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Regulation No 347/2013 on Guidelines for Trans-European Energy Infrastructure: the provisions on permit granting and public participation and their implementation in the UK.

Introduction

Energy generation and security is a major concern of the European Union (EU). The EU is the world's biggest importer of energy and its energy consumption has a very significant impact on green house gas emissions.¹ The need for European co-operation on energy was recognised in the original treaties on a European Coal and Steel Community and Euratom. However, the idea of a Trans-European Energy Network did not emerge until the 1980s when it became clear that the completion of the Single Market should be supported by a modern system of infrastructure. Today, there is a clear basis for legal action in the Treaty on the Functioning of the European Union on a Trans-European Network not just with respect to energy, but transport and communications² The European Union's current policy on Trans-European Energy Infrastructure has its roots in the EU 2020 strategy.

The EU 2020 Strategy and Energy Infrastructure Provision

In 2010, the European Commission published its Europe 2020 Strategy for smart, sustainable and inclusive growth.³ Sustainable growth, it is said, will provide "a more resource efficient, greener and more competitive economy".⁴ The aim of a resource efficient Europe is:

" to support the shift towards a resource efficient and low-carbon economy that is efficient in the way it uses all resources ... to decouple our economic growth from resource and energy use, reduce CO₂ emissions, enhance competitiveness and promote greater energy security."⁵

The Strategy sets headline targets for progress on these aims. The indicators for sustainable growth include: a reduction in greenhouse gas emissions by at least 20% compared to 1990 levels or by 30%, if the conditions are right; an increase in the share of renewable energy sources in our final energy consumption to 20%; and a 20% increase in energy efficiency.⁶

The Strategy promised to introduce an initiative to upgrade the Trans-European Energy Network, focusing in particular on interconnections for renewable energy. As

¹ European Commission, *Sustainable, Secure and Affordable Energy for Europeans* (EC, 2014).

² Article 170-172 Treaty on the Functioning of the European Union.

³ Commission Communication *Europe 2020 A Strategy for Smart, Sustainable and Inclusive Growth* COM (2010) 2020.

⁴ Smart growth is defined as promoting "an economy based on knowledge and innovation", whilst it is said that inclusive growth will foster "a high-employment economy delivering economic, social and territorial cohesion." Commission Communication *Europe 2020 A Strategy for Smart, Sustainable and Inclusive Growth* COM (2010) 2020, p.10.

⁵ Commission Communication *Europe 2020 A Strategy For Smart, Sustainable and Inclusive Growth* COM (2010) 2020, p.10.

⁶ Commission Communication *Europe 2020 A Strategy For Smart, Sustainable and Inclusive Growth* COM (2010) 2020, p.10.

a result, the Commission published a document setting out *A Blueprint for an Integrated European Energy Network*;⁷ and subsequently, the European Parliament and the Commission issued a Decision laying down guidelines for Trans-European Energy Networks (TEN-E).⁸ These guidelines were considered to have made “a positive contribution to selected projects by giving them political visibility” but were considered to lack “vision, focus, and flexibility to fill identified infrastructure gaps”.⁹ The EU has also introduced Directives on common rules for the internal markets of electricity and gas, but the aims of this legislation are considered to be thwarted by the continuing lack of interconnections between energy networks.¹⁰ Significant work has therefore been undertaken to identify critical ‘infrastructure needs’ and how to finance them.¹¹

The projects necessary to create the TEN-E will entail huge costs and are not always commercially viable, where, for example, it can be “impossible to recover all the costs through tariffs” or “the future benefits may be too uncertain to lead to an agreement on cost allocation, and implementation of the project is delayed.”¹² Funding problems are exacerbated by the current credit crisis and subsequent cost of financing.¹³ Therefore, €5.85 billion will be made available by the EU for improving Trans-European energy infrastructure up to 2020.¹⁴ A significant issue remains however, as to how ensure that key infrastructure projects across Europe are given priority in the decision making process and subject to an efficient process of permitting. Thus, Regulation 347/2013 introduces new rules on the decision making process for ‘projects of common interest’ (PCIs).

The Regulation

The aim of the Regulation is to “lay down guidelines for the timely development and interoperability of priority corridors and areas of trans-European energy infrastructure.”¹⁵ This is to be achieved by identifying PCIs, defined as “a project necessary to implement the energy infrastructure priority corridors and areas.”¹⁶ The

⁷ Commission Communication *A Blueprint for an Integrated European Energy Network* COM (2010) 677.

⁸ Decision 1364/2006 *Laying Down Guidelines For Trans-European Energy Networks*.

⁹ Regulation No 347/2013 *Guidelines for Trans-European Energy Infrastructure*, Preamble, para 6.

¹⁰ Regulation No 347/2013 *Guidelines for Trans-European Energy Infrastructure*, Preamble, para 8.

¹¹ See further Directive 2008/114 *on the Identification and Designation of European Critical Infrastructures and their Assessment of the Need to Improve their Protection* and Commission Staff Working Paper *on Energy Infrastructure Investment Needs and Financing Requirements* (Commission, June 2011).

¹² *Connecting Europe: The Energy Infrastructure For Tomorrow* (EU Commission, 2014), p. 5.

¹³ *Connecting Europe: The Energy Infrastructure For Tomorrow* (EU Commission, 2014), p. 5.

¹⁴ See further Commission Communications *Proposal for a Regulation establishing the Connecting Europe Facility* COM (2011) 665 and *A Growth Package for Integrated European Infrastructures* COM (2011) 676. This initiative is implemented through Regulation 1316/2013 *Establishing the Connecting Europe Facility*.

¹⁵ Regulation No 347/2013 *Guidelines for Trans-European Energy Infrastructure*, Article 1.

¹⁶ Regulation No 347/2013 *Guidelines for Trans-European Energy Infrastructure*, Article 2(4).

Regulation aims to facilitate the timely implementation of such projects by “streamlining, coordinating more closely and accelerating permit granting processes and enhancing public participation.”¹⁷ It is this aspect of the Regulation that forms the focus of this paper.¹⁸

The first stage is to identify PCIs which are defined according to priority corridors and areas listed in Annex 1 to the Regulation.¹⁹ The priority corridors are broken down into electricity, gas and oil corridors and the thematic areas are smart grids, electricity highways and cross border carbon dioxide networks.²⁰ The identification of projects is undertaken by regional groups of Member States (MS) associated with these priority areas and corridors, along with the Commission.²¹ These groups will draw up a regional list of projects, and with the consent of the relevant MS, the Commission will formally adopt projects every two years.²² The PCIs identified have to meet the following general criteria:

1. The project is necessary for at least one of the energy infrastructure corridors and areas.
2. The potential overall benefits of the project outweigh the costs, including in the longer term.
3. The project has some cross-border implication.²³

There are also specific substantive criteria that apply to the different types of project, i.e., electricity, oil or gas which cover issues such as market integration, sustainability, security of supply and competition. Electricity transmission and storage projects and gas projects must contribute significantly to at least one of the listed criteria which include sustainability.²⁴ Once the PCIs are identified, the project promoter (Transmission Systems Operator (TSO), distribution system operator or

¹⁷ Regulation No 347/2013 *Guidelines for Trans-European Energy Infrastructure* Article 2(1).

¹⁸ The Regulation also includes provision to provide rules and guidance for cross-border allocation of costs and risk related incentives for PCIs and determine the conditions for eligibility of such projects for Union financial assistance. Regulation No 347/2013 *Guidelines for Trans-European Energy Infrastructure* Article 2 (1).

¹⁹ Regulation No 347/2013 *Guidelines for Trans-European Energy Infrastructure* Annex 1.

²⁰ Smart grids will “involve technologies that can efficiently integrate the behaviour and actions of all users of the network and in particular the large amounts of energy from renewable sources and electricity highways will accommodate increasing wind surplus generation and connect the new generation with hubs and major storage capacities whilst coping with variable and decentralised supplies. Annex 1.

²¹ Regulation No 347/2013 *Guidelines for Trans-European Energy Infrastructure* Article 3.

²² Regulation No 347/2013 *Guidelines for Trans-European Energy Infrastructure* Article 3.

²³ Regulation No 347/2013 *Guidelines for Trans-European Energy Infrastructure* Article 4 (1). A project with a cross border implication is one that involves at least two MS; or it is located in one state but has a significant cross border impact; or crosses the border of at least one MS and a European Economic Area.

²⁴ Regulation No 347/2013 *Guidelines for Trans-European Energy Infrastructure* Article 4(2). For electricity transmission and storage projects the sustainability criteria is defined as “inter alia through the integration of renewable energy into the grid and the transmission of renewable generation to major consumption and storage sites; and for gas projects it is defined as “inter alia through reducing emissions supporting intermittent renewable generation and enhancing deployment of renewable gas.”

other investor), must draw up an implementation plan for the project. This will include a timetable of: feasibility and design studies; approval by the national regulatory authorities; construction and commissioning; and, a permit granting schedule.²⁵ If the project “encounters significant implementation difficulties” the Commission can designate, in agreement with the MS concerned, a European Coordinator.²⁶

Permit Granting and Public Participation under the Regulation.

Article 7 (1) makes it clear that the list of PCIs establishes the “necessity of these projects from an energy policy perspective without prejudice to the exact location, routing or technology of the project.” As a result, the status of these projects as PCIs should not make any individual development consent a *fait accompli*. Article 7(2) states that PCIs should be allocated “the status of the highest national significance possible and be treated as such in permit granting processes.” MS are to designate one national competent authority (NCA) to be responsible for facilitating and coordinating the permit granting process for PCIs; although this responsibility can be subject to delegation in certain circumstances so long as there remains one authority with overall responsibility.²⁷ The NCA must be in a position to issue a ‘comprehensive decision’ which is defined as “the decision or set of decisions ... that determines whether or not a project promoter is to be granted authorisation to build the energy infrastructure to realise a project...”²⁸ MS have a choice of three types of scheme to follow in the decision making process:

- (i) The integrated scheme – the decision is issued by the NCA as the sole legally binding decision.
- (ii) The co-ordinated scheme – the decision has several constituent parts that are issued by different authorities but coordinated by the NCA.²⁹ In this case MSs may provide (a) that the NCA can establish on a case by case basis a reasonable time limit for individual decisions; (b) that an individual decision be taken by the NCA where the decision is not made in the time limits, outlined in the Regulation, and the delay cannot be justified; or the decision is not sufficiently substantiated.
- (iii) The collaborative scheme – the decision is co-ordinated by the NCA and MS may provide that the NCA can establish on a case by case basis a reasonable time limit for individual decisions.³⁰

²⁵ Regulation No 347/2013 *Guidelines for Trans-European Energy Infrastructure* Article 5. They must also provide an annual report on each project.

²⁶ Regulation No 347/2013 *Guidelines for Trans-European Energy Infrastructure* Article 6. They are appointed for one year renewable twice.

²⁷ Regulation No 347/2013 *Guidelines for Trans-European Energy Infrastructure* Article 8 (2).

²⁸ Regulation No 347/2013 *Guidelines for Trans-European Energy Infrastructure* Article 2(2).

²⁹ Regulation No 347/2013 *Guidelines for Trans-European Energy Infrastructure* Article 8(3).

³⁰ Regulation No 347/2013 *Guidelines for Trans-European Energy Infrastructure* Article 8 (3). The Regulation also specifically states that different schemes can be adopted for onshore and offshore projects. Regulation No 347/2013 *Guidelines for Trans-European Energy Infrastructure* Article 8(4).

In addition, the Regulation introduces strict time limits for the decision making process according to two clearly defined stages:

- (i) The pre-application procedure - which begins when the project promoter provides written notification of the application (including a reasonably detailed outline of the project). The time limit here is 2 years.³¹
- (ii) The statutory permit granting procedure – which begins with the date of acceptance of the application and ends when the decision is taken. The time limit here is 18 months.³²

These time limits do not include appeals or other judicial process,³³ and the total time limit of 3 years and 6 months may be extended by 9 months on a case by case basis.³⁴ At the pre-application stage the Regulation also provides a duty for project promoters to draw up a detailed schedule for the permit granting process.³⁵

On transparency and public participation, the Regulation provides a duty for MS or the NCA to produce a *Manual of Procedures* for PCIs, by May 2014,³⁶ which must be made available to the public.³⁷ The Regulation includes a number of principles for public participation to be followed during the permitting process:³⁸

- Stakeholders affected by a PCI,³⁹ shall be extensively informed and consulted at an early stage, when potential concerns by the public can still be taken into account, and in an open and transparent manner.
- Public consultation procedures are grouped together where possible and each public consultation covers all subject matters relevant to the particular stage of

³¹ Regulation No 347/2013 *Guidelines for Trans-European Energy Infrastructure* Article 10(1).

³² Regulation No 347/2013 *Guidelines for Trans-European Energy Infrastructure* Article 10 (1).

³³ Regulation No 347/2013 *Guidelines for Trans-European Energy Infrastructure* Article 10 (6).

³⁴ Regulation No 347/2013 *Guidelines for Trans-European Energy Infrastructure* Article 10 (2).

³⁵ Regulation No 347/2013 *Guidelines for Trans-European Energy Infrastructure* Article 10 (4). This must include, as a minimum, the decisions and opinions to be obtained; the authorities, stakeholders and the public likely to be concerned; the individual stages of the procedure and their duration; major milestones to be accomplished and their deadlines in view of the comprehensive decision to be taken; and the resources planned by the authorities and possible additional resource needs. Annex VI (4).

³⁶ Regulation No 347/2013 *Guidelines for Trans-European Energy Infrastructure* Article 9(1).

³⁷ Regulation No 347/2013 *Guidelines for Trans-European Energy Infrastructure* Annex VI (1). As a minimum, it must specify:

- the relevant decisions and opinions to be obtained;
- the names and contact details of the NCA, other relevant authorities and major stakeholders concerned;
- the work flow, outlining each stage of the process, including the indicative time frames and a concise overview of the decision making process;
- information about the scope, structure and level of detail of documents to be submitted with the application (including a checklist); and,
- the stages and means of participation in the process for the general public.

³⁸ Regulation No 347/2013 *Guidelines for Trans-European Energy Infrastructure* Article 9(2)

³⁹ Including relevant national, regional and local authorities, landowners and citizens living in the vicinity of the project, the general public and their associations, organisations or groups.

the procedure. Subject matters to be addressed should also be clearly indicated in the notification. Public consultation may however, take place in more than one geographical location.

- Comments and objections are admissible from the beginning of the public consultation until the expiry of the relevant deadline only (as outlined below).⁴⁰

There are also a number of specific procedural duties with respect to public participation in the decision making process. First, the project promoter must submit a 'concept for public participation' to the NCA within three months of the start of the project.⁴¹ The project promoter, or if national law requires it the NCA, must then carry out at least one 'public consultation' as part of the pre-application process.⁴² The aim of this consultation is "to inform stakeholders about the project at an early stage and help to identify the most suitable location or trajectory for the project and other relevant issues."⁴³ The Regulation specifies the following measures that must be taken as part of this consultation as a minimum:

- Publishing an information leaflet of no more than 15 pages with details of: the purpose and preliminary timetable of the project; the national grid development plan; alternative routes; expected impacts; mitigation measures; and web address; and
- Informing all stakeholders affected about the project through a website (referred to below); and
- Providing a written invitation to relevant affected stakeholders to dedicated meetings to discuss concerns.⁴⁴

The project promoter must then prepare a report summarising the results of activities related to the participation of the public.⁴⁵ The report is to be submitted with the application and must be taken into account by the NCA in making the final decision.⁴⁶ A website must also be created by the project promoter, or if national law requires it the NCA, to provide access to information about the PCI; and this must be linked to the Commission website.⁴⁷

⁴⁰ Regulation No 347/2013 *Guidelines for Trans-European Energy Infrastructure* Annex VI(3).

⁴¹ Regulation No 347/2013 *Guidelines for Trans-European Energy Infrastructure* Article 9(3). This must include, as a minimum, information about the stakeholders concerned and addressed; measures envisaged including proposed general locations and dates of dedicated meetings; the timeline; and the human resources allocated to tasks. Annex VI (2).

⁴² Regulation No 347/2013 *Guidelines for Trans-European Energy Infrastructure* Article 9(4).

⁴³ Regulation No 347/2013 *Guidelines for Trans-European Energy Infrastructure* Article 9(4).

⁴⁴ Regulation No 347/2013 *Guidelines for Trans-European Energy Infrastructure* Annex VI(5).

⁴⁵ Regulation No 347/2013 *Guidelines for Trans-European Energy Infrastructure* Article 9(4).

⁴⁶ Regulation No 347/2013 *Guidelines for Trans-European Energy Infrastructure* Article 9(4).

⁴⁷ Regulation No 347/2013 *Guidelines for Trans-European Energy Infrastructure* Article 9(7). Other 'appropriate means' should be used to publish information where the public has open access. The website shall make available, as a minimum, an information leaflet; a non-technical summary of no more than 50 pages; the project and public consultation planning; contact details in view of obtaining the full set of application documents; and contact details in view of conveying comments and objections during the public consultation. Annex VI(6).

PCIs will be subject to a number of environmental Directives such as, the EIA/SEA Directives, the Habitats Directive and the Water Framework Directive.⁴⁸ Each of these, have detailed requirements for environmental assessment. None of these provisions can, of course, stop a PCI from proceeding and the Regulation specifically states that PCIs can be considered of overriding public interest for the purposes of Article 6(4) of the Habitats Directive.⁴⁹ However, given the complexity of the legal framework for environmental assessments:

“There is a risk that the overall assessment process is not sufficiently planned and co-ordinated, which leads to parallel procedures, but also at times to unnecessary overlaps in assessments....The above issues can become bottlenecks, and ... hinder PCIs from progressing and entering into operation. All of these bottlenecks need to be addressed, and if possible remedied, without lowering the quality of the environmental assessments performed, and with a view to meeting the permitting deadlines set out in the new TEN-E Regulation.⁵⁰

Therefore, the Regulation required the Commission to publish non-binding guidance on streamlining environmental assessment procedures for PCIs.⁵¹

The Guidance outlines measures that should be taken to ensure the co-ordination of these assessments by the following means: early planning, ‘road mapping’ and scoping of assessments; early and effective integration of environmental assessments and of other environmental requirements; procedural co-ordination and time limits; data collection, data sharing and quality control; cross-border co-operation; and early and effective public participation. Of particular significance is the co-ordination of the procedural requirements for early and effective participation under the EIA Directive with those for pre-application consultation on PCIs.⁵²

The EIA Directive requires MS to ensure that the public are informed electronically and by public notices of; the request for development consent; the availability of relevant information; and the arrangements for public participation.⁵³ MS also have a duty to ensure that the public are given “early and effective opportunities to participate in the environmental decision making process.⁵⁴ However, the detailed

⁴⁸ Directive 2011/92 on the assessment of the effects of certain public and private projects on the environment; Directive (2001) 42 *on the assessment of the effects of certain plans and programmes on the environment*; Directive (1992) 43 *on the conservation of natural habitats and of wild fauna and flora*; and Directive (2000) 60 *establishing a framework for the Community action in the field of water policy*.

⁴⁹ Regulation No 347/2013 *Guidelines for Trans-European Energy Infrastructure* Article 7(8).

⁵⁰ *Streamlining Environmental Procedures for Energy Infrastructure Projects of Common Interest* (European Commission, 2013), p.14.

⁵¹ Regulation No 347/2013 *Guidelines for Trans-European Energy Infrastructure* Article 7(4) *Streamlining Environmental Procedures for Energy Infrastructure Projects of Common Interest* (European Commission, 2013).

⁵² Directive 2011/92 on the assessment of the effects of certain public and private projects on the environment. Participation is ‘optional’ under the Habitats Directive but there are also requirements in the Water Framework Directive for participation on River Basin Management Plans.

⁵³ Article 6(2) Directive 2011/92 on the assessment of the effects of certain public and private projects on the environment. This was recently amended by Directive 2014/52.

⁵⁴ Article 6(4) Directive 2011/92 on the assessment of the effects of certain public and private projects on the environment.

arrangements for informing and consulting with the public are a matter for the MS.⁵⁵ The process of public participation under the EIA Directive may therefore extend not just to the pre-application procedure but the statutory permit granting procedure. However, the EIA Directive does not include anything like the detailed requirements for pre-application consultation laid down in the Regulation. The EU Commission guidance suggests that the best means of providing an early and effective opportunity for public participation is to include the arrangements for this in a 'road mapping' exercise at the 'concept stage' of a PCI, along with the different environmental assessment procedures required.⁵⁶ This will be the responsibility of the project promoter in cooperation with the NCA.⁵⁷ The guidelines are to be implemented by MS, where necessary, by non-legislative and/or legislative means.⁵⁸

Implementation of the Regulation in the UK

In the UK, the Government "operates a liberalised energy market, in which decisions on investment in energy infrastructure are made and delivered by the private sector."⁵⁹ As all EU MS, the UK is individually concerned about the security, affordability and environmental sustainability of energy supplies; and the need to improve energy infrastructure provision.⁶⁰ The UK Government publishes a National Infrastructure Plan (NIP), the latest version of which is 2013. This sets out its long term plans for investment up to 2020.⁶¹ It has also recently introduced powers to reform the Electricity Market in the UK under the Energy Act 2013 to "incentivise up to £110 billion of further investment needed over the coming decade to replace the UK's ageing energy infrastructure with a more diverse and low-carbon energy mix."⁶² With regard to PCIs, all the priority areas concern the UK; and the priority corridors of relevance are: the North Sea offshore electricity grid, North-South electricity interconnections in Western Europe and North-South gas connections to Western Europe.⁶³ Therefore, a number of projects have been identified in the first list of PCIs that involve the development of energy infrastructure in the UK – both on and off-shore.⁶⁴

⁵⁵ Article 6(5) Directive 2011/92 on the assessment of the effects of certain public and private projects on the environment.

⁵⁶ *Streamlining Environmental Procedures for Energy Infrastructure Projects of Common Interest* (European Commission, 2013), p.15 and p.28.

⁵⁷ *Streamlining Environmental Procedures for Energy Infrastructure Projects of Common Interest* (European Commission, 2013), p. 15.

⁵⁸ Article 7(6) MS have 9 months to take non-legislative measures and Article 7(7) 2 years to introduce legislation.

⁵⁹ *Europe 2020: UK National Reform Programme 2014* (HM Government, 2014)

⁶⁰ See for example the warning from the National Grid that its capacity to supply electricity this winter will be at a seven-year low due to generator closures and breakdowns. 'National Grid warns of lower winter power capacity' 28 October 2014 www.bbc.co.uk/news.

⁶¹ *Europe 2020: UK National Reform Programme 2014* (HM Government, 2014) para 3.165.

⁶² *Europe 2020: UK National Reform Programme 2014* (HM Government, 2014) para 3.172.

⁶³ Regulation No 347/2013 *Guidelines for Trans-European Energy Infrastructure* Annex 1.

⁶⁴ These focus predominantly on cross-border projects with Ireland but also between Belgium and the UK. The projects include off-shore projects and on-shore projects to facilitate connections. See further http://ec.europa.eu/energy/infrastructure/pci/doc/2013_pci_projects_country.pdf.

As in most EU MS, new systems of planning for the energy infrastructure have been introduced in recent years that provide for a more streamlined system of 'development consent' for some energy projects.⁶⁵

In the UK, the Planning Act 2008 governs the planning of 'nationally significant' infrastructure in England, and some projects in Wales. The Act refers to a number of categories of infrastructure and uses thresholds to establish their 'national significance'.⁶⁶ 'Development consent' for these projects is granted by the Planning Inspectorate (PINs) on behalf of the Secretary of State (SS).⁶⁷ Decisions are taken in line with National Planning Policy Statements (which are produced for each category of infrastructure) unless the adverse impacts of the project on the local community would outweigh the benefits.⁶⁸ Infrastructure projects which do not meet the relevant threshold are subject to the Town and Country Planning Act 1990.⁶⁹ Decisions on these projects will normally be taken by the Local Planning Authority (LPA), although they may be 'called-in' by the SS.⁷⁰ The UK Government published its *Manual of Procedures* as required by the Regulation on PCIs, in May 2014.⁷¹ This states that the NCA will be the SS for the Department of Energy and Climate Change, which will carry out its role according to the collaborative scheme in which the decision is co-ordinated by the NCA.⁷² The responsibilities of the SS will however, be devolved to governments in Scotland, Northern Ireland and Wales as appropriate.⁷³ Indeed, the planning of infrastructure across the UK is becoming increasingly complicated by the powers of the devolved governments.⁷⁴ This paper will therefore, focus on the implementation of the Regulation in England.

It might have been expected that all PCIs, in England, would be considered as nationally significant infrastructure projects (NSIPs) under the Planning Act 2008, given the requirement in the Regulation that PCIs should be "allocated the status of the highest national significance possible and be treated as such in permit granting processes."⁷⁵ However, the Manual states that "TEN-E Regulation does not change

⁶⁵ This was the subject of a recent Conference of the European Environmental Law Forum on environmental and planning law aspects of large scale projects, the proceedings of which will be available in 2015. See further <http://www.eelf.info>.

⁶⁶ Ss14-30 Planning Act 2008.

⁶⁷ S31 Planning Act 2008.

⁶⁸ S104 Planning Act 2008.

⁶⁹ S70(2) Town and Country Planning Act 1990 and s38(6) Planning and Compulsory Purchase Act 2004 state that decisions must be taken in line with the development plan unless material considerations indicate otherwise.

⁷⁰ S77 Town and Country Planning Act 1990.

⁷¹ *Manual of Procedures for the Permitting Process for Projects of Common Interest in the UK* (Department of Energy and Climate Change, 2014).

⁷² *Manual of Procedures for the Permitting Process for Projects of Common Interest in the UK* (Department of Energy and Climate Change, 2014), para 3.2.

⁷³ *Manual of Procedures for the Permitting Process for Projects of Common Interest in the UK* (Department of Energy and Climate Change, 2014), para 3.4. The SS will normally be the consenting authority for off-shore projects as well as on-shore with the exception of electricity interconnector cables where responsibilities will be delegated to the Marine Maritime Organisation. *Manual of Procedures for the Permitting Process for Projects of Common Interest in the UK* (Department of Energy and Climate Change, 2014). para 3.5.

⁷⁴ See for example, the proposed legislation on planning in Wales. Jenkins V. 'The Proposals for the Reform of Land Use Planning in Wales' *Journal of Planning Law* (2014) Issue 10 1055-1204.

⁷⁵ Regulation No 347/2013 *Guidelines for Trans-European Energy Infrastructure* Article 7(3).

the consenting regimes applicable to energy infrastructure in the UK".⁷⁶ The Planning Act 2008 will therefore only apply to the following PCIs in England: gas transporter pipelines and other pipelines, overhead electric lines and pumped storage generating plants; but only where they exceed the relevant thresholds. This means different types of electricity interconnector projects in England will be dealt with either by the LPA under the Town and Country Planning Act 1990 or the SS under Planning Act 2008 or Electricity Act 1989.⁷⁷ Despite the fact that the SS will act as the NCA in all cases this creates a very complicated picture for developers (or project promoters as they are referred to in the Regulation) and the public alike.⁷⁸ This also means that there is insufficient room within this paper to consider the arrangements for the permitting and public participation of PCIs in all these scenarios; even only within England. Therefore, it will focus on a comparison with the requirements of the Planning Act 2008.

Permitting

There is no requirement in the Planning Act 2008, as is found in the Regulation, for developers to create an implementation plan. Furthermore, there is no legal duty, or indeed any guidance, on the use of a 'road mapping' exercise of environmental assessment; as suggested in the EU Commission's guidance. There is also no time limit on the pre-application procedure other than to state that the decision as to whether to accept the application must be made in 28 days. This is considerably less than the 3 month time limit for PCIs stipulated in the Regulation.⁷⁹ There are however statutory deadlines for the decision making process under the Planning Act 2008 once an application for development consent is made. An application for development consent is always subject to some sort of public examination which is carried out by PINs.⁸⁰ This must be carried out according to a statutory timetable and maximum period of 6 months.⁸¹ PINs provides a report of its recommendations to the SS within 3 months of the public examination and the SS then has a further 3 months to make the final decision.⁸² Therefore the total maximum statutory period for the process is 12 months, rather than the 18 months identified in the Regulation. The decision of the SS on development consents under the Planning Act 2008 is final;⁸³ but it may be subject to judicial review. This can, of course, create significant delay. The judicial review of the Hinkley Point case, for example, took nearly 17 months having been appealed to the Court of Appeal - a longer time in fact than the

⁷⁶ *Manual of Procedures for the Permitting Process for Projects of Common Interest in the UK* (Department of Energy and Climate Change, 2014), para 3.8.

⁷⁷ Regulation No 347/2013 *Guidelines for Trans-European Energy Infrastructure* Annex 1. Indeed submarine cables are considered by the Marine and Maritime Organisation.

⁷⁸ In fact, Annex 1, which sets out all the arrangements in the devolved areas of the UK for all types of project (both on and off-shore) extends to eight pages.

⁷⁹ Regulation No 347/2013 *Guidelines for Trans-European Energy Infrastructure* Article 10(1).

⁸⁰ Ss 86-102 Planning Act 2008. These provisions are supplemented by the Infrastructure Planning (Examination Procedure) Rules 2010 and the *Planning Act 2008: Guidance for the Examination of Applications for Development Consent for Nationally Significant Infrastructure Projects* (DCLG, 2010).

⁸¹ S98 Planning Act 2008.

⁸² Section 116 Planning Act 2008.

⁸³ Within 6 weeks. S118 Planning Act 2008.

decision making process on the project.⁸⁴ NSIPs may also be subject to Special Parliamentary procedure if the project involves the compulsory acquisition of certain types of land.⁸⁵ This has caused significant delay for some projects.⁸⁶ These instances in which this procedure may be invoked have however, been significantly reduced by the Growth and Infrastructure Act 2013.⁸⁷

Participation

There is provision under the Planning Act 2008 for pre-application consultation which involves not just the public but statutory bodies and local authorities.⁸⁸ The local authority is not only consulted but must be invited to submit a local impact report; the content of which is left to the discretion of the local authority.⁸⁹ The way in which the application is to be publicised is set out in regulations which state that notice must be publicised, for at least two successive weeks, in one or more local newspapers; and once in a national newspaper and the London Gazette.⁹⁰ The developer has a duty to consult directly with the 'local community' defined, as in the Regulation, as those within the vicinity of the land.⁹¹ He/she must prepare a statement setting out how they propose to consult with the 'local community' about the application.⁹² However, there is no legal provision, as in the Regulation, with regard to the detailed arrangements for this consultation process, i.e., to provide a leaflet, inform all stakeholders about the project through a website and to hold dedicated meetings for all stakeholders. Nor does the Planning Act 2008 include any general guidelines on participation as our found in the Regulation. The original guidance on pre-application consultation under the Planning Act 2008 made suggestions as to the type of consultation process to adopt and recommended calling upon the expertise of local authorities.⁹³ However, the new guidance simply states that:

"The timing and duration of consultation will be likely to vary from project to project, depending on size and complexity, and the range and scale of the impacts."⁹⁴

Therefore, under the Planning Act 2008 the nature of the consultation process is left entirely to the discretion of the developer. Developers must therefore, take particular note of the requirements of the Regulation for PCIs. In deciding whether to accept an

⁸⁴ R. (on the application of an Taisce (National Trust for Ireland)) v Secretary of State for Energy and Climate Change [2014] EWCA Civ 1111.

⁸⁵ S122-134 Planning Act 2008.

⁸⁶ The Rookery South energy from waste project, for example, was the first to gain development consent from the SS under the Planning Act 2008 in October 2011. However, it was subject to the 'special parliamentary procedure' which caused a delay of a further sixteen months. See further www.planningportal.gov.uk.

⁸⁷ Ss 24 and 25 Growth and Infrastructure Act 2013.

⁸⁸ Ss42-44 Planning Act 2008.

⁸⁹ S60 Planning Act 2008. Cross refer to later guidance. Furthermore, the local interest is represented by Parish Councils in England Infrastructure Planning (Applications: Prescribed Forms and Procedure) Regulations 2009/2264.

⁹⁰ Infrastructure Planning (Applications: Prescribed Forms and Procedure) Regulations 2009/2264, reg. 4(1).

⁹¹ s47 Planning Act 2008.

⁹² S48 Planning Act 2008

⁹³ *Planning Act 2008: Guidance on pre-application consultation* (DCLG, 2009).

⁹⁴ *Planning Act 2008: Guidance on pre-application consultation* (DCLG, 2013).

application PINs must consider the adequacy of this process of consultation which the developer must report on.⁹⁵ This is rather different to the duty under the Regulation to give ‘due account’ to this report in the final decision on the PCI.⁹⁶

The Regulation also includes a requirement for developers to create a website for their projects. Most large companies have websites that often include specific pages on individual development projects. However, the best means of accessing information is through the PINS website which includes details of the stages of each project and all relevant documentation.⁹⁷ The UK government has not set up a new web platform for the purpose of providing information about PCIs, but uses its page on consents and planning applications for national energy infrastructure projects on the Gov.UK website for this purpose.⁹⁸ There is currently no link from here to the Commission’s website.⁹⁹ Thus, the PINS website probably remains the most significant web platform for information on these projects and should in future clearly identify projects that are PCIs with links to information provided by the EU Commission.

Conclusions

Land use planning is “quintessentially a local process”;¹⁰⁰ but the need to meet the demands for secure, affordable and environmentally sustainable energy infrastructure has led to the introduction of new national planning procedures. Regulation No 347/2013 now provides guidelines for MS projects identified as necessary to complete the Trans-European Energy Network. It presents a very small step toward the development of common rules on land use planning, traditionally considered to be solely a matter of competence for MS. The aim of the Regulation is to improve efficiency in the permitting process for PCIs whilst ensuring effective means of public participation. This is a difficult balance to strike. In the permitting regime for PCIs, new time limits for the decision making process are accompanied by detailed requirements on pre-application consultation; and it is submitted that the Government should consider extending these requirements to all NSIPs decided under the Planning Act 2008.¹⁰¹ The key requirement of the Regulation, that PCIs should be allocated “the status of the highest national significance possible and be treated as such in permit granting processes”, appears however, to have been ignored by the UK Government. PCIs in England are therefore, subject to a wide range of different procedures depending on their nature and size. This clearly defeats attempts to provide a transparent system of decision making for the benefit of developers and the public alike.

⁹⁵ S55 Planning Act 2008.

⁹⁶ Regulation No 347/2013 *Guidelines for Trans-European Energy Infrastructure* Article 9(4).

⁹⁷ See further <http://infrastructure.planningportal.gov.uk>.

⁹⁸ <https://www.gov.uk/consents-and-planning-applications-for-national-energy-infrastructure-projects>.

⁹⁹ http://ec.europa.eu/energy/infrastructure/pci/pci_en.htm.

¹⁰⁰ Stallworthy M., *Sustainability, Land Use and the Environment* (Cavendish, 2002).

¹⁰¹ Indeed the Regulation states that although it applies only to PCIs “MS may nevertheless apply, by virtue of their national law, the same or similar rules to other projects which do not have the status of projects of common interest within the scope of this Regulation.” Regulation No 347/2013 *Guidelines for Trans-European Energy Infrastructure* Preamble para 39.