



Recommendations for a compulsory Sustainability Criteria of the Trans-European energy infrastructure regulation

The present recommendation explains why sustainability must be one of the obligatory criteria for the qualification of infrastructure as “project of common interest”. It also provides an analysis on the scope of the sustainability criterion and the proper integration of its environmental, social and economic pillars in trans-European energy infrastructure (TEN-E) regulation.

Recommendations

- 1) The sustainability criteria in the TEN-E should be made obligatory. This means a shift from the specific criteria to general mandatory criteria in Article 4 of the TEN-E.
- 2) The sustainability criteria must be widened to take into account nature conservation, climate protection and social criteria.
- 3) Absolute emissions reduction, nature-compatibility of infrastructure, the mitigation of impacts according to the mitigation hierarchy and the precautionary principle for the avoidance of harm to biodiversity and ecosystems should be included.
- 4) Direct or indirect support to fossil fuel infrastructure (including fossil gas and hydrogen produced from fossil fuels), oil, carbon capture and storage or use and projects that are not in line with nature protection should be excluded from the TEN-E Regulation.
- 5) The “Do no harm” principle must be applied. It needs to be assessed whether the sustainability outcome can be reached by other means, such as energy efficiency, resource efficiency, circular-economy or non-infrastructure solutions.
- 6) Projects without a credible plan for transition to net-zero and that exceed a strict emission threshold to near-zero and/or that do not comply with EU Nature Directives and the Aarhus Convention should be denied the status as Projects of Common Interest (PCIs).
- 7) A shadow carbon price, if applied, should include Scope 3 emissions, cover all greenhouse gases and methane GWP calculations should be adjusted to a 20-year timeframe. A steering effect can be reached by taking into account the recommendations of the global expert group on carbon pricing.

1. The EU Treaties sustainable development mandate

The principle of sustainable development appears in EU primary law since the Amsterdam Treaty (Articles 1(2)(5) and 2). At present, the Treaty on the European Union (TEU), in its Article 3(3) provides that the internal market must be based on sustainable development describing the three pillars of the latter: economic -“balanced economic growth and price stability”; social-“ a highly competitive social market economy”; environmental- “a high level of protection and improvement of the quality of the environment”.

Similarly, Article 11 of the Treaty on the Functioning of the European Union prescribes an obligation for the EU to promote sustainable development through the integration of environmental protection in all policies and activities of the EU. Therefore, the “integration principle” of Article 11 is binding.¹

The principle of sustainable development is further strengthened through its integration in the Charter on Fundamental Rights of the European Union, specifically Article 37. According to the wording of Article 6(1) TEU, the Charter has the “same legal value” as the EU Treaties. As a result, policies and measures adopted by the EU must not contradict the provisions of the Charter, including the sustainable development principle.

The TEN-E regulation under revision is considered as one of the secondary legislation measures that implement the principle of sustainability in the energy sector, specifically in energy networks. As explicitly mentioned in its preamble, the regulation should contribute to sustainable growth (recital 17) and trans-european networks should promote sustainable development (recital 8). Despite the clear mandate in the preamble of the TEN-E regulation, the Treaties, and the Charter of Fundamental Rights, sustainability has not been included into the mandatory selection criteria of project eligibility as TEN-E infrastructure.

The undergoing revision must remedy this inconsistency and re-align TEN-E with the principle of sustainable development and primary EU law by making sustainability one of the mandatory conditions for developing trans-european networks and selecting projects. This change is more than necessary under the Green Deal ambition to make the EU's economy sustainable given that energy systems are key components of this transition.

2. Scope of Sustainability

According to Principle 1 of Rio Declaration² “Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature”. Preserving the natural foundations of life is a prerequisite for a well-functioning

¹ See ClientEarth, “The impact of the Lisbon Treaty: An environmental perspective”, available at <https://www.documents.clientearth.org/wp-content/uploads/library/2010-02-01-what-does-the-lisbon-treaty-mean-for-the-environment-in-europe-ce-en.pdf>

²United Nations Conference on Environment and Development. (1992). Agenda 21, Rio Declaration, Forest Principles. New York: United Nations.

economic system and social justice. It is therefore important to reconcile the three "pillars" as described by the Brundtland Report³, the Rio Declaration, and the 2002 World Summit on Sustainable Development or the "circles" of sustainability which are Environment, Social and Economic in the Revision of the TEN-E Regulation. In order to achieve a sustainable outcome, these need to be balanced. The principle of "Strong Sustainability" assumes that "human capital" and "natural capital" are complementary, but cannot be duplicated. It demonstrates that substitutability of human capital for natural capital should be severely limited, as there are elements of natural capital that are critical to human existence and well-being. Natural capital usually covers the stock of environmental assets such as natural resources, biodiversity and other ecosystem structures and functions relevant for its services.

The criteria of the sustainability objective of the TEN-E regulation and of the PCI lists were largely ignored throughout the last years⁴. Food and Water Action Europe therefore raised a complaint to the European Ombudsman⁵.

Despite the fact that sustainable development in energy systems is one of the key objectives of the regulation, paradoxically sustainability is included in Article 4 as a specific, narrow and non compulsory eligibility criterion when determining key infrastructure "inter alia, though the integration of renewable energy into the grid and the transmission center and storage sites"; thus it takes no direct approach or consideration of the three mentioned pillars. Indirectly, the deployment of renewable energy might lead to climate benefits, to social benefits and economic benefits. The deployment of renewable energy alone does not ensure the implementation of "sustainability" as defined above. Energy infrastructure can lead to increased greenhouse gas emissions, especially when they transport fossil fuels. They can also be responsible for biodiversity loss, e.g. cross-cutting forest and bird collision. Social dissatisfaction of affected communities, and economic burdens on EU citizens for affordable energy supply should also be considered when assessing the sustainability of a project.

A. Environmental Sustainability

Environmental goals, such as dealing with 'acid rain', air pollution, protecting, restoring and maintaining natural habitats and protecting species and the depletion of finite fossil fuel resources have long been part of the energy policy 'trilemma' – the triple challenge of maintaining affordable, secure and environmentally acceptable energy supply. However, in the current TEN-E Regulation, this is not reflected. In recent years and across sectors, environmental, climate and energy policies have been fragmented and the 'environmental' element has been insufficiently linked.

The TEN-E Regulation should consider a wider set of environmental protection issues, such as resource use and preventing further loss of global biodiversity. In line with the new 2030

³ Brundtland, G. (1987). Report of the World Commission on Environment and Development: Our Common Future. United Nations General Assembly document A/42/427.

⁴ Deputy-Director Energy Claus-Dieter Borchhard, ITRE-Meeting, Oct 17th 2019

⁵<https://www.foodandwatereurope.org/wp-content/uploads/2020/02/FoodandWaterEuropeEU-Ombudsman-Complaint.pdf>

Biodiversity Strategy, and the EU Nature Directives, a “favourable conservation status”⁶ and the net-gain concept should be applied to reach environmental sustainability and in order to protect species through the TEN-E Regulation and bring consistency of the TEN-E Regulation with Natura 2000 and nature protection. Also resource use, resource efficiency, sufficiency and circular economy in line with the “EU waste hierarchy” must be taken into consideration and prioritised.

The climate protection criteria needs to be taken into account to deliver absolute emission reductions and to phase out fossil fuels. The future TEN-E Regulation must exclude any infrastructure projects directly or indirectly supporting or depending on fossil fuels and projects that are not in line with nature protection. The climate, health and environmental impact of an energy infrastructure project and of the Ten Year Network Development Plan must be assessed. When assessing, full life-cycle greenhouse gas emissions should be examined, including for non-renewable hydrogen. This includes up-, mid- and downstream Scope 3 emissions of the gas/ electricity which the energy infrastructure will transport, and indirect emissions generated by the production, processing or transport of energy carriers. Indirect emissions needed to transport/liquefy gas, like energy input and emissions at LNG export terminals, during shipping, and at compressor stations need to be included. Assessing the alternative and overlapping use for biogas feedstock avoids double counting and prioritizes more sustainable use of the feedstock. Methane emissions and savings of alternative uses of feedstock should be considered. The positive externalities of the project - societal change, reduction of costs, better environmental alternatives - should be taken into account.

B. Social Sustainability

The consideration of social sustainability requires a look at the negative impacts of infrastructure projects on local communities.

A socially sustainable energy transition must be centred around providing people and communities with clean, affordable, reliable energy. Public participation and community ownership models have proved important for public acceptance of new energy infrastructure, while public opposition to the energy transition can arise when communities' rights and concerns are not adequately heard and taken into account. Participatory processes under the existing TEN-E Regulation have often been sorely lacking, with great discrepancies across the efforts made by different project promoters to consult local communities when developing their projects. It has also been difficult for citizens and civil society to provide input into the broader PCI selection process due to a lack of transparency and inadequate consideration of the outcomes of public consultations.

The revised TEN-E Regulation should be fully aligned with the Aarhus Convention⁷ and allow for efficient, timely, adequate access for information and public participation when all the options are open and should provide for remedies. The Regulation should set mandatory

⁶ Epstein, Y., López-Bao, J.V., & Chapron, G. (2015). A Legal-Ecological Understanding of Favorable Conservation Status for Species in Europe. *Conservation Letters*.9(2):81-88. DOI:10.1111/conl.12200.

⁷ Aarhus(1998). Convention on Access to Information, Public Participation in Decision-making and Justice in Environmental Matter.

consultation principles as set out in the Aarhus Convention which enshrine the right of EU citizens to be informed of and involved in decisions that affect the environment including clarifying how the comments have been duly taken into account. Regional Group meetings should be more accessible to stakeholders and the decisions made during the PCI selection process more transparent and free from conflicts of interest. When a project is controversial, Regional Groups must have dedicated meetings with concerned stakeholders. Member States environmental authorities and stakeholders must have an earlier opportunity to comment on a binding infrastructure plan. Best practice examples of public participation by project promoters should be collected and all project promoters should be encouraged/required to implement these practices.

Finally, the TEN-E Regulation must secure that the public has access to procedures to remedy violations of the rights of access to information and public participation, as well as breaches of environmental legislation throughout the decision making processes of the TEN-E regulation (EU and national level).

C. Economic Sustainability

Sustained growth is assumed to be a part of the concept of sustainable development of the economy⁸. Sustainable criteria are often described as innovativeness, competitiveness or public debt. The TEN-E Regulation “contributes to smart, sustainable and inclusive growth”⁹ and is laid out to benefit the European Union in terms of competitiveness and economic, social and territorial cohesion. The level and impacts of the climate and biodiversity crisis beyond the costs incurred, the so-called “costs of inaction” are hardly counted in the public debate.

Investments in energy infrastructure are long-term investments that should be expected to deliver returns over several decades. The revised TEN-E Regulation should ensure the economic sustainability of new infrastructure projects in line with the energy efficiency first principle by only investing in projects that are compatible with the climate neutral economy of 2050 and with protecting habitats and species. This requires careful planning that includes accurate assessments of both future energy demand and the climate and environmental impact of energy projects. Failure to do so can result in the investment of EU funds in stranded assets. This has already occurred under the current TEN-E Regulation, for example in the case of the MidCat-STEP gas pipelines. The projects received a total of €6,351,067 in CEF funding before regulators ruled that it was too costly and did not respond to any market need. The risk of stranded assets requires that the TYNDP be developed or overseen by an independent body which can ensure that planned infrastructure projects will be compatible with decarbonisation and hence be in operation for the full extent of their economic lifetime.

⁸ H. Spangenberg (2005): Economic sustainability of the economy: Concepts and indicators. In: International Journal of Sustainable Development 8(1-2).

⁹ Regulation (EU) No 347/2013 of the European Parliament and of the Council of 17 April 2013 on guidelines for trans-European energy infrastructure and repealing Decision No 1364/2006/EC and amending Regulations (EC) No 713/2009, (EC) No 714/2009 and (EC) No 715/2009 Text with EEA relevance.

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