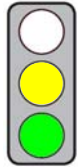


MAIN ISSUES

Objective of the Regulation: The European internal energy market is to be completed through the development and setting-up of “Trans-European Networks for Energy” (TEN-E).

Parties affected: All citizens, the economy as a whole, in particular energy enterprises.



Pros: (1) In order to complete the internal energy market, it is essential to develop the cross-border gas and electricity infrastructure.

(2) Streamlined permit-granting procedures for energy infrastructure expedite the development of infrastructure and thus improve the energy supply within the internal market.

Cons: The adoption of the TEN-E Guidelines in the form of a Regulation infringes Art. 171 (1) TFEU.

CONTENT

Title

Proposal COM(2011) 658 of 19. October 2011 for a **Regulation on Guidelines for the trans-European energy infrastructure** and repealing Decision No. 1364/2006/EG

Brief Summary

Note: The pages and articles quoted refer to the Regulation Proposal unless otherwise indicated.

► General context and targets

- The EU intends to develop and modernise a “trans-European network for energy” (TEN-E) to address the energy policy challenges of competitiveness, climate protection and security of supply (s. [CEP Compass EU Energy Policy](#), p. 9 et sqq. – in German only).
- The proposed Regulation:
 - lays down the guidelines “for the timely development and interoperability” of TEN-E (Art. 1 (1));
 - comprises certain categories of energy infrastructures for the transmission, distribution and storage of electricity or gas and for the transport of oil or CO₂ (Annex II) located in the EU or linking the EU and at least one third country (Art. 2 (1));
 - is complemented by the proposed Regulation for a “Connecting Europe Facility”, which provides for EU funding for energy infrastructure of 9.1 billion Euros between 2014 and 2020 [COM(2011) 665, p. 6].
- The TEN-E Guidelines focus in particular on the following targets (Recital 6):
 - fully integrating national energy markets into a single energy market in order to ensure that, amongst other things, no Member State is isolated from the European energy network;
 - by 2020, accomplishing the EU targets to reduce greenhouse gas emissions by 20%, improve energy efficiency by 20% and increase the share of renewable energies in final energy consumption to 20%;
 - preparing the EU energy system for a long-term “decarbonisation” by 2050 (cp. Communication COM(2011) 112; s. [CEP Policy Brief](#)).

► Investment needs and obstacles to investments

- The Commission estimates the total investment needs for energy infrastructure “of European importance” to be at “about EUR 200 billion” up until 2020 (p. 4):
 - approx. EUR 140 billion for high voltage electricity transmission systems, storage and “smart grid applications” [cp. Communication COM(2011) 2020, s. [CEP Policy Brief](#)];
 - approx. 70 billion for high pressure gas transmission pipelines (coming into the EU and between EU Member States), storage, liquefied natural gas terminals (LNG) and compressed natural gas terminals (CNG) and reverse flow infrastructure; and
 - approx. EUR 2.5 billion for carbon dioxide transport infrastructure.
- According to the Commission, the existing TEN-E policy lacks “vision, focus and flexibility” to fill identified infrastructure gaps (Recital 5). Necessary investments are either not made at all or are delayed due to lengthy and ineffective permit-granting procedures, public opposition, lack of a focus on European infrastructure priorities, limited financing capacities and inappropriate funding instruments (p. 4).

► Infrastructure priorities

- The TEN-E Guidelines define 12 infrastructure priorities for which EU action “is most warranted” (p. 3). They comprise (Art. 1 (1), Annex I)
- trans-European “energy infrastructure corridors” (e.g. the northern sea offshore grid) and
 - trans-European “energy infrastructure areas” (e.g. “smart energy grids”).

► **“Projects of common interest”**

- Infrastructure priorities are implemented on the basis of “projects of common interest” (PCIs).
- PCIs must in particular (Art. 4 (1))
 - be necessary for the implementation of the energy infrastructure priority corridors and areas;
 - display “economic, social and environmental viability” and
 - affect at least two Member States, either by crossing the border of a Member State or by “having a significant cross-border impact” (Art. 4 (1) lit. c, Annex IV.1.)
- PCIs are identified in a multi-level selection process (Art. 3):
 - For the energy priority corridors and areas, as well as the related geographic areas, the Commission deploys “regional groups” composed of representatives from Member States, the network operators, project developers and the Commission (Annex III.1.1.).
 - Each regional group draws up a proposed list of PCIs; each PCI proposal requires the approval of the affected Member State (Art. 3 (3)).
 - By 31. July 2013 at the latest, the Commission will adopt an EU-wide PCI list which must then be reviewed every 2 years and, where necessary, updated (Art. 3 (1)).
- The PCIs entering the EU-wide list are to be conferred the “highest possible priority” (Art. 3 (7)):
 - in the regional investment plans for electricity [Art. 12 Regulation (EC) No. 714/2009; s. [CEP Policy Brief](#)] and gas [Art. 12 Regulation (EC) No. 714/2009; s. [CEP Policy Brief](#)],
 - in the 10-year network development plans for electricity [Art. 22 Directive 2009/72/EC; s. [CEP Policy Brief](#)] and gas [Art. 22 Directive 2009/73/EG; s. [CEP Policy Brief](#)] and
 - in “other affected infrastructure plans”.

► **Faster and more transparent permit granting**

- PCIs are to be allocated the “highest national significance possible” within national permit-granting procedures (Art. 8 (1)).
- Each Member State is to designate an authority responsible for the coordination of PCI permit-granting procedures (Art. 9 (1)); this will then adopt a “comprehensive decision”.
- Member States can choose between the following schemes:
 - “Integrated scheme” (Art. 9 (2) lit. a): The competent authority adopts the sole legally binding decision. Other authorities may give their opinion as input.
 - “Coordinated scheme” (Art. 9 (2) lit. b): The comprehensive decision may encompass several legally binding individual decisions by the competent authority and other authorities.
- The permit-granting procedure consists of two phases of up to three years (Art. 11 (1)):
 - The “pre-application procedure” (phase 1) covering the period between the start of a permit-granting procedure and the acceptance of the submitted application file must not exceed 2 years.
 - The “statutory permit granting procedure” (phase 2) covering the period between the acceptance of the application file to a comprehensive decision” must not exceed 1 year.
- If decisions in two or more Member States are required, the competent authorities concerned must cooperate (Art. 9 (3)).
- Project promoters must, within three months of the start of the permit-granting procedure (Art. 11 (1)), submit a concept for public participation to the competent authority (Art. 10 (3)).
- Before submitting the application file (Art. 11 (1)), either the project promoters or the competent authority must conduct a public consultation (Art. 10 (4), Annex VI), whereby the “stakeholders concerned” (Annex VI.2) must be informed “at an early stage” as to the project concerned.

► **Cost-benefit analysis, cost allocation and investment incentives**

- The European Network of Transmission System Operators for Electricity (ENTSO-E) and the European Network of Transmission System Operators for Gas (ENTSO-G), the EU Agency for the Cooperation of Energy Regulators (ACER) and the Commission are to develop together a methodology for a “harmonised energy system-wide cost-benefit analysis” for PCIs in the electricity and gas sector (Art. 12 (1-5), Annex V). The methodology will be applied to the cost-benefit analysis under ten-year network development plans for electricity or gas (Art. 12 (7)).
- The investment costs for PCIs in the electricity and gas sector (Art. 13 (1)) should:
 - be borne by those transmission system operators from the Member States for which the project concerned creates benefits; and
 - by the transmission system users through access fees.
- With regard to the cross-border allocation of the investment costs of transmission system operators for PCIs in the electricity and gas sector and their inclusion into grid tariffs, the national regulatory authorities concerned take joint decisions. In so doing, the benefits of the projects in the Member States concerned and the possible need for financial support is to be taken into account (Art. 13 (5)).
- For the implementation of PCIs of “higher risks”, national regulatory authorities must set “appropriate incentives” by tariffs (Art. 14).

► EU funding measures

- For certain PCIs in the electricity, gas and CO₂ sector, the EU may grant funding for studies and “financial instruments” falling under the proposed Regulation for a “Connecting Europe Facility” [COM(2011) 665] (Art. 15).
- For certain PCIs in the electricity, gas and oil sector, funding is possible only for those infrastructure projects which cannot be financed through user charges (Art. 15 (2) and (3)).

Changes to the Status quo

- To date, the TEN-E guidelines have only taken into consideration projects from the electricity and gas sector. Now projects for the transport of oil or CO₂ are also included.
- Until now, national permit-granting procedures under the TEN-E guidelines have not been regulated at EU level; streamlining is now planned.

Statement on Subsidiarity by the Commission

According to the Commission, the energy transmission infrastructure has a “trans-European or at least cross-border nature or impact”. In contrast, the national administrations do not have the competency to deal with the overall infrastructures. Therefore the planning must be organized from a European perspective. (p. 8)

Policy Context

In the TEN-E Guidelines of 2006 (Decision No. 1364/2006/EC), 550 projects from the electricity and gas infrastructure sectors eligible for EU funding were listed. The TEN Financing Regulation (No. 680/2007) regulates the conditions for the co-financing of TEN-E projects and for the period of 2007 to 2013 covers funding in the volume of EUR 155 million. In its EU Energy Strategy 2020 [COM(2010) 639, s. [CEP Policy Brief](#)] the Commission called for a new approach to the planning, construction and operation of energy infrastructures. Preliminary considerations for the now proposed TEN-E Guidelines were presented by the Commission in November 2010 in its Communication “Energy infrastructure priorities for 2020 and beyond A blueprint for an integrated European energy network” [COM(2010) 677; s. [CEP Policy Brief](#)].

Legislative Procedure

19 October 2011	Adoption by Commission
24 November 2011	Debate in the Council
Open	Adoption by the European Parliament and the Council, publication in the Official Journal of the European Union, entry into force

Options for Influencing the Political Process

Leading Directorate General:	DG Energy
Committees of the EP:	Industry, Research, Energy (in charge), rapporteur: António Fernando Correia de Campos (S&D Group, PT)
Committees of the German Bundestag:	Economy and Technology (in charge); Environment, Nature and Reactor Safety; Affairs of the European Union
Decision mode in the Council:	Qualified majority (approval by a majority of Member States and at least 255 out of 345 votes; Germany: 29 votes)

Formalities

Legal competency:	Art. 172 TFEU (trans-European Networks)
Form of legislative competence:	Shared competence (Art. 4 (2) TFEU)
Legislative procedure:	Art. 294 TFEU (ordinary legislative procedure)

ASSESSMENT

Economic Impact Assessment

Ordoliberal Assessment

The development of the cross-border infrastructure for electricity and gas is essential for the completion of the internal energy market. Moreover, the increased deployment of renewable energies which are subject to weather-related fluctuations in the electricity sector require an improved coordination, both spatially and temporally, of power generation and consumption (lines, storage and “smart grids”). Hence the improved coordination proposed by the EU is appropriate.

Impact on Efficiency and Individual Freedom of Choice

Employing a uniform methodology as the basis for the cost-benefit analysis makes the debate on the selection of energy infrastructure projects and the cost allocation between several Member States concerned more objective. **In principle, it is correct that the costs for the energy infrastructure development are borne**

through user charges, as they benefit from an increased security of supply and lower energy prices as a result of cross-border competition. **The costs for investments necessary for the development of power generation through renewable energies, however, should be borne by energy producers.** Only then can the choice of locations and technologies be optimised in line with cost criteria. Financing through taxes is intended only for those infrastructure projects which cannot be financed through user charges but are desired in order to complete the interconnected internal energy market and the security of energy supply. This reduces false incentives for too expensive, wrong or unnecessary infrastructure projects.

The streamlining of permit-granting procedures expedites the development of infrastructure and improves energy supply in the internal market. It remains questionable whether or not the Commission will really achieve its ambitious target within three years. Energy infrastructure projects usually face public opposition. The planned early and systematic integration of the public can help promote projects in a positive manner.

Impact on Growth and Employment

Energy infrastructure projects are accompanied by short-term growth effects at regional level. However, more significant is that a safe, reliable and economic energy supply has a positive impact on growth and employment in the long run.

Impact on Europe as a Business Location

A safe, reliable and economic energy supply increases the quality of the business location.

Legal Assessment

Legislative Competency

Unproblematic. The competency for the planning and construction of energy infrastructures lies primarily with the Member States. However, the EU may deliberately contribute to the establishment and development of TEN-E (Art. 170 (1) TFEU) in order to complete the internal market (Art. 26 TFEU) and to strengthen the economic, social and territorial cohesion in the EU ("cohesion", Art. 174 TFEU). In so doing, the EU may promote the cooperation and interoperability of the single national energy transmission systems (Art. 170 (2) TFEU). To this end, it may define targets, priorities and broad lines of TEN-E policy measures in guidelines as well as identify "projects of common interest" (Art. 171 (1) TFEU).

Subsidiarity

The precondition that at least two Member States must be affected by a PCI, either by crossing the border of a Member State or by "having a significant cross-border impact" (Art. 4 (1) lit. c), is principally appropriate to safeguard the principle of subsidiarity (Art. 5 (3) TEC) in selecting the projects.

Proportionality

Unproblematic.

Compatibility with EU Law

The Commission chooses as a legally binding form of action for the TEN-E Guidelines (Art. 171 (1) TFEU) not a "decision" addressed only to Member States but a Regulation which applies "directly" and generally (Art. 288 TFEU). According to the Commission, this is "necessary to ensure timely implementation of the energy infrastructure priorities by 2020" (p. 8). However, what speaks against a Regulation is the fact that the **TEN-E Guidelines** only define the "objectives, priorities and broad lines" of TEN-E policy actions and should identify PCIs (Art. 171 (1) TFEU). Therefore, they **should not** – according to their nature prescribed by primary law – **be self-executable against a wide target group, but should be addressed to the Member States**, which alone can work towards their implementation within the given "objectives, priorities and broad lines". Accordingly, the proposed rules on the permit-granting procedure, for instance (Art. 9), require a substantiating implementation into national law. **The adoption of TEN-E Guidelines as a Regulation therefore infringes Art. 171 (1) TFEU.**

Compatibility with German Law

The proposed rules for the permit-granting procedure require amendments, in particular to the "Raumordnungsverordnung" (ROV, German Regional Planning Act), des Energiewirtschaftsgesetzes (EnWG, the German Energy Act), the Gesetz zum Ausbau von Energieleitungen (EnLAG, German Act on the Development of Energy Transmission Lines) and the Netzausbaubeschleunigungsgesetzes Übertragungsnetz (NABEG, German Act on an Expedited Development of Networks Network Transmission Grid).

Conclusion

The development of cross-border gas and electricity infrastructure is essential for completing the internal energy market and increasing power generation from renewable energies. In principle, it is correct that the costs for the development of energy infrastructure are financed through cost allocation on user charges. Investment costs, which are necessary for the development of power generation through renewable energies, should, however, be allocated to the energy producers concerned. The planned streamlining of permit-granting procedures expedites the development of infrastructure and improves the security of the energy supply in the EU. However, the adoption of the TEN-E Guidelines in the form of a Regulation infringes Art. 171 (1) TFEU.