnerability to major accidents and disasters. Resource efficiency, sustainability and climate change are now supposed to be “important elements in assessment and decision-making” (recital 7).

Although weak, a provision for a “one-stop shop” has been implemented: Article 1(2)(a) stipulates that the EIA procedure “may be integrated into the existing procedures for development consent”. Furthermore, coordinated and/or joint procedures shall be provided for in case a project requires more than one type of assessment (new Article 2(3)). The intention is to improve the coordination between different pieces of environmental legislation (e.g. the EIA Directive and the Habitats Directive). However, the one-stop shop principle has not been made mandatory as the Directive states that Member states only have to “endeavour to provide for a single assessment” which does not prohibit them to maintain a two-track system with all inconsistencies and delays this entails.

Regarding the suggestion of the proposal to include specific minimum time frames for certain stages of the EIA procedure, the Directive now stipulates in an added paragraph 7 to Article 6 that the minimum time frame for consulting the public concerned on the EIA report shall be not shorter than 30 days to ensure effective participation in the decision-making. The need for “reasonable time-frames” is also stressed in other clauses such as the one regulating transboundary consultations or recital 36 which argues for an enhanced legal certainty that has to be balanced with the aim to not compromise the desire for high standards of protection and effective participation of the public as well as proper access to justice.

Annex IV has been amended and now requires the project developer to include in his submission a description of the energy use during the project implementation and operation and the waste produced. Additionally, new clauses in the second paragraph of Annex IV oblige the project developer to elaborate on alternatives to his chosen project plan and explain why this particular one was chosen as well as a comparison of the environmental effects of the different options.

Also new is a provision for penalties in case of infringement (new Article 10a). However, it is left up to the Member states which kind of penalty applies as long as they are “effective, proportionate and dissuasive”.

The new Directive will enter into force on the 15th of May 2014 whereas the Member states have until 17th May 2017 to implement the new provisions in their national legislations (Article 4 Directive 2014/52/EU).

3 The European Energy Infrastructure Package

3.1 Development and Background

Based on Article 4(2)(i) TFEU, the European Union has a shared competence, together with Member states, when it comes to the topic of energy. Under Title XXI, Article 194, the TFEU states the aims of European energy policy: to ensure the functioning of the energy market, the security of supply, to promote energy efficiency and saving as well as the development of renewable energy forms, and to promote the interconnection of networks. Paragraph 2 entitles the European Parliament and the Council to adopt measures to achieve these objectives. Furthermore, Articles 170 to 172 titled “Trans-European Networks” stress the need for the European Union to contribute to the establishment of transboundary energy infrastructure networks. The treaty text states the objective that the European Union shall specifically promote the interconnection of national networks and in order to achieve this, shall establish guidelines and “projects of common interest” that will advance the interconnection, security of supply and other goals of the European Union. There is the possibility of financial support for such projects provided for in Article 171(1) third indent as well. Measures relating to this issue are to be adopted by the European Parliament and the Council but are also subject to the approval of the concerned Member state on whose territory a project is to be implemented (Article 172 TFEU).

Acting on those provisions, the European Commission published its priorities in the energy infrastructure sector for the following 20 years on 17th November 2010. To ensure a smooth operation of energy networks in the 21st century, the Commission identified a number of priority corridors delivering electricity, gas and oil to isolated areas while connecting networks across Europe (European Commission, 2010b). These corridors were thought to be the base on which future projects should be planned.



Figure 3: Priority Corridors 2010. Source: European Commission Directorate-General for Energy, 2011c.

As a next step, on 19th October 2011, the Commission adopted a proposal for guidelines concerning trans-European networks with the aim to complete certain strategic networks and storage facilities until 2020 that are essential to a well-performing energy market in Europe. This proposal was tabled within the framework of a European investment plan amounting to € 50 billion to improve energy, transport and digital networks across Member states. As President José Manuel Barroso explained, “We are closing the missing links in Europe's infrastructure networks that otherwise would not be built.” (European Commission, 2011a: 1). This so-called “Connecting Europe Package” was introduced to replace the TEN-E framework with the TEN-E guidelines and TEN-E financial regulation.

To close the mentioned missing links, the proposal established 12 particular corridors and areas for electricity and gas transportation as well as oil and CO₂ transport. Projects that would enhance and implement these corridors' functions ("projects of common interest") were to be financially supported by the European Union via the Connecting Europe Facility fund.

3.2 Goals and Targets

The reason for a new framework instead of the existing regime of TEN-E guidelines was the aging of the system and the inability to support the European Union's 2020 energy efficiency and renewable energy targets (European Commission, 2011c: 1). According to these targets, a 20% reduction of greenhouse gas emissions, a 20% increase in energy efficiency and a 20% share of renewable energy in final energy consumption is aimed at (European Commission, 2010a: 11).

However, as the Commission estimated in 2011, these targets would hardly be met in time due to problems with permit procedures for projects and lack of investments in infrastructure (European Commission, 2011b). Building permits often take too long to obtain, especially in the case of overhead lines where durations of more than 10 years are not an exception (European Network of Transmission System Operators for Electricity, 2010: 280). As the assessment of current procedures shows, one of the major reasons for delay is the inefficiency of the processes (European Commission, 2011c: 1). Often, there are no clear time limits and there is a lack of organised planning of the different steps and stages. Also, coordination among the many pieces of environmental legislation is insufficient which adds to the retardation of permit procedures. Another important aspect is the opposition of the public towards many projects. According to the Impact Assessment of the Commission, this problem arises from the unawareness of the public of the societal value of projects, inadequate involvement into the decision-making and concerns about the environment, landscape, health and safety (ibid. 1).

The lack of investment is mainly due to the fact that some projects are simply not commercially viable given that for instance interconnections in areas with a low level of gas consumption do not show the same profit as in densely populated areas. This hesitation to invest is further amplified by the current economic crisis that cut down available funds significantly. Thus, links between networks are not built which would be essential to a competitive internal market (ibid). A further problem is related to

the asymmetric aspect of many transboundary projects. For example, if electricity lines are built in one country to conduct excess energy from solar power from another country, the first country has the costs whereas the second one receives the benefits. The European Commission estimates that from 2011 to 2021, € 200 billion will be necessary to construct gas pipelines and electricity grids. In detail, € 140 billion are needed for high-voltage electricity transmission systems, smart grids and storage, € 70 billion for gas pipelines, storage, Liquefied Natural Gas terminals and reverse flow infrastructure and additionally € 2.5 billion for CO₂ transportation systems. Those sums signify a 100% increase of investments in the electricity sector and a 30% increase in the gas sector compared to the numbers of 2000 to 2010 (European Commission, 2011b).

For these reasons, energy networks in Europe have not been renewed as necessary and are now aging and not fit for the challenges of the 21st century (European Commission, 2011d: 1). Yet the infrastructure plays a vital role in the functioning of European economy and industries, in the enabling of a further expansion of renewable energy sources and the quality of life of European citizens.

Therefore, the EU Energy Infrastructure Package aims at integrated and more powerful networks to be able to accommodate 20% of renewable energy that is often fluctuant depending on wind speed and sun activity. To achieve the target of 20% saving of energy consumption, smart meters and smart grids are to be employed in the European grids to allow consumers to change their use patterns and to operate a grid that regulates itself most efficiently. Further, the package supports the diversification of gas sources to gain independence from single sources and advertises interconnections between the networks to reach a competitive internal market with fair prices for consumers (European Commission, 2011b).

Three objectives characterise the package: to streamline permit granting procedures across the European Member states so they consume less time while at the same time allow for an efficient public participation to foster general acceptance. Secondly, the allocation of costs according to where benefits and risks occur as to facilitate the implementation of projects and thirdly, the establishment of financial assistance by the EU for projects of common interest via market-based and direct support (European Commission, 2011c: 2).

3.3 Regulation 347/2013 on Guidelines for trans-European Energy Infrastructure

On 17th April 2013, Regulation 347 was adopted by the Council putting the Commission's proposal into action with 1st June 2013. The regulation establishes "guidelines for the timely development and interoperability of priority corridors and areas of trans-European energy infrastructure set out in Annex I" (Article 1(1)). Annex I specifies 12 priority corridors and areas within which the projects of common interest are to be settled. In order to implement these projects, the regulation determines the process of identification of PCIs as well as the streamlining, coordination and improvement of duration and public participation in permit procedures. It further deals with the cost allocation across borders and risk-related incentives for investment and establishes criteria for Union financial assistance.

3.3.1 Projects of Common Interest

Projects of common interest, or PCIs, are the key feature of the Energy Infrastructure Regulation. Pursuant to Article 2, a project of common interest is a "project necessary to implement the energy infrastructure priority corridors and areas set out in Annex I and which is part of the Union list of projects of common interest". Article 4 stipulates a number of criteria that a PCI has to fulfil: the aforementioned necessity for a priority corridor, the potential overall benefits have to outweigh the costs and further, that the project either crosses the border of two Member states (or a European Economic Area country) or is located on the territory of one Member state but has a significant impact on another. Additionally, gas, electricity transmission and storage projects have to contribute to (i) market integration, competition and system flexibility, or (ii) sustainability, or (iii) security of supply. The criteria for smart grid projects require a contribution to integration and involvement of network users, efficiency and interoperability, network security, system control and quality of supply, optimised planning for investments and market functioning and customer service. For oil projects, security of supply, efficient and sustainable use and interoperability are requirements for eligibility. Finally, carbon dioxide transportation projects have to help avoidance of emissions while securing energy supply, increase the resilience and security of transport or help the efficient use of resources by connecting CO₂ sources and storage sites. All these criteria

shall ensure that only projects are selected that contribute most to the implementation of the priority corridors and areas.

To identify potential PCIs, the regulation sets up Regional Groups that do so following the process sketched out in Annex III.2. Then, the Commission is obliged to adopt a list of the PCIs which has to be updated every two years (Article 3(4)). Once a project is completed or no longer fulfils the criteria, it has to be taken off the list. The first Union list was adopted on 14th October 2013 consisting of 248 projects. However, in general, the regulation explicitly states that the Commission should aim at a manageable number of PCIs and estimates this number at around 220 projects (recital 23). Only with a manageable number of projects is it possible to achieve the regulation's objectives considering the administrative and financial constraints for both the European Union and the Member states. Yet the forecasted number of 100 projects in the electricity sector and 50 in the gas sector proved to be insufficient resulting in an excess 28 projects.

Selected PCIs are supposed to become part of the relevant national 10-year network development plans under Article 22 of Directives 2009/72/EC and 2009/73/EC and receive the highest status of priority possible within them. For the second and all following Union lists, PCIs should already be part of the latest 10-year network development plans. According to recital (28), the projects' priority status on the national level should ensure a rapid administrative treatment and a recognition by national authorities as "being in the public interest" in a legal sense where that is of advantage.

The 12 priority corridors and areas are listed in Annex I. They are divided into electricity, gas and oil corridors as well as thematic areas, namely: the Northern Seas offshore grid, North-South electricity interconnections in Western Europe, North-South electricity interconnections in Central Eastern and South Eastern Europe, the Baltic Energy Market Interconnection Plan in electricity, North-South gas interconnections in Western Europe, North-South gas interconnections in Central Eastern and South Eastern Europe, the Southern Gas Corridor, the Baltic Energy Market Interconnection Plan in gas, oil supply connections in Central Eastern Europe, smart grids deployment, electricity highways and a cross-border carbon dioxide network. The investment costs for these are estimated by the Directorate-General for Energy to be at € 218.5 billion of which € 9.12 billion will need to be funded by the EU (European Commission Directorate-General for

Energy, 2012: 8). Among them, the North-South electricity interconnections in Central Eastern and South Eastern Europe as well as smart grids deployment account for the biggest sums with € 40 billion needed in total. The EU expects to be funding € 2.4 billion and € 1 billion respectively.

To give an example, the corridor of North-South electricity interconnections in Western Europe was created to enhance integration of energy islands and enable the network to transmit energy from renewable sources. As the Directorate-General for Energy estimates, it is necessary for a full exploitation of renewable sources to improve interconnections between Member states as well as between Member states and third countries. Especially, a smooth transmission from the North, where the energy is generated, to the consumption centres elsewhere and from the Iberian Peninsula across the Pyrenees is essential (ibid. 11).

A project of common interest implementing this corridor is, for instance, the internal Austrian overhead line between Westtirol and Zell-Ziller that will help to increase the capacity at the Austrian-German border. The existing line of 220kV will be upgraded and additional 220/380kV transformers of 1,200 MVA capacity will be constructed at both the substation Westtirol and Zell-Ziller. This will improve the n-1 security requirement by providing more security of supply in Western Austria. According to the project developer, Austrian Power Grid AG, this upgrade is necessary to accommodate increased feeding in of electricity from South East Europe and imports from Italy, Germany, Belgium and France. The situation is aggravated by the high output of wind turbines in Eastern Austria. Thus, the project will help to build a ring of 380kV lines in Austria to support the East-West transmission in general (Austrian Power Grid AG, 2013: 48).

Other PCIs in Austria include hydro-power storage sites in Salzburg, Vorarlberg and Tyrol, interconnection lines between Austria and Italy, bidirectional gas pipelines with the Czech Republic or a cluster of interconnections with Germany between St. Peter and Isar consisting of 380kV lines and new substations (European Commission, 2014). The once included project “Tauerngasleitung” between Haiming and Tarvisio in Italy, however, was recently cancelled due to a lack of investors and firm opposition by citizens’ initiatives (Salzburger Nachrichten, 2014). According to the rules of Regulation 347/2013, it will therefore be eliminated from the Union list.

3.3.2 Treatment of PCIs

The regulation stipulates that PCIs should be “implemented as quickly as possible and should be closely monitored and evaluated, while keeping the administrative burden for the project promoters to a minimum” (recital 25). This specifies the direction the treatment of PCIs should take. Concerning the standards for public participation, the regulation suggests additional measures to enhance transparency in the permit procedures (recital 30). Furthermore, a harmonisation of the main principles in environmental assessment is planned via a correct and coordinated implementation of the EIA Directive, the SEA (Strategic Environmental Assessment) Directive, the Aarhus Convention and the Espoo Convention. If a transboundary aspect is found in a case, Member states are encouraged to implement joint procedures and exchange best practice and administrative capacity-building in this respect (recital 31 and Article 8(5)). In general, costs of the construction and operation of a PCI should be borne by the users of the infrastructure (recital 35). However, when tariffs cannot cover these costs, a cross-border allocation of costs should be done. Thus, the regulation also deals with the assessment and distribution of costs for projects of common interest.

Interestingly, the regulation also suggests to use synergies, where possible, in the planning of PCIs together with other infrastructure projects such as transport and telecommunication. It is assumed that under certain circumstances, coordination can make sense in a technical, economic, environmental or spatial sense and then, the integration of networks should be stressed so existing routes are reused and as little land as possible is used overall (recital 27).

Turning to the details of treatment for PCIs, Article 5 stipulates the obligation of the project developer to establish an implementation plan including a time table for several steps of the process. That includes the steps for feasibility and design studies, the approval procedure, construction and commissioning and the permit granting schedule pursuant to Article 10(4)(b). To monitor the progress and compliance with the time table, the Regional Group and the Agency for the Cooperation of Energy Regulators (“ACER”) shall watch the process and, if necessary, make recommendations on how to facilitate it. Additionally, every year by 31st March, project developers have to submit a report giving details of the progress. In case of electricity or gas projects, this report goes to the competent authority and ACER. In case of oil and carbon dioxide transportation projects, they are directed to

the respective Regional Group. The report states the advancement in the permit procedures and in construction, any delays and their reasons. If applicable, it also issues an adapted plan to overcome these problems. Within three months, ACER evaluates the report and submits a consolidated statement on its own to the Groups including recommendations for improvement of the implementation. Besides this, the competent authority also has to report yearly to the Groups on the progress made with the permit granting for projects on the territory of the respective Member state. These measures aim at maintaining the time tables set up and at avoiding the failing of PCIs.

If, however, a PCI is delayed, the regulation stipulates a procedure to get back on track: if the delay is due to an investment not carried out by the transmission system operator, national authorities have to take measures pursuant to Article 22(7)(a)-(c) of Directives 2009/72/EC and 2009/73/EC. In other cases, the project developer should choose a third party to finance or construct the project before the delay exceeds two years. When the project developer fails to do so, authorities of the Member states or eventually, the European Commission can step in with finding investors or constructors.

Another tool to target implementation difficulties is the appointment of a European coordinator. The concept has already been introduced by Decision 1364/2006/EC and foresees that the Commission designates a coordinator if the PCI enters into significant delays or implementation difficulties (Article 6). The working period of the coordinator is suggested with one year, renewable twice. In 2007, four European coordinators were appointed under the old Decision 1364/2006/EC, namely for the Baltic and North Sea off-shore wind connections, the “French-Spanish connection”, the “Salzburgleitung”: Austrian Power link Salzach neu – Tauern, the axis linking Caspian Sea countries and the Middle East to the European Union, including the Nabucco pipeline and the “Northern European power-link” (European Commission Directorate-General for Energy, 2011b). The initial term was four years, nonetheless some coordinators, such as Mr. Adamowitsch for the “Salzburgleitung”, finished their work earlier than that with a summary of recommendations (Adamowitsch, 2009).

Building upon this concept, Article 6 provides the capacities of the European coordinator. He shall promote the PCI he has been assigned to, facilitate cross-border dialogue where appropriate, assist in consultations and permit procedures and help find investors and financial assistance. Further, he should assure sufficient

support and strategic direction by the Member state concerned to facilitate the realisation of the project. Each year, a report is due to the Commission on the progress and obstacles to guarantee transparency.

Chapter III of Regulation 347/2013 deals with the permit granting procedure and public participation (important notice: the provisions of Chapter III do not apply for projects already submitted before 16th November, 2013). Article 7 stresses the importance of PCIs in the context of the European infrastructure development calling for authorities and project developers to treat the project as rapidly as is legally possible. These strong words are coupled with the automatic status after entering the Union list as “priority project” and “project of public interest” with the highest national significance possible. This explicitly applies also to spatial planning and environmental assessment. To allow for such rapid treatment, the Commission issued guidelines on how to streamline EIA procedures with legislative and non-legislative measures. Member states are obliged to publish non-legislative measures until 24th June 2014 and legislative measures until 24th September 2015 (Cabinet of the Commissioner for Energy, 2013: 20) following the suggestions of these guidelines.

Another part of the high status of PCIs is that they are to be considered as being “of public interest” in the sense of Article 6(4) of Directive 92/43/EEC (“Habitats Directive”) and Article 4(7) of Directive 2000/60/EC (“Water Framework Directive”). Article 7(8) of Regulation 347/2013 even explicitly states that PCIs, given that they fulfil the criteria of the mentioned Directives, receive the status of being “of overriding public interest”. This allows a permit even if the status of the water body affected deteriorates or fails to achieve good status because the reasons for the PCI are overriding these objectives if additionally, mitigation measures are taken and no other means are available. This preferential treatment is thought to further help a quick and efficient implementation of PCIs.

An essential feature of the regulation is the “one-stop shop” principle for which Member states had to announce a single authority competent to coordinate and facilitate the permit granting process (Article 8(1)). In Austria, the Minister for Science, Research and Economy, rather surprisingly, informed the Commission of being responsible for this task (Parlamentsdirektion Republik Österreich, 29. Jänner 2014: 113). However, the competent authority is allowed to delegate the task to another authority given that the project developer still only has one point of contact.

A comprehensive decision on the permit application can be made following one of these schemes: (1) the integrated scheme, where a sole legally binding decision is issued by the competent authority and other concerned authorities only give their input internally, or (2) the coordinated scheme, where several authorities issue a number of legally binding decisions which are coordinated by the competent authority, or (3), the collaborative scheme, where a comprehensive decision is coordinated by the competent authority that consults with other concerned authorities but does not make the decision itself. If this last scheme is chosen by a Member state, it has to inform the Commission and state the reasons for this choice (Article 8(3)). Each delay occurring in such a coordinated process has to be reported to the competent authority including a justification and a new time limit for delivering so as to avoid unnecessary retardations.

To enhance transparency and effective public participation, the regulation obliges Member states to publish a manual of procedures by 16th May 2014. This manual is not legally binding but should specify the applicable laws, opinions and decisions that need to be obtained by the developer, contact details of the competent authority and other stakeholders, a concise overview of the decision-making process with indicative time frames, information about the scope, structure and the level of detail of the documents to be submitted, a check list and the stages and means of public participation (Annex VI.1).

Article 9(2) refers to Annex VI.3 that sets out the principles for public participation to be followed by all parties in the process. They apply additionally to the Aarhus Convention's and Espoo Convention's principles and aim at increasing the level of participation compared to the current one via guaranteeing early information and dialogue. This means extensive information and consultation in an open and transparent manner and at a stage where concerns can still be fully taken into account. The competent authority might support the project developer in these activities if deemed helpful. The stakeholders to be involved in this process comprise not only national, regional and local authorities as well as landowners and citizens of the vicinity, but also the general public and associations and organisations thereof.

The consultation process is to be carried out in groups where possible. It should be organised in a way that each consultation session deals with all matters for a specific stage of the process which has to be clearly indicated in the notification of

the consultation. On the other hand, a subject matter relevant to a certain stage cannot be addressed in another consultation session (this does not apply to different geographical locations but separate sessions). The public can comment and make objections only between the beginning of the consultation and the expiry of the deadline.

In line with these principles as well as the guidelines from the national manual, project developers have to submit a concept for public participation approximately in the first three months of their permit procedure. According to Annex VI.4, this concept has to include information about the stakeholders affected, planned measures for the participation and possible meetings, a time line and the human resources available for each task. Further, a first consultation with the public has to take place before the submission of the final application for approval. This requirement shall help to find an appropriate location or trajectory, identify main issues from the beginning and avoid lengthy changes later on. Annex VI.5 establishes principles for this first meeting as well: beforehand, the project developer has to publish a short booklet (max. 15 pages) that explains roughly the purpose of the planned project, states a time table, outlines the national grid development plan, alternatives to the project, expected impacts and measures mitigating them. Furthermore, the booklet has to refer to the manual of procedures and the website required by Article 18. Also, all stakeholders concerned have to be informed via the website required by Article 9(7) and via additional means of open access. Moreover, the developer has to invite affected stakeholders personally in written form to specific meetings (Annex VI.(5)(c)). When submitting the final application for approval, a summarising report of these activities concerning public participation has to be added.

In case of a cross-border project, the first public consultation should be followed within two months with a consultation in the other state so no part of the public is left uninformed or with unvoiced concerns compared to the other. Relevant information should also be made available to the competent authority of the other state so they can decide whether they want to take part in the public participation procedures.

The aforementioned website referred to in Article 9(7) has to be set up by the project developer or the competent authority, depending on national laws of Member states. All relevant information about the project is found there as well as a link to the Commission's website. Annex VI.6 further specifies what has to be on the website

including the information booklet mentioned before, a non-technical summary (max. 50 pages) stating the current status of the project and any changes to it, the planned public participation with dates and locations of meetings and contact details for receiving full documentation of the application or to communicate objections and comments.

A new feature introduced by the regulation is the two-phase-system of the permit granting process. The first phase (“pre-application procedure”) begins with the start of the permit procedure and ends with the acceptance of the application for approval by the competent authority. The pre-application procedure should not exceed two years and already includes the writing of any required environmental reports by the project developer. The start of the procedure is marked by the notification of the project to the competent authority together with an outline of the project. Within three months, the competent authority then has to decide whether it deems the project mature enough for a permit granting process or not whereby a rejection always needs to be justified. If the project seems mature enough, a mandatory scoping takes place. The competent authority and other concerned authorities identify the scope of material and level of detail of the documents the project developer has to submit in his application. He is also allowed to submit a proposal for the scoping. In any way, the scoping has to be based on the check list referred to in Annex VI.1.(e).

Secondly, the authority and the project developer set up a detailed time line for all steps of the permit granting procedure. If the project has a transboundary aspect, authorities in both Member states are encouraged to establish a joint schedule and match their respective time tables. In terms of detail of the schedule, Annex VI.2 elaborates on the required points: decisions and opinions necessary to obtain, the authorities, stakeholders and public that are likely concerned with the project, individual stages of the procedure and their duration, milestones for the developer to be accomplished and the respective deadlines and the planned and needed resources of the authorities.

A third requirement during the pre-application procedure is that after receiving the draft application, the authority has to notify the project developer if, considering the scoping done before, any information is missing. Within three months after receipt of the missing information, the competent authority accepts the written application. For the process of information exchange, efficient cooperation is needed between

authority and project developer. It requires the project developer to strive for completeness and good quality of his documents as well as early reassurance of this by the authority (Article 10(5)).

The second phase is the “statutory permit granting procedure”, beginning with the acceptance of the application file and ending with the issuance of a comprehensive decision. This phase must not last longer than one and a half years although Member states can set an even shorter deadline if appropriate (Article 10(1)(b)). However, if the competent authority estimates that the two phases will not be completed within the given time frame, it may prolong the deadline by nine months before expiry of the original deadline. That decision has to be reported to the respective Group together with planned measures to prevent any more delays.

In case that a route or location has to be determined only for the purpose of implementing a PCI, the regulation acknowledges the time lag such a determination can cause. Thus, if the determination cannot be covered in the same procedure as the permit granting, a further six months are scheduled for this decision. This in turn shortens the possibility for prolongation mentioned before to six months as well.

To tackle the issue of lacking investment in PCIs, the regulation establishes an energy system wide cost-benefit analysis. The methodologies for that analysis were prepared by the European Network of Transmission System Operators (ENTSO) for electricity and the ENTSO for gas in line with certain criteria laid out in Annexes IV and V (European Network of Transmission System Operators for Electricity, 2013; European Networks of Transmission System Operators for Gas, 2013). By 16th May 2015, regulatory authorities in the framework of ACER shall publish a set of indicators and reference values in order to compare unit investment costs for comparable projects of electricity and gas transmission and storage. The values can later on be used by ENTOS for the development of future ten-year network development plans. Further on, by 31st December 2016, the ENTSOs have to submit an interlinked electricity and gas market and network model which will then be included in the methodologies as well.

Currently, Member states pay for the infrastructure on their own territory, regardless of where benefits or risks occur. Compensation in this context is usually not done despite the result that some projects are then delayed, contorted in terms of location or technology or not considered at all (Meeus and He, 2014: 2). The regulation

therefore establishes a tool to advance cost allocation agreements across borders to enhance general welfare. Article 12 thus stipulates that the investment costs of a PCI should be borne by the transmission system operator or project developer where a net positive impact occurs. What is not covered by charges then has to be paid for by the network users via tariffs in the respective Member state. This provision however only applies after the request by a project developer and, in case of a gas project, only after an assessment of market demand has shown that the costs are unlikely to be covered by tariffs only.

As a next step, the project developers submit an investment request after consulting with the transmission system operators of the Member states with positive impacts. The request is addressed at the national regulatory authorities and substantially asks for a cross-border cost allocation. Article 12(3) stipulates that further, a project-specific cost-benefit analysis according to the methodology of the ENTSOs needs to be enclosed as well as a business plan stating the financial viability of the project, the financing option and if developers achieve this, a proposal for allocation. The deadline for submission of this request was 31st October 2013 for PCIs on the first Union list.

The decision of allocation is made by the national regulatory authorities after consulting with the project developers within six months of receiving the request. The coordinated decisions determine how much each operator has to bear as well as the inclusion in tariffs. They can foresee only a partial allocation of costs or a package deal including several PCIs. When making the decision, national authorities should be guided by the existence of congestion rents or other charges and revenues from the compensation mechanism originating from Article 13 of Regulation 714/2009/EC. Additionally, economic, social and environmental costs and benefits should be considered. If negative externalities, such as loop flows, are diminished in a Member state as a result of a PCI implemented there, such a benefit does not constitute a reason for cost allocation to this Member state.

The decision has to be published and notified to ACER. This notification has to contain the basis of the decision, namely the evaluation of impacts on each Member state, of the business plan, of regional or Union-wide positive externalities and the result of the consultations with developers. In case the national authorities do not come to an agreement within six months, they have to inform ACER thereof which takes over and decides on the matter within three months. An extension of two

additional months is possible if ACER needs to seek information from project developers or consultations are done.

The provisions on cross-border cost allocation, however, are not applicable for PCIs which have received an exemption under Article 36 of Directive 2009/73/EC (high risk incurring new gas infrastructure), under Articles 16(6) and 17 of Regulation 714/2009 (“Regulation on conditions for access to the network for cross-border exchanges in electricity”), of Article 22 of Directive 2003/55/EC (“Directive concerning common rules for the internal market in natural gas”) or of Article 7 of Regulation 1228/2003/EC (“Regulation on conditions for access to the network for cross-border exchanges in electricity”).

Another instrument to encourage investment is the granting of incentives to project developers of gas projects or high-voltage overhead transmission lines, electricity highways or equipment essential to these projects. Pursuant to Article 13, if a PCI incurs higher risks in terms of development, construction, operation or maintenance, compared to a normal project with comparable circumstances, Member states and national authorities shall provide appropriate incentives in line with existing legislation. Again, this provision does not apply for the exempted projects mentioned before. What the authority needs to consider when granting incentives is listed in Article 13(2): the cost-benefit analysis and positive externalities resulting from the PCI, an analysis of the specific risk, mitigation measures taken and a comparison of positive impacts with a less risky alternative. The Article explicitly mentions risks related to new technologies in transmission or to under-recovery of costs and development risks as being eligible under this provision.

Incentives can, for instance, cover rules for anticipatory investment, recognition of costs before commissioning, additional return on capital invested or any other appropriate measure. Required action by Member states involves the submission of criteria used to measure high risk to ACER which in turn supports the sharing of good practices between Member states and gives recommendations concerning incentives and how to achieve a common methodology in measuring risk. If Member states fail to adopt sufficient measures to implement PCIs, the Commission has the right to issue further guidelines on the use of incentives (Article 13(7)).

The Energy Infrastructure Package also foresees financial assistance by the European Union in form of grants for studies and further financial instruments. For

these, projects concerning electricity, gas and carbon dioxide transport, however not oil projects, can apply. Furthermore, electricity projects, except installations aiming at two-way digital communication and monitoring (Annex II.1(e)), and gas projects, except for hydro-pumped electricity storage projects, are also eligible for grants for work if they fulfil the following criteria of Article 14(2): the cost-benefit analysis indicates significant positive externalities (security of supply, solidarity between Member states or innovation), a cross-border cost allocation decision has been issued pursuant to Article 12 or the project at least aims at providing services across borders. Furthermore, the project improves safety or brings innovation, and the business plan shows that the project is not commercially viable whereby a decision on incentives and its justification is to be taken into account. Projects falling under Annex II.1.(e) and 4 are also eligible if the project developers prove that the projects have significant positive externalities and are not commercially viable. Similarly, projects which encountered difficulties in staying on schedule and where thus the Commission called for proposals by third parties to take over development (Article°5(7)(d)) can also apply for grants for work if they fulfil the above mentioned criteria of paragraph 2. More details of Union financial assistance are given under chapter 3.4.



Figure 4: Financial assistance. Source: European Commission Directorate-General, 2012: 4

To monitor efficient implementation of the Union list of PCIs, Article 17 obliges the Commission to issue a report on the progress including the funds used, the evolution of interconnection of networks and energy prices and any system failure events as well as their causes and costs. Furthermore, among other points, details of public participation in PCI implementation, maximum durations of permit granting procedures, the level of opposition, best practices used and the effectiveness of time schemes are to be reported.

Finally, to guarantee transparency and publicity, by April 2014, the Commission establishes an infrastructure transparency platform containing information about

each PCI, their implementation plans, the results of cost-benefit analyses, the PCI Union list and the funds engaged for each project.

3.4 The Connecting Europe Facility

A significant part of the European Energy Infrastructure Package is the Connecting Europe Facility established by Regulation 1316/2013 on 21st December 2013. The aim of the so-called CEF is to provide investment into infrastructure networks as well as to leverage both public and private funding and thereby contribute to the European Union objectives of sustainable growth. Current estimates suggest that the trans-European infrastructure for electricity and gas would require € 200 billion until 2020 of which only € 100 billion will come from the market but the other € 100 billion will need public action to be invested (European Commission, 2011e: 2). Therefore, although the market is expected to play a significant role, the Union budget will contribute a considerable amount of investment so the necessary renewing and adaptation of infrastructure networks is performed.

The added value of the CEF as a common funding framework in the EU is expected to be four fold. Firstly, a common framework constitutes a notable simplification of funding mechanisms and allows for a consistent approach of funding across all sectors. Secondly, the CEF provides financial certainty and thus will enhance the interest of private investors. As financial instruments in the CEF are managed in a centralised and coordinated manner, more effectiveness in the interworking between private investors and financial institutions will ensue. Then, the CEF will enable synergies to develop between sectors and networks at planning and implementation level and lead to the generation of economies of scale. Finally, a common framework can make use of best practice sharing and experience gathered which results in a more effective and efficient financing across Europe altogether (ibid. 5).

The Multi Annual Financial Framework for 2014-2020 equips the CEF with € 33.2 billion of which € 5.85 billion are dedicated to the energy sector (Article 5(1)(c) of Regulation 1316/2013). The distribution will be done indirectly via existing institutions such as the European Investment Bank (Norton Rose Fulbright LLP (UK), 2013: 17). The leverage effect created by the CEF is expected to be from 6 to 15 times the original investment amount. As the CEF's assistance can be applied for in parallel with the normal European Investment Bank's instruments, the latter is expected to be leveraged and as a result, private funding shall follow suit (ibid. 19).

PCIs are not automatically eligible to CEF funding as pointed out above under 3.3.2, but are subject to certain criteria under Regulation 347/2013 and Regulation 1316/2013. The requirements under Regulation 1316/2013 stipulate that a PCI needs to follow one of the mentioned objectives, namely, increase competitiveness by advancing a European internal energy market, improve security of supply or contribute to sustainable development and environmental protection, particularly via integrating renewable energy and developing smart grids and CO₂ networks. The achievement of these objectives is evaluated *ex post* by measuring for instance the impact on energy prices, the reduction of energy isolation, the diversification of sources or the amount of CO₂ emissions avoided (Article 4(3) Regulation 1316/2013).

The assistance by CEF can take two different forms with separated procedures and application tracks. The first form, grants, is meant as a last resort and makes up 90% of the CEFs budget. The other form, financial instruments, accounts for 10 % and should be applied for first.

Table 1: Budget distribution. Source: European Commission Directorate-General for Energy, 2013.

<i>Estimation only current prices</i>	2014	2015	2016	2017	2018	2019	2020	Total
Grants	365.7	436.8	664.5	766.8	826.2	960.0	1,192.4	5,212.4
Financial instruments	40.6	48.5	73.8	85.2	91.8	106.7	132.5	579.2

The first call for proposals for grants for studies and works is open from May until August 2014 (Innovation and Networks Executive Agency, 2014). However, only legal personalities can apply which might exclude unincorporated joint ventures, depending on the Commission's decision (Norton Rose Fulbright LLP (UK), 2013: 20). Distributed grants are limited and cannot exceed 50% of the costs of studies or work. Only in case a project contributes highly to regional or Union-wide security of supply, strengthens solidarity or involves highly innovative solutions, an upgrade to 75% of costs is possible (Article 10(3) Regulation 1316/2013). The first disbursements will happen in the beginning of 2015, if the schedule is adhered to. However, regarding the complex application procedure and the required maturity of projects, it remains to be seen whether the budget for this first period will be distributed completely.

Concerning the second form of assistance, financial instruments, a number of options are to be chosen from. Institutions such as the European Investment Bank will provide enhanced loans, project bonds and equity instruments without any call for proposals. PCIs have to prove maturity to be selected and additional consideration will be given to sectoral diversification and geographical balance in choosing projects for assistance (Article 15). They should represent added value to the European market, match the European 2020 Strategy and present a leverage effect for investment. In the first phase, from 2014-2016, preference will be given to projects targeting energy isolation, reducing bottlenecks and completing the internal market (Article 17(6)).

3.5 Streamlining Recommendations

On 24th July 2013, the Directorates-General for Energy and for Environment presented streamlining guidelines, giving six specific recommendations:

a) “Early planning, ‘roadmapping’ and scoping of assessments”

First of all, early planning is necessary to know how to accommodate the number of assessments required without missing the respective deadlines. In a complex case, for example, the EIA Directive might be applicable as might be the Water Framework Directive and the Habitats Directive. Thus, a “roadmapping” of the different assessments is recommended to specify at what stage in the permit procedure which type of assessment takes place. This should be done at a very early point and is the responsibility of the project developer in cooperation with the competent authorities (European Commission Directorate-General for Energy and Directorate-General for Environment, 2013: 15). To avoid repetition or non-consideration of certain points, it can also be helpful to include the aspects to be treated in each stage of the roadmapping. The guidelines also stress the importance of scoping to allow for an early dialogue with the competent authority and, among other benefits, identification of information gathering methods, alternatives and issues of concern to stakeholders. In fact, it is suggested to have early scoping already at a conceptual stage and later again during further development of the procedure. A very early scoping before the pre-application procedure, where it is required pursuant to Article 10(4)(a), is supposed to reduce the time for later scoping. Member states which already have early scoping in place are Germany and Hungary, for instance. A further suggestion is the creation of sensitivity maps,

such as suitability maps showing a combination of technical potential and environmental sensitivity, to guide the decision on a location for the project (ibid. 16).

- b) “Early and effective integration of environmental assessments and of other environmental requirements”

According to the Commission, assessments should be carried out as early as possible. Furthermore, tiering of assessments should be done efficiently in order to allow assessments to complement and build on each other. In the same light, the Commission recommends to make Strategic Environmental Assessments and Appropriate Assessments under the Habitats Directive mandatory at the development stage of national energy plans to assess from the beginning the sensitivity and suitability of regions and projects (ibid. 18).

The guidelines put particular emphasis on the impacts on biodiversity and habitats as well as modifications on water bodies as being of most importance when assessing PCIs (ibid. 20). For water bodies, an impact always has to be measured against the water status stated in the River Basin Management Plan (RBMP) of the respective water body. As mentioned before, a PCI can be of “overriding public interest” and thus be approved even if it modifies a water body. If such a project was not considered under the current RBMP, the Plan should be updated and a thorough consultation performed to explain the reasons for altering the water body. In this context, the Commission recommends to include all PCIs of the first Union list into the update of RBMPs in 2015 (ibid. 21). Additionally, issues of climate change adaptation should be taken into account, such as landslides, strong winds, flooding, fires, rising temperatures and rising sea levels.

- c) “Procedural coordination and time limits”

Regulation 347/2013 allows Member states to choose from three different permit schemes. The guidelines strongly suggest to choose either the integrated or the coordinated approach because of the level of coordination they allow. Moreover, they argue for strong coordinating competences of the authority in charge including the competence to request joint or overall environmental assessments, to establish the scope of single assessments and to organise joint consultations (ibid. 23). Another helpful tool would be to establish time limits for certain parts of the

assessment to meet the overall time requirements and generally enhance efficiency of the process. Any exceedance should have clear consequences. As an example for useful time limits, the consultation phase of the environmental report is mentioned with the recommendation of setting a minimum of 30 and a maximum of 60 days based on experience across Member states and the practices of the Aarhus Convention. The Commission suggests further that Article 10(6) of Regulation 347/2013 stipulating that time limits of the regulation shall be without prejudice to other legal obligations should be applied in analogy.

d) “Data collection, data sharing and quality control”

The guidelines urge project developers to start early with data collection as missing data is one of the major causes of delays in permit procedures. Thus, collection and identification should already start at the roadmapping stage and project developers should be allowed access to all relevant and available data that national authorities hold. Furthermore, Member states are encouraged to collect information at a regional or national level to help project developers and enhance effective tiering between higher and lower levels of assessment (ibid. 25). The collection of case law and precedents shall further improve transparency, legal certainty and strengthen a common methodological approach towards assessments. In the same context, Member states could profit from sharing data and cooperating on data bases, especially regarding border regions to avoid double work. Moreover, the establishment of *ex post* monitoring schemes to evaluate actual impacts of PCIs and mitigation measures will improve the quality of prediction in assessments. However, it is recommended to coordinate these *ex post* monitoring schemes on a higher level and not on individual projects.

The use of external experts and quality control is strongly suggested despite its high costs but due to the potential of reducing delays, it is still deemed beneficial. The EU Cohesion Policy Funds are an option to support training to all stakeholders involved (ibid. 26). From the authorities’ side, guidance documents, exchange of good practice, support tools and specific advice are a good opportunity to improve the quality of the process.

e) “Cross-border cooperation”

As stipulated by Article 8(5) of Regulation 347/2013, transboundary projects require cooperation and coordination of the Member states concerned. They should strive for joint procedures for the environmental impact assessment which could be jointly organised or by a third party (ibid. 28). The forms such agreements can take are manifold from bilateral or multilateral agreements, to institutionalised or informal and designed on an *ad hoc* basis or for PCI-categories. Moreover, the concept of a European coordinator provided for by Regulation 347/2013 can also be taken up at an earlier stage by Member states to prevent more serious difficulties later on.

f) “Early and effective public participation”

The final recommendation of the Commission focuses on public participation and stresses the importance of early planning and inclusion of the public already in the roadmapping process of the project. Public events early on can be helpful to receive feedback and input for the project and deal with concerns the public might have. It should be kept in mind however to have an efficient tiering of consultations. For instance, public participation is optional under the Habitats Directive but required under others, therefore being strongly suggested to be done early on in any case. In Germany, for example, “application conferences” are held where transmission system operators (TSOs), environmental organisations and relevant authorities are invited to determine the scope of SEAs and EIAs (ibid. 29).

On the basis of these six recommendations, Member states should revise their legislative and non-legislative practice and streamline it accordingly.

4 Analysis

4.1 Analysis of the Legal Relation

Regarding the question of the legal relationship between the EIA Directive regime and the Energy Infrastructure Package regime, the previous chapters have shown that there will be no parallel systems but adaptations to the existing EIA regimes in Member states including to the UVP regime in Austria. PCIs will receive a special treatment whereas other projects with potential significant impacts on the environment will not be subject to any new conditions or provisions. To comply with the requirements of the EIP, some provisions of the UVP-G will need to be changed as well as current practices regarding public consultations, time scheduling or the start of the official procedure.¹

With respect to pending obligations of Member states to implement certain measures, it is expected that in Austria, non-legislative measures will be introduced in June 2014 and legislative measures in September 2015, pursuant to Regulation 347/2013. These measures will take up the recommendations of the Commission discussed under 3.5 and strengthen *inter alia* cross-border data sharing, establish specific time limits for individual steps of the procedures and consequences in case of failure. Concerning the manual of procedures, Austria has not published any documents so far, missing the deadline on 16th May 2014. No information has been released on when this act will follow. Equally overdue is the decision which authority will be responsible as a one-stop shop for the PCIs' procedure. The Ministry of Science, Research and Economy has been envisaged for this task (Beratungen des Ständigen Unterausschusses des Hauptausschusses in Angelegenheiten, 2013), there has been a notification to the European Commission that the Ministry considers itself responsible and they have also led the negotiations for Austria on Regulation 347/2013 (Member of Parliament Christiane Brunner, 2014). However, no formal decision has been made so far. Neither is there word on which scheme

¹ In the Supplements to the Stenographic Protocols of the National Council XXIV, Minister Mitterlehner mentioned that in order to comply with the EIP, amendments to Austrian material laws as well as the constitution are necessary (Beratungen des Ständigen Unterausschusses des Hauptausschusses in Angelegenheiten, 2013). However, this statement is incorrect, because as a regulation, no implementation into national law is needed nor allowed. Only where national law contradicts a regulation are changes due (Commission of the European Communities vs French Republic, 1991: marginal no. 13).

Austria will follow regarding the choice Article 8(3) offers, although the current regime resembles the integrated approach. The settlement on these important features will strongly determine how the Austrian treatment of PCIs will look like in the future.

4.2 Analysis of Consequences for Project Developers

The second question in this research was what consequences the EIP and the treatment of PCIs will have on the work of project developers. The objective was to identify advantages and disadvantages under the new regime from the point of view of project development.

One significant advantage compared to the current situation is the shortening of the assessment procedure's length to 3.5 years. As permit granting procedures for infrastructure projects usually take up to 10 years (European Network of Transmission System Operators for Electricity, 2010: 280), this feature makes the new procedure attractive to project developers. A shorter duration means not only less time invested but also fewer costs for human resources and more certainty in planning.

However, the rather tight time frames of the regulation require strict time management on the developer's side and put limits on the level of depth achievable when preparing documents or planning steps. Compared to the time management under the UVP-G so far, where the authority decides on a schedule, the new time-frames might be a challenge for the organisation used for project developing up until now. Another issue is the introduction of consequences for non-compliance with deadlines. These will probably be implemented by the legislative measures taken by Member states in September 2015 and are required to be "clearly defined and enforced" (European Commission Directorate-General for Energy and Directorate-General for Environment, 2013: 23). Under the UVP-G regime, the only consequence for exceeding a deadline of the time schedule is that the authority has to give a justification for it in the final decision (Article 7(1)).

The newly introduced one-stop shop principle is also of advantage to project developers as they only have one point of contact instead of several authorities dealing with the project. This should also lead to more efficient handling of documents and submissions making it less likely that information is lost. However, in

Austria, the EIA procedure already offers a comprehensive assessment of all applicable laws. Thus, the improvement in this regard will be limited.

A major advantage for project developers is the financial help projects can receive if they fulfil the conditions of the EIP regulation or of the CEF regulation. All projects are eligible for certain kinds of assistance such as support for studies or national incentives. According to E-Control Austria, though, the existing incentive scheme is already very successful: since 2001, € 3.7 billion have been invested in electricity networks and € 1.1 billion in gas networks (Energie-Control Austria, 2013: 16). Projects which are not commercially viable and thus otherwise would not be built can further receive support for work under the CEF which in turn leverages more private funding allowing in the end for a successful and feasible construction and operation. This increase in realisable projects will lead to more jobs and contracts for potential project developers. Furthermore, the new concept of cost allocation across borders will finally enable projects to be built where formerly no consensus could be reached because of a discrepancy between costs and benefits for each side. With a valid cost allocation decision, developers can take on projects that otherwise would only cause costs but no benefits to a specific country.

The extensive provisions on public participation of the EIP regime both put a burden on the project developers while also offering benefits. On the one hand, project developers have to invest time in the consultation process and schedule detailed plans on when and how to get in contact with the public which constitutes also an administrative strain on them. On the other hand, an improved cooperation with the public, especially early on, can result in constructive feedback and avoid problems and opposition later on which is one of the main reasons for delays (European Commission Directorate-General for Energy, 2011a: 181). In respect of this issue, the Regional Groups in their first cross-regional meeting have stressed the importance of support for PCIs from opinion leaders and local politicians to raise awareness for the necessity of the project (European Commission Directorate-General for Energy, 2014b).

Concerning the monitoring process, the streamlining guidance issued supplementary to the EIP regulation initiates more extensive post-control of projects. Under the UVP-G, only column 1 projects are subject to post-control to examine whether the provisions of the decision have been adhered to (Article 22 UVP-G). In contrast, the recommendations suggest post-control for all PCIs. This, if

implemented by Member states, will require more effort and cooperation between project developers and competent authorities and result in longer durations of overall project implementation.

4.3 Analysis of Consequences for the Public

The most burdensome provisions for the project developers are at the same time the biggest advantage for the public wanting to take part in the decision-making of an EIA. Particularly the fact that the first consultation has to be scheduled before the pre-application phase is an improvement in terms of early involvement. This allows the public to voice their concerns at an early stage and have an influence on the planning, locating and development of the final project.

Similarly, the obligation of project developers or national authorities to set up websites with information about each project and to publish leaflets summarising key features of projects will enhance transparency. Members of the public who want to get involved have now easier access to reliable information while at the same time misunderstandings and misinformation can be avoided which proves advantageous to both sides. Also helpful is the roadmapping done by the developers so the public can inform themselves as to when the next step happens and how they can take part in the process.

However, from the point of view of the public, it has been suggested that the tight time limits might result in a less efficient participation of the public (European Commission, 2011b). Less time would mean less involvement, more shallow consultations and would make it more difficult for the public to get organised and form a comprehensive opinion on the subject. These factors could lead to a deterioration of public participation compared to the current status.

From a more general perspective of “public”, meaning the society as a whole, there are a number of positive features of the EIP to point out. First of all, the energy infrastructure being built is beneficial to the public who profit from an intact infrastructure both in their businesses as well as in the quality of their private life. Without the PCI concept, this much needed renewing would not take place leaving them with outdated networks not fit for their consumption patterns.

In addition, the burden on taxpayers is eased with the CEF and private funding stepping in instead of state funding to build necessary networks. Also, cross-border cost allocation is advantageous to the taxpayers as their country only pays for the benefits they receive and does not have to cover costs without benefits attached. As a result, tariffs on energy consumption will not rise as much as otherwise expected.

The Commission's recommendation on a more comprehensive examination with inclusion of all relevant environmental assessments constitutes another gain for the general public. The more comprehensive the examination, the better cumulative effects are detected and the better the overall decision-making will be. The Austrian UVP-G system, though, already works with a concentrated examination and therefore already fulfils this recommendation, so no further improvements are expected.

What could be considered a downside for the public is the provision that PCIs will receive the highest possible status under national law. Even the status of "overriding interest" is an option and can lead to the implementation of projects detrimental to, for instance, water bodies' quality. This provision therefore might be understood by the public as a threat to environmental protection and requires extra efforts in informing the public about the positive effects and the necessity of the project.

A further advantage brought by the EIP is the thorough treatment PCIs receive before they are adopted onto the Union list. As a result, the best possible version is chosen with several different perspectives – from the Regional Groups, to project developers, ACER and the Commission – involved guaranteeing a balanced assessment. Other advantages include the promotion of solidarity among European citizens as mentioned as an objective in the regulation (recital 4) and the likely creation of new jobs to implement and operate the PCIs.

5 Conclusion

The purpose of the current paper was to examine the implications the European Energy Infrastructure Package, and particularly the EIP regulation, has on the environmental impact assessment regime in Austria. The focus was on the legal relationship between the two instruments as well as the positive and negative consequences the introduction of the EIP would have on project developers and the public.

It has been shown that the EIA will continue to be the framework for assessment of projects with potentially negative impacts while now incorporating the treatment for projects of common interest under additional provisions. Moreover, the research has shown that multiple benefits arise from the package for project developers and the public alike despite some drawbacks in terms of administrative burden and efforts needed. One of the major findings was that project developers will profit from a significantly shorter permit procedure of 3.5 years and from the utilisation of financial instruments to make projects feasible that otherwise would not be built. The public on the other hand will benefit from an earlier involvement in projects and more transparency via websites and published leaflets.

In general, therefore, it can be concluded that the Energy Infrastructure Package promises to realise urgently needed energy networks in Europe in an effective and efficient way without jeopardising the existing high standards of environmental protection in Europe. However, it remains to be seen whether the requirements regarding time scheduling and early planning will be achievable for most PCI developers and authorities. The same holds true for the expected leverage effect on private funding for PCIs. As ever so often, the implementation, acceptance and application by stakeholders will determine the eventual value of the EIP.

Bibliography

Adamowitsch G. W. (2009, July): Energy Infrastructure - European Coordinators. Abschlussbericht des Europäischen Koordinators: "Salzburgleitung". [Online] http://ec.europa.eu/energy/infrastructure/tent_e/coordinators_de.htm - accessed: May 27th, 2014.

Austrian Power Grid AG (2013): Masterplan 2030: Für die Entwicklung des Übertragungsnetzes in Österreich. Planungszeitraum 2013 – 2030 mit Ausblick bis 2050. Vienna. p.86.

Beratungen des Ständigen Unterausschusses des Hauptausschusses in Angelegenheiten (2013, January 15th): V-35 der Beilagen zu den Stenographischen Protokollen des Nationalrates XXIV. GP. Wien.

BMLFUW (2011): Runder Tisch Effiziente UVP-Verfahren Zusammenfassung, Wien. p.6.

Bundesminister für Land- und Forstwirtschaft, Umwelt und Wasserwirtschaft (2012): 5. UVP-Bericht an den Nationalrat 2012. Wien. p.110.

Cabinet of the Commissioner for Energy (2013, March 27th): Gas Infrastructure for a European Energy Market.

Commission of the European Communities vs French Republic Case C-307/89 (1991, June 11th). European Court of Justice. European Court reports 1991 Page I-02903.

Energie-Control Austria (2013): Pressekonferenz - Präsentation des Jahresberichts 2012.

European Commission (2001): Guidance on EIA - Scoping. Office for Official Publications of the European Communities, Luxembourg. p.35.

European Commission (2009, July 23rd): Report from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions. On the Application and Effectiveness of the EIA Directive. Brussels.

European Commission (2010, March 3rd): Communication from the Commission. Europe 2020: A Strategy for Smart, Sustainable and Inclusive Growth. Brussels.

European Commission (2010, November 17th): Press Release - IP/10/1512. Energy infrastructure: Commission proposes EU priority corridors for power grids and gas pipelines. Brussels.

European Commission (2011, October 19th): Press Release - IP/11/1200. Connecting Europe Facility: Commission adopts plan for € 50 billion boost to European networks. Brussels.

European Commission (2011, October 19th): Press Release - Memo/11/710. The Commission's Energy Infrastructure Package. Brussels.

European Commission (2011, October 19th): Commission Staff Working Paper. Executive Summary of Impact Assessment Accompanying the Document Regulation on Guidelines for the Implementation of European Energy Infrastructure Priorities. Brussels.

European Commission (2011, October 19th): Regulation on Energy Infrastructure Priorities - Citizens' Summary. Brussels.

European Commission (2011, October 19th): Proposal for a Regulation of the European Parliament and of the Council establishing the Connecting Europe Facility. Brussels.

European Commission (2012, October 26th): Proposal for a Directive of the European Parliament and of the Council amending Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment. Brussels.

European Commission (2014, January 14th): Energy Infrastructure: Projects of Common Interest. Overview of Projects by Country. [Online]
http://ec.europa.eu/energy/infrastructure/pci/pci_en.htm - accessed: May 16th, 2014.

European Commission Directorate-General (2012): Connecting Europe: The Energy Infrastructure of Tomorrow. Brussels.

European Commission Directorate-General for Energy (2011): Permitting procedures for energy infrastructure projects in the EU: evaluation and legal recommendations. Brussels. p.221.

European Commission Directorate-General for Energy (2011): Energy Infrastructure: European Coordinators. [Online]
http://ec.europa.eu/energy/infrastructure/tent_e/coordinators_en.htm - accessed: May 16th, 2014.

European Commission Directorate-General for Energy (2011): Energy Infrastructure: Priorities for 2020 and Beyond - A Blueprint for an Integrated European Energy Network.

European Commission Directorate-General for Energy (2012): Future Funding for Energy Policy. Connecting Europe: The Energy Infrastructure of Tomorrow. [Online]
http://ec.europa.eu/energy/mff/facility/connecting_europe_en.htm - accessed: May 14th, 2014.

European Commission Directorate-General for Energy (2013, November 19th): Introduction to Connecting Europe Facility. CEF Info Day 19 Nov 2013.

European Commission Directorate-General for Energy (2014): First Cross-Regional Group Meeting 2014. Regulation on guidelines for trans-European energy infrastructure & Connecting Europe Facility.

European Commission Directorate-General for Energy and Directorate-General for Environment (2013): Streamlining Environmental Assessment Procedures for Energy Infrastructure Projects of Common Interest (PCIs). Brussels. p.33.

European Commission Directorate-General for Environment (2014, January 24): Environmental Impact Assessment - EIA. [Online] ec.europa.eu/environment/eia/eia-legalcontext.htm - accessed: February 12, 2014.

European Network of Transmission System Operators for Electricity (2010): Ten-Year Network Development Plan 2010-2020. Brussels. p.287.

European Network of Transmission System Operators for Electricity (2013, November 14th): Cost Benefit Analysis Methodology for Projects of Pan-European Significance. ENTSO-E Guideline for Cost Benefit Analysis of Grid Development Projects. [Online] <https://www.entsoe.eu/major-projects/ten-year-network-development-plan/cba-methodology/> - accessed: May 17th, 2014.

European Networks of Transmission System Operators for Gas (2013, November 15th): CBA Methodology. ENTSG Cost-Benefit Analysis Methodology. Energy System-Wide CBA Methodology. [Online] <http://www.entsog.eu/publications/cba-methodology#CBA-METHODOLOGIES> - accessed: May 17th, 2014.

Glasson J., Therivel R., and Chadwick A. (2012): Introduction to Environmental Impact Assessment. 4th edition, Routledge, London.

Innovation and Networks Executive Agency (2014): CEF Energy Call for Proposals 2014. [Online] http://inea.ec.europa.eu/en/cef/cef_energy/apply_for_funding/cef_energy_call_for_proposals_2014.htm - accessed: May 18th, 2014.

Meeus L., and He X. (2014): Guidance for Project Promoters and Regulators for the Cross-Border Cost Allocation of Projects of Common Interest. Policy Brief. European University Institute, Fiesole, Italy. p.6.

Member of Parliament Christiane Brunner (2014, April 1st): Anfrage an den Bundesminister für Wissenschaft, Forschung und Wirtschaft betreffend EU VO TEN-Energie. [Online] http://www.parlament.gv.at/PAKT/VHG/XXV/J/J_01257/fnameorig_344824.html - accessed: May 20th, 2014.

Norton Rose Fulbright LLP (UK) (2013, December 10th): European energy infrastructure opportunities. European energy infrastructure opportunities. Projects of Common Interest connecting Europe. [Online] <http://www.nortonrosefulbright.com/uk/knowledge/publications/110122/european-energy-infrastructure-opportunities> - accessed: May 18th, 2014.

Ökobüro - Koordinationsstelle österreichischer Umweltorganisationen (2012): Informationstext zum UVP-Gesetz. p.49.

Parlamentsdirektion Republik Österreich (29. Jänner 2014): Stenographisches Protokoll. 9. Sitzung des Nationalrates der Republik Österreich, Wien. p.321.

Salzburger Nachrichten (2014, April 3rd): Tauerngasleitung kommt nicht - Projekt für tot erklärt, Salzburg.

Sommer A., and Bergthaler W. (2000): Evaluation der Verfahren nach dem UVP-Gesetz. Das Lebensministerium. p.158.

Umweltbundesamt GmbH (2006): UVP-Evaluation. Evaluation der Umweltverträglichkeitsprüfung in Österreich. Wien. p.169.

Umweltbundesamt GmbH (2012): UVE-Leitfaden. Eine Information zur Umweltverträglichkeitserklärung. Wien. p.178.

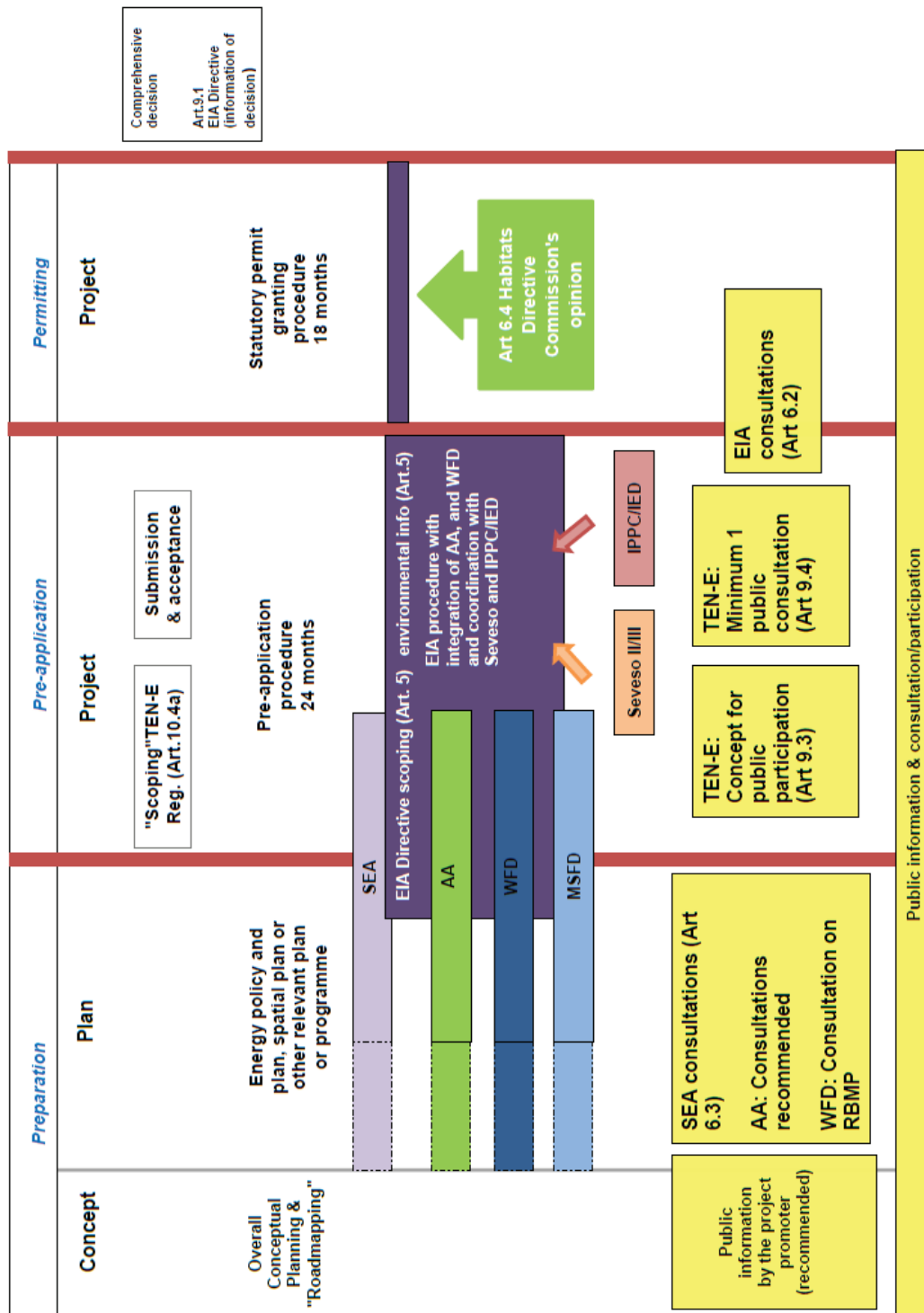
Verbund Umwelttechnik GmbH (2014): EIA Procedure.

List of Figures and Tables

Figure 1: Key stages of an EIA	8
Figure 2: EIA procedure	16
Figure 3: Priority Corridors 2010	25
Figure 4: Financial assistance	40
 Table 1: Budget distribution	 42

Appendix

Streamlining Environmental Assessments for Energy PCIs: the Overall Procedure



Source: European Commission Directorate-General for Energy and Directorate-General for Environment, 2013: 15.