

ENERGY INFRASTRUCTURE PACKAGE: REGULATORY ISSUES

24 January 2012

Introduction

1. This paper outlines the main issues that European Energy Regulators have identified in the Commission's Proposal COM(2011)658 ('Guidelines for Trans-European Energy Infrastructure'), and Proposal COM(2011)665 ('Establishing the Connecting Europe Facility').
2. Regulators are concerned about the large and growing range of coordination and planning processes – not only those associated with the infrastructure package. (Just a few include: ten year network development plan, regional plans, national plans, Regional Initiatives, regional roadmaps, European roadmap, 3-year plan). In many cases, there are potential overlaps and interactions often involving different groups. These threaten to complicate and confuse both stakeholders and regulators alike. We should take great care before adding further to this already very long list.
3. The ten year network development planning (TYNDP) process is, in our view, central to the future of our networks. It provides an excellent basis for ensuring that all necessary projects are identified, assessed (including a comprehensive cost benefit analysis), and where appropriate incorporated into a coherent Europe-wide plan. Input into the TYNDP by the regions through the regional plans required in the 3rd Package will similarly assist in ensuring comprehensive coverage.
4. Permitting remains the biggest obstacle to timely investments. This is a particular problem in relation to cross-border projects which are essential for the achievement of the single energy market.
5. Regulators welcome and support the aims of the Infrastructure Regulation and many of the amendments we are suggesting are aimed at clarifying the Commission's proposal. This paper contains a summary of the main issues we have identified and where we are suggesting that amendments would be helpful.

The paper is divided into two parts, relating to each of the EC proposals mentioned above.

Regulators' key recommendations for a workable and effective Regulation:

- The TYNDP should be at the core of the PCI process
- The timescales for the process and for ACER review should be more realistic
- NRAs and ACER should participate fully in the regional groups, but participation should not prejudice the fulfillment of their legal objectives and duties
- There should be clear and quantifiable criteria for the cost benefit analysis methodology and for the selection of PCI projects
- The regulatory aspects of the plans for the individual projects should be reviewed by ACER, including by its Board of Regulators (in accordance with the procedure in Article 15(1) of Regulation No 713/2009)
- Only efficiently incurred costs should be allowed for cost recovery from network tariffs in order to ensure the effective use of capital

- NRAs must retain the discretion and power to decide on the nature of incentives, on a case-by-case basis, and such incentives should be proportionate to the risk incurred by investors

Proposal COM(2011)658 ('Guidelines for Trans-European Energy Infrastructure)

Process for selection of PCI projects

6. The selection (identification and criteria) of projects of common interest (PCI) is at the core of the proposal as the selected projects will benefit from a special regime in terms of permit granting procedures, regulatory treatment and direct EU financial support.

Relationship with TYNDP and national plans

7. Regulators consider that the selection of these PCIs should be based on the Ten Year Network Development Plan (TYNDP). If elaborated effectively, the TYNDPs should provide a comprehensive view of electricity and gas infrastructure development needs across the European Union. We agree with the proposal to have a rolling process whereby 'PCI candidates' must initially be in the current TYNDP, which would include proposals from transmission system operators (TSOs) as well as from 3rd parties (e.g. Member States, European Commission), and which have been subject to the cost-benefit analysis (CBA). To be accepted as PCI, projects will in addition need to comply with clearly defined selection criteria in order to ensure that progress on all investments is undertaken cost effectively and without undue delay. We welcome the Commission's proposal to have the TYNDP at the core of the process. We have made proposals for amendments which clarify and reinforce the central role of the TYNDP.

Timetable

8. The timetable in Art. 3(5) gives ACER only two months to submit an opinion to the Commission on the lists of PCI projects proposed by the Regional Groups. The Commission would have received it at least six months before the adoption date of the Union-wide list, suggesting then that the Commission has four months to adopt this list. We consider that the time period for ACER is too short for it to analyse the lists from the Groups and to consult on its views. We propose that the Groups should submit their list of proposed projects to ACER at least nine months before the adoption date of the Union-wide list, thus allowing ACER six months.

Regional Groups: governance, relationship with RI and composition

Composition of Regional Groups

9. Annex III of the draft Regulation sets out the Commission's proposals for the composition of the Regional Groups. The proposed membership of the Groups includes national regulatory authorities (NRAs) and the Agency. Regulators consider that both NRAs and the Agency should participate fully in the work of the Groups. However, we must recognise that both NRAs and the Agency have legal responsibilities set out in the Infrastructure

package, the 3rd Package and national laws in relation to proposed projects and therefore should not be placed in a position where their future decisions might be adversely affected through their work in the Groups.

European CBA (Art. 12 and Annex V)

Process

10. The proposed CBA methodology prepared by the ENTSOs is aimed at the selection of PCI projects. The use of a CBA in relation to the initial selection of projects for the TYNDP is unclear. We are proposing amendments to ensure that the CBA is undertaken as part of the initial TYNDP project selection process and that clearly defined criteria contained in the draft regulation are then used in order to select PCI projects from the TYNDP list.

PCI selection criteria

11. Some of the criteria in Annex IV which are taken into account in the CBA are insufficiently clear to base decisions on which projects should be labelled PCI. Key criteria on sustainability have no quantified thresholds to determine whether a project should proceed, thus leaving uncertainty for project promoters and lack of clarity for NRA decisions and ACER opinions. We have proposed amendments which are aimed at clarifying the criteria for the selection of PCI projects, and which also have an important role in the CBA methodology to be developed by the ENTSOs and subsequently applied by project promoters.

Investment decisions, tariffs, cost allocation

12. Art. 5 provides for a plan to elaborate the timetable leading to the completion of specific projects. The proposal is that the plan is prepared by the project promoters. The plan is used to drive the subsequent process. However, as promoters have a major interest, we propose that the regulatory elements, and in particular the timetable for regulatory approval, is subject to an opinion by the Agency.
13. Regulators recognise that providing regulatory certainty for priority investments (including clear cost allocation procedures) is a central element of the draft Regulation. Consistent with this objective, regulators consider it important that Art. 13 should be clarified to ensure that only efficiently incurred costs (rather than all costs) should be allowed for cost recovery from network tariffs in order to ensure that consumers' interests are balanced with those of investors.

Priority thematic area Smart grids deployment (Annex I, number (10) and Annex II, point 1(e))

14. Regulators doubt that a medium voltage distribution project can fit the criterion set out in Art. 4.1 (c) "the project involves at least two Member States, either by directly crossing the border of one or more Member States or by being located on the territory of one Member State and having a significant cross-border impact as set out in point 1 of Annex IV". Other initiatives by the European Commission, Member States and NRAs are already targeting smart grid projects in medium voltage distribution networks. Regulators therefore

recommend that medium voltage distribution networks are removed from the scope of a regulation which is focussed on transmission and on cross-border issues.

Incentives (Art. 14)

15. Regulators consider that the proposals relating to incentives should be clarified so that any incentives given are related to the risks of specific projects, and that NRAs retain the power to decide on the nature of such incentives on a case by case basis. We do not consider that Europe-wide guidelines are appropriate when the risks posed by projects are specific to each project. Regulators already share best practice through CEER and through ACER.
16. It should be clarified in Art. 14 that costs that investors are allowed to recover should take account of remuneration they may receive through the Inter-TSO compensation Scheme in order to avoid double remuneration.

Eligibility of projects for Union financial assistance (Art 15)

17. Regulators consider that the criteria for eligibility for Union financial assistance in the form of innovative financial instruments should be clarified in relation to PCI projects in the electricity and gas sectors. Regulators request that financial instruments should only be made available if the project is not commercially viable, to avoid crowding out of private financing and potentially resulting in delay to such projects.

Interactions with Proposal COM(2011)665 ('Establishing the Connecting Europe Facility')

Introduction

18. Regulators would like to emphasise the specific regulatory context of the energy sector with respect to the financing of infrastructure. We propose specific amendments to Proposal COM(2011)665 (herein draft CEF Regulation) and the comments below explain where there is an interaction with our proposed amendments to Art. 15 of the draft Infrastructure Regulation.

Eligibility conditions in general (Art 7)

19. Article 7 (3) draft CEF Regulation provides that *"in the field of energy, the specific eligibility conditions of actions implementing projects of common interest for Union financial aid in the form of financial instruments and grants under this Regulation are set out in Article 15 [Infrastructure Regulation]"*. Regulators have provided comments above on the need to define more clearly the eligibility for support in the form of financial instruments (under Art. 15 Infrastructure Regulation) to those PCI that clearly are not commercially viable in order to avoid crowding out of private financing and to avoid the risk that commercially viable projects will be delayed unnecessarily.

Types of financial instruments (Art 14)

20. Art. 14 (1) draft CEF Regulation provides that *"financial instruments set up in accordance with Title VIII of [the upcoming New Financial Regulation 2012], may be used to facilitate access to finance by entities implementing actions contributing to projects of common interest as defined in [the proposed Infrastructure Regulation, the proposed Guidelines for trans-European telecommunications networks and the proposed Union Guidelines for the development of the trans-European transport network], and to the achievement of their objectives. The financial instruments shall be based on ex-ante assessments of market imperfections or sub-optimal investment situations and investment needs"*.

21. Regulators agree with the general approach for financial instruments to be based on ex-ante assessments of market imperfections or sub-optimal investment situations and investment needs. As noted above, this however needs to be translated into specific conditions for access to support in the form of financial instruments (under Art. 15 Infrastructure Regulation), to ensure consistency between the legislative instruments.

22. At present, Art. 15 draft Infrastructure Regulation provides that Union financial assistance for works in the form of innovative financial instruments may be offered unconditionally to any PCI in the fields of electricity and gas. Regulators instead request that such financial instruments should only be made available if the project is not commercially viable and crowding out of private financing is thus not likely.

Access to financial instruments (Art 15)

23. Art. 15 (1) draft CEF Regulation provides that *"Actions supported by means of financial instruments shall be selected on a first come first served basis and shall seek sectoral diversification in accordance with Articles 3 and 4 as well as gradual geographical*

diversification across the Member States". Regulators consider that the allocation of financial instrument support for those projects that are not commercially viable (and thus in principle qualify for financial instrument support) should prioritise those projects yielding the highest net positive impact rather than by means of a "first come first served" rule.