LEGAL REPORT

Opportunities and restrictions for public participation in European transmission grid projects

A legal report submitted to the BESTGRID Project

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GERMANWATCH

Brief Summary

This report describes the planning and licensing process for extra high voltage transmission lines under EU and national law regulatory framework. It is shown that the TEN-E Regulation 347/2013 introduces binding priorities (PCI, Projects of Common Interest) into national planning processes, shifting participation requirements to the EU level. The comparison between the German and the UK system of planning and permitting displays the different approaches: while the regulatory system is much more refined in Germany, granting much access and public participation, the participatory approach in the UK is more open, and access to justice is easier.

Against this backdrop, the report addresses the difficult question of how results of public participation processes can best be incorporated in decision making to increase acceptance towards projects. The authors argue that while public participation as such will not lead to acceptance for projects *per se,* it is worth engaging the public at the early stages to shift participation away from perceived sheer information sharing. To reach this aim, it remains necessary to increase the public's grasp on the need for new high voltage lines, as well as on the European-level PCI project selection process (more important in continental Europe than in the UK). Round tables and any other early participation tools should and can be used, even if legally, there is no scope for consensual or self-governed decision making. What is possible, however, is formalizing an agreement that has been taken between the stakeholders and the applicant in the context of the permit granting or corridor finding procedure in the formal permit /development consent. Taking account of agreements in the authority's planning discretion does not endanger the legality of the decision. Such options may help increase acceptance more than a proliferation of further regulation of public participation options of which – at least in Germany – there are now many.

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Content

A. Background and task

1. The core question and structure of the report

We have been asked to submit a short legal report, explaining procedures for public participation for new grid projects in Germany and the UK, focusing on the following question:

How does public participation for new grid projects work and how can results of public participation processes be incorporated in decision making about the form (e.g. corridor) and structure of a given grid project

i) without endangering the legality of any taken decision,
ii) to reduce conflicts, such as legal challenges to permits, and
iii) to best incorporate local/regional knowledge in decision making?

The background to this question is evident in the general perception, also partly within the BestGrid project[1] that public participation is often an aim in itself and does not (significantly) imprint any substance on the project in question.

The strengths and weaknesses of public participation in planning and project permitting procedures is a well-researched subject both in law and sociology, as is "public participation" itself which can range from pure information to self-governance.

It is safe to say that public participation in the grid planning process (both in Germany and the UK) has been limited to information and input from stakeholders, but is far from "self-governance" with respect to the general public. As this paper will demonstrate co-decision making is not endorsed by either EU or national laws – which emphasizes the question above – how can the legal processes truly take account of the results of public participation in any given grid project or strategy.

Public participation requirements established by the 1998 Aarhus Convention[2] and the EU legislation, such as the original 1985 directive on environmental impact assessment (EIA, 85/337/EC, now with all its amendments codified by directive 2011/92/EU)[3] and the 2001 directive on the strategic environment assessment of plans and projects (SEA, 2001/42/EC) are well researched in legal literature and applied by German courts as well as the European Court of Justice (ECJ). Especially the ECJ has often set out how it values the procedural aspects in granting consent to large projects in order to observe EC environmental law.[4]

Yet, especially the legislative energy package ("Energiewende") introduced in 2011 in Germany, which also transposes the EC electricity directive (2009/72/EC) tries to explore new ways with respect to planning and decision making for energy grid projects.

In this context, this report is meant to serve as a reference point for the BestGrid handbook on participation and transparency, provided by Germanwatch, but focusses on providing an answer to the above mentioned question, using the German system as a yardstick, but at each step of the analysis also providing a "mirror" description of the UK system.

[1] http://www.bestgrid.eu
[2] http://www.unece.org/fileadmin/DAM/env/pp/documents/cep43e.pdf, UN-ECE 1998
[3] As recently amended by Directive 2014/52/EU, all EU legislation can be found on http://eur-lex.europa.eu/.
[4] See recently ECJ judgement of 7. November 2013, C-72/12 (Altrip).

2. Brief policy and legal background

Electricity supply is a vital issue for economies worldwide and while security of supply has in the past been the main yardstick for energy policy and law, more recently, this has been complemented with i) free market / consumer protection values and ii) environmental /climate change targets which influence energy supply and transmission greatly. Overall therefore, the legal systems regulating electricity are fluid and progressing, first trying to grapple with the challenges of integrating more renewable electricity into the system, but now also with designing "smart grids" which are necessary to reach energy efficiency targets, as well as enabling decentralized energy systems.

It is against this background that new grid infrastructure is physically necessary, and has gained a new public and political status as a precondition to reaching environmental goals as well as preserving energy security.

2.1 EU

The European Directive 2003/54 (concerning common rules for the internal market in electricity) stipulated liberalization in a (then) mostly state-run market. In most countries at that time, electricity was produced by state-owned enterprises or by monopolies and the grid infrastructure was likewise operated or state run like other essential infrastructure such as roads or railways. Since free trading in electricity is an aim of European policy since 1999, the grid structure in Europe came under EU scrutiny and Trans-European Energy Networks (TEN-E) were prioritized on the European level to ensure energy supply but also to ensure the technical preconditions for trading electricity would be in place. To this date however, a "non-discriminatory network access" does not exist[5] which is why the most recent electricity directive 2009/72[6] focusses on "supporting an improved and integrated grid infrastructure" and on continuing the separation of generation/supply of electricity and networks/ transmission ("unbundling"), also in order to "incentivize more renewable energy sources".

In addition to this directive, the EU seeks to improve the ability to trade in electricity through Regulation 714/2009[7], which, inter alia, establishes the European Network of Transmission System Operators for Electricity (Art. 5), which is obliged to draw up a ten-year network development plan (see below).

2.2 Germany

In Germany, the energy supply industry as well as the grid operators, while formally private corporations, were largely exempt from competition (regulated monopolies) until the first reform of the main Energy Industry Act in 1999 (*Energiewirtschaftsgesetz*, EnWG). This reform has continued – motivated *inter alia* by EC law but also by the reunification of western and eastern Germany – over the years, with another law reform in 2005[8] and the most recent "Energiewende" legislative pack-

[5] Directive 2009/72, para. 4.

[6] Directive 2009/72 of 13th July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54, OJ L 211/15.

[7] Regulation 714/2009 of 13th July 2009 on conditions for access to the network for cross-border exchanges in electricity and repealing Regulation EC No. 1228/2003, OJ L 211/15

[8] See on the history: Schneider/Theobald, Energierecht, 2013, § 1 Grundlagen des deutschen Rechts der Energiewirtschaft (Theobald).

age in 2011[9] and 2014, which will be described in more detail below since it also sets new standards with regard to grid planning and public participation. Additions and changes to the "Energiewende" legislative package have been made (e.g. EEG 2014) and are still underway – this will be described below. The entire energy "market" system is thus still comparatively new, with new laws and regulations in place which are partially still not fully tried.

The space of Germany today is shared between four transmission system operators (TSO), namely Tennet TSO, 50 Hertz Transmission, Amprion and TransnetBW, with many smaller companies sharing the distribution grid. These are licensed/certified to operate generally as such under the EnWG.

Some have argued that the systematic approach lacks consistence which implies new challenges for power grid planning. For example, while there is now a system for state grid planning, there is no such strategic approach with regard to generation capacities and locations, which some claim might be needed. There is also a lack of consistency with regard to decentralized power and heat sources as opposed to larger installations.

2.3 UK

First it is necessary to note that the UK is made up of England, Wales, Scotland and Northern Ireland. This contribution considers primarily the legal position in England and Wales, noting differences with Scotland, which has a different legal system and Northern Ireland, to whom energy policies are devolved.

The UK has been in the forefront of the privatisation and liberalisation of the electricity sector. Following the election of a Conservative government under Margaret Thatcher in 1979, industries including essential utilities were moved from public to private ownership. During the 1980's telephone, then gas, airports, water and finally, by 1990, electricity were moved to the private sector.

In 1947 when the UK electricity sector was nationalised, it had been divided into three areas: England and Wales, Scotland and Northern Ireland. This provided three separate systems, although linked by interconnectors. In England and Wales the nationalised Central Electricity Generating Board ("CEGB") included the national grid and was responsible for electricity generation and transmission in England and Wales. There were twelve area boards which dealt with distribution and supply. In Scotland and in Northern Ireland all elements of the system: generation, distribution, distribution and supply, were run by one body.

The economists who encouraged privatisation suggested doing so by splitting the national grid transmission role from the power generating role, privatising regional electricity boards, letting private companies build power stations, selling state owned power stations and ending the obligations to buy coal. By the 1990s this had been implemented.

At first the government retained "golden shares" which maintained its control. These were withdrawn in 1995. Privatisation meant that the public role and oversight of the provision of electricity inherent in public ownership and control through government and parliament was at an end. In line with EU legislation, the Government role was reduced to the ensuring fair competition, regulating natural monopoly and protecting consumers and the environment.

[9] In general on this: Buchan, The Energiewende – Germany's Gamble, Oxford Institute for Energy Studies, 2012, 1-35.

Today the urgent policy objectives are reducing carbon emissions and ensuring security of supply (see below) and the challenge is to ensure that a privatised industry can and will respond to these imperatives.

While the UK has not adopted an "Energiewende" package, grid extension and better planning for extension and connection is a major concern for OFGEM (see below).

Both for energy generation projects and new transmission lines, there has been some degree of public participation prescribed in national laws both in Germany and the UK, and since 1985 the European standards for conducting an environmental impact assessment (for specific projects) as well as a strategic environmental assessment of plans and programs (since 2001) have overlapped with these national requirements and have largely replaced them in importance.

In Germany, the *Energiewende* legislative package 2011 has now in fact installed requirements that go beyond EC law in many ways. This will be described in more detail below.

An important issue to note is that – both in Germany and the UK – any new or upgraded transmission line is a project proposed by a private undertaking for a financial return and economic interest, even if in the interest of security and stability of electricity supply. If a project is proposed hinges on economic decision making of management, and not on a decision of a public authority or government. Therefore, public participation serves a different purpose than for a state infrastructure project such as a road – even if non-discriminatory access to the networks is part of EC and national legislation, not everybody can "use" the grid, rather, most of the citizens of Europe will remain consumers of a product only, with the grid services being the main source of income of large operators.

B. Grid infrastructure planning on the European level

1. TEN-E

The guidelines for trans-European energy networks (TEN-E) list and rank, according to the objectives and priorities laid down, projects eligible for Community assistance, and introduce the concept of "project of common interest".

The TEN-E Decision 1364/2006/EC[10] (which is now repealed, but was still applicable when the new German legislation passed in 2011) listed 568 energy infrastructure projects that are eligible for Community assistance under Regulation (EC) No 2236/95 and ranks them in three categories[11].

As its Art 1 sets out, Decision 1364/2006 only "defines the nature and scope of Community action to establish guidelines for trans-European energy networks", which implies that the list of projects in not legally binding on Member States. There was no direct obligation on Member States to carry out specific projects, even if the Commission repeatedly stresses that realisation of prioritised projects, is key to achieving the Energy 2020 strategy, especially the 20% target for renewable energy in 2020.

Despite the non-binding nature of the TEN list and ranking, German courts have already accorded importance to the inclusion of a project in TEN, in particular with regard to road projects. The inclusion will serve as an indication of the common interest in the project[12] and as such will serve as a basis for an exemption from nature protection aims, as will be discussed below. They also served as a basis for the National Grid Plan, *the Bundesbedarfsplan* on the basis of the EnWG and for the list of projects contained in the 2009 EnLAG (see below).

Due to the shortcomings in grid development, the Commission set out a proposal for new TEN-E guidelines in 2011[13] and on this basis the EP and Council have adopted the new TEN-E Regulation 347/2013[14], which still identifies projects for community assistance, but also includes important provisions with respect to permit granting and public participation (Art. 7 ff.) that go far beyond the former decision 1364/2006. In particular, it is now made clear that projects of common interest must be implemented by the Member States:

> "[PCI] shall become an integral part of the relevant regional investment plans under Article 12 of Regulations (EC) No 714/2009 and (EC) No 715/2009 and of the relevant national 10-year network development plans under Article 22 of Directives 2009/72/EC and 2009/73/EC and other national infrastructure plans concerned, as appropriate. Those projects shall be conferred the highest possible priority within each of those plans." (Art. 3.6)

[10] Decision No 1364/2006/EC of the European Parliament and of the Council of 6 September 2006 laying down guidelines for trans-European energy networks and repealing Decision 96/391/EC and Decision No 1229/2003/EC. (Competence: Article 154 of the Treaty establishing the European Community, now 290 TFEU).
[11] Projects of common interest, Priority projects and projects of European interest.
[12] See only Bundesverwaltungsgericht (High Administrative Court), 9 A 25/12, judgement of 23.4.2014, para. 74; 9 A 14/12 judgement of 6.11.2013, para. 69.
[13] COM 2011/658 final, 19.10.2011
[14] Regulation 347/2013 of 17 April 2013 on guidelines for trans-European energy infrastructure, OJ L 115/39

The selection process is set out in inter alia Art 3 and 4 of the TEN-E Regulation. The process has been described[15] in the following manner:

The process of selecting PCIs takes the following steps:

1. Project promoters submit proposals to Regional Groups composed of representatives of Member States, national regulatory authorities, transmission system operators (TSOs), the Commission, the EU Agency for Co-operation of Energy Regulators (ACER) and the European Networks of Transmission System Operators (ENTSOs) for Electricity and Gas.

2. Regional groups assess the eligibility of the proposals according to criteria set out in the Regulation, such as contribution to energy security, market integration and sustainability, as well as benefiting more than one EU Member State[6]. For the second and subsequent lists of PCIs, proposals must already be in the ten-year network development plans (TYNDP) for electricity and gas, prepared by the ENTSO for Electricity and ENTSO for Gas respectively[7]. The Groups assess and rank the projects. If the number of proposed projects exceeds a manageable number, the Commission can remove the lowest ranking proposals.

3. In preparing their lists, the Regional Groups are required by the TEN-E Regulation to consult organisations representing various stakeholders, including environmental groups.

4. The decision making body of each Regional Group (decision making powers in the Groups are restricted to Member States and the Commission) adopts the regional lists of proposed PCIs (draft regional lists).

5. ACER provides an opinion on the draft regional lists, in particular on the consistent application of the criteria and the cost-benefit analysis across regions.

6. The European Commission adopts the final EU list of PCIs, through the delegated act procedure.

The fact that proposals only come from the Member States has raised criticism since this process does not guarantee that TEN-E are in the European interest, but possibly only a reflection of Member State's interest.

Stakeholder participation is required as Annex III, Point 5 requires each Regional Group to consult organisations representing relevant stakeholders, including those for environmental protection; and Article 18 requires the Commission to establish a 'transparency platform' after completion of the first list. Note however that this is not a full public participation requirement.

[15] EEB, Birdlife: Connecting Energy, Protecting Nature, 2014.

Art 7.1 of the Regulation stipulates that "the adoption of the union list shall establish the necessity of these projects from an energy policy perspective", and, Art 7.2 clarifies that "projects of common interest shall be allocated the highest national significance possible".

The regulation mandates the Commission to issue "guidelines" to streamline environmental assessments. It also sets out explicitly (in line with the German court's findings), that for the purposes of derogations under European nature protection or water law, such projects "may be considered as being of overriding public interest, provided that all the conditions set out in these Directives are fulfilled. " (Art. 7. 8 refers to the Habitat-Directive 92/43 and the Water Framework Directive 2000/60). The directives and their conditions for derogations, such as "no viable alternative to the project" still apply, but the derogations under Art 6 para. 4 Habitat Directive or Art 4 para. 7 Water Framework Directive will likely be influenced by this clause, because it may strengthen the case for a PCI having 'overriding public interest' status.

The TEN-E Regulation also contains several requirements to streamline PCI approval processes in the Member States and to increase public acceptance through participation: On the basis of Art. 8 any Member State is obliged to designate "one national competent authority" for the permitting procedure for projects of common interest. Art 9 contains public participation requirements and determines specific requirements in Annex VI.3 which complement any requirements set out in the EIA and SEA directives.

The project promoter (i.e. the operator) must submit a "concept for public participation" (Art. 9.2), which must include at least one consultation before the final application is delivered to the relevant authority (Art. 9.4), and a requirement to operate a website is set in Art. 9.7. This is new and goes beyond EIA and SEA requirements.

Art 10 sets out that the permitting phase shall consist of two procedures: pre-application (2 years) and the formal (statutory) permit granting procedure (1 ½ years).

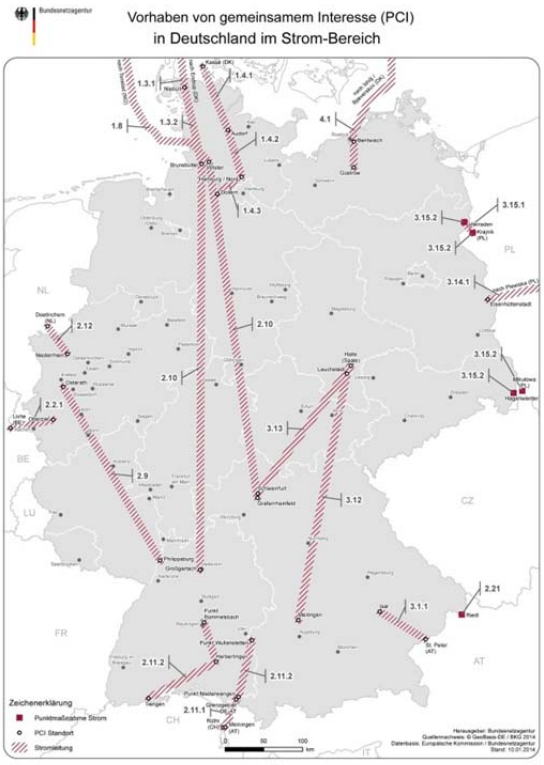
Thus, enshrined in this (little noticed) piece of EC legislation are important standards for the implementation of all large high-voltage line projects. Art. 9 of the TEN-E Regulation must always be taken into account when looking at national systems for planning a permit granting system.

There are 20 PCI identified for Germany at this stage. For the UK, there are several connectivity PCI's identified (connections to Scandinavia and France).

In response to Art. 9, the German Federal Grid Agency *Bundesnetzagentur* has published a handbook for the special procedures to be followed in licensing a project of common interest (PCI) in 2014[16] and a similar publication exists in the UK.

The following graph shows the current PCI projects in Germany,[17] which include the BestGrid projects NemoLink and SuedLink.[18]

[16] Bundesnetzagentur, Verfahrenshandbuch, Projects of Common Interest (PCI), 2014.
[17] Taken from the website www.bundesnetzagentur.de
[18] http://ec.europa.eu/energy/sites/ener/files/documents/2013_pci_projects_country_0.pdf, Nemo (p4), and SuedLink (page 19, 2.10).



A map of all European PCIs can be accessed online, the list is updated every two years.[19]

The consultation for the new list of PCI is ongoing (April 2015).

2. Ten-Year Development Plan (TYNDP)

Independently of this list of TEN-E projects, and in accordance with Regulation 714/2009 (see above) ENTSO-E[20] adopt the Ten-Year Network Development Plan (TYNDP), which is a non-binding planning (and investment related) document. This will automatically include the PCIs identified according to the TEN-E Regulation 347/2013, as is stipulated in Art 3.6:

> "6. Projects of common interest included on the Union list pursuant to paragraph 4 of this Article shall become an integral part of the relevant regional investment plans under Article 12 of Regulations (EC) No 714/2009 and (EC) No 715/2009 and of the relevant national 10-year network development plans under Article 22 of Directives 2009/72/EC and 2009/73/EC and other national infrastructure plans concerned, as appropriate. Those projects shall be conferred the highest possible priority within each of those plans."

The TYNDP 2014 explains how the operators propose to integrate by 2030 up to 60% of renewable energy, in Europe's electricity power grid. The TYNDP was produced with stakeholder involvement (Art 10 of Regulation 714/2009), including national authorities as well as all relevant grid develop-

[19] https://ec.europa.eu/energy/sites/ener/files/documents/2014_pcielec_smart_grid_cef.pdf
[20] ENTSO-E: European Network of Transmission System Operators.

ers, but not with formal public participation as specified in the SEA directive or regulation 347/2013.[21]

Naturally, since the TYNDP includes the PCI, it contains investment assumptions for projects that already are deemed of community importance. National authorities must be able to implement the TYNDP, and the entire process leads to operators losing some of their freedom of investment[22], even if the plan itself is not legally binding on any authority or indeed any grid operator proposing a new project.

[21] For the full set of documents and plans: https://www.entsoe.eu/major-projects/ten-year-network-development-plan/tyndp-2014/Pages/default.aspx

[22] Theobald/Schneider, Energierecht, 2013: § 7 (Hermes) Planung von Erzeugungsanlagen und Transportnetzen, Rd. 65.

C. Planning and licensing process in Germany

The first section will set out the legal framework for planning and licensing of new grid infrastructure in Germany, including public participation on the various stages, taking into account the EU framework.

The second section will look into the substantive standards to be complied with by operators in order to obtain a permit.

1. Context Energiewende

This section must be seen in the context of the Energiewende, i.e. the massive policy change of 2011 designed to

i) phase out nuclear power as a reaction to the Fukushima catastrophe and

ii) meet intermediate and long term climate protection targets.

The following box[23] summarises the Energiewende goals set in 2011 by the conservative-liberal government of Chancellor Merkel:

Infobox 1: Goals of the Federal Government's Energy Concept

The Energy Concept plans to cut **greenhouse gas emissions** by 40% by 2020, and by at least 80% by 2050 as agreed by the industrialised nations.

Renewables are to be expanded to become the mainstay of energy supply. The aim is to increase their share in **gross final energy consumption** from roughly 10% in 2010 to 60% in 2050. The share of renewables in **electricity supply** is to grow to as high as 80% by 2050.

At the same time, the government seeks to reduce energy consumption over the long term. Compared to 2008 levels, there is to be a 50% reduction in **primary energy consumption** by 2050. On average, this demands a 2.1% annual increase in energy productivity relative to final energy consumption.

By 2050, **electricity consumption** is to drop 25% compared to 2008, and should already be down 10% by 2020. **Final energy consumption in the transport sector** is to be reduced by around 40% by 2050 compared to 2005 levels.

Furthermore, the annual **rate of energy retrofits for buildings** is to be doubled from current levels, from one to two percent of existing buildings per year.

The following box[24] summarises the legal package:

[23] Federal Ministry of Economics and Technology: Germany's new energy policy - Heading towards 2050 with secure, affordable and environmentally sound energy, 2012, p.6.

[24] Ibid.

Infobox 2: Energy Package – six laws and one ordinance

- Act to Restructure the Legal Framework for the Promotion of Electricity Generation from Renewable Energy Sources *(Gesetz zur Neuregelung des Rechtsrahmens für die Förderung der Stromerzeugung aus erneuerbaren Energien,* EEG), including the 2011 firsthand report on the Renewable Energy Sources Act
- Act on Measures to Accelerate the Expansion of the Electricity Grid *(Gesetz über Maßnahmen zur Beschleunigung des Ausbaus der Elektrizitätsnetze,* NABEG*)*
- Act to Restructure Provisions of the Energy Industry Act *(Gesetz zur Neuregelung energiewirtschaftsrechtlicher Vorschriften,* EnWGÄndG*)*
- Act Amending the Act to Establish a Special Energy and Climate Fund *(Gesetz zur Änderung des Gesetzes zur Errichtung eines Sondervermögens "Energie- und Klimafonds",* EKFG-ÄndG*)*
- Fourth Ordinance amending the Ordinance on the Award of Public-sector Contracts
- 13th Act to Amend the Atomic Energy Act *(13. Gesetz zur Änderung des Atomgesetzes,* AtomG*)*
- Act Strengthening Climate-Friendly Measures in Towns and Municipalities *(Gesetz zur Stärkung der klimagerechten Entwicklung in den Städten und Gemeinden)*

The 2011 package has been updated several times, e.g. through the new renewable energy act (EEG) 2014[25] and again now with the plans to change parts of the EnLAG and EnWG.[26]

It was recognized early on that the current grid structure in Germany was not up to the task of implementing the drastic changes of the "*Energiewende*". More wind-derived electricity from the north of Germany would have to flow to the demand centres in the south and west of the country, thus the transmission grids would have to be expanded: large-scale extra-high-voltage lines were needed to reduce the energy lost when transporting over long distances.

The two laws focusing on grid planning and licensing procedures are the EnWG and the NABEG, which will be at the centre of the following sections.

These were preceded by the still applicable 2009 Energy Line Expansion Act *(Energieleitungsausbaugesetz,* EnLAG), now under revision, which contains a list of priority line construction projects, totaling around 1,900 kilometres of energy lines. It must be kept in mind that the procedural requirements for projects falling under the EnLAG differ substantially from any others– despite the fact that some EnLAG projects also qualify as PCI projects.

As a preset, it should also be noted that as a result of the package, the federal grid agency *Bundesnetzagentur, BNetzA* has increased its mandate in many ways and is now one of the most powerful federal agencies with respect to economic decision making. It has become the examination and decision making authority both on the spatial planning and actual permitting level for most of the important high voltage lines. This has resulted in a more centralised approach in comparison to the former procedures for licensing transmission lines which took place on the level of the states (*Länder*).

[25] Gesetz für den Ausbau erneuerbarer Energien, Erneuerbare-Energien-Gesetz, BGBl I 2014, 1066. This law has first been enacted in 2000 and has now been completely revised. The predecessor to the EEG was the federal feed-in-law of 1990, establishing the first encompassing feed in tariff for renewables in Europe.

[26] 25.3.2015 "Gesetzentwurf der Bundesregierung „Entwurf eines Gesetzes zur Änderung von Bestimmungen des Rechts des Energieleitungsbaus", http://www.bmwi-energiewende.de/EWD/Redaktion/Newsletter/2015/6/Meldung/neuerungen-fuer-mehr-transparenz-akzeptanz.html;jsessionid=DA319F7A48B5141DAD764F0A6A618B60

2. Types of transmission lines

The first necessary distinction when trying to understand the new legal system for planning and licensing grid infrastructure in Germany is which type of power grid one is looking at.

In Germany, the power grid is divided into transmission grids (extra-high voltage) and distribution grids (high voltage, medium voltage and low voltage). Only the former can pertain to any lines of European interest.

Transmission grids:

Extra-high voltage: 220 kV or 380 kV, which is used to transport electricity across the country to major demand centres. It is connected to the European grid by interconnection lines.

Distribution grids

Includes high voltage (60 kV to 110 kV, used for the rough distribution of electricity), medium voltage (6 kV to 30 kV, used to distribute the electricity to regional substations or directly to larger establishments, such as hospitals) and low voltage (230 V or 400 V (which is the actual local-level distribution).

This report focusses on the extra-high voltage lines only, even if the distribution grid is also under "reconstruction" and many extra-high-voltage projects also link in with some distribution grid lines.

The new rules with regard to the planning phases and public participation as set out in the NABEG only apply to such extra high voltages lines (both alternating current (AC) and direct current (DC) that span states inside Germany or are of a transboundary nature ("länderübergreifende und grenzüberschreitende Höchstspannungsleitungen"). However, the extra-high voltage lines without cross border importance will also feature in the Federal Requirement Plan, see below.

It is also mostly these high voltage lines that cause political debate and discussions, linked in with the Federal climate change targets. Note, however, that the development of the distribution grid is also of high importance given its role as feed-in grid for renewable electricity from solar and wind installations throughout the country.

3. The planning and licensing structure after 2011

For the extra high voltage transmission lines defined above, there is now a national grid planning phase leading to a federal list of projects to be prioritised followed by the project related planning in two steps: the spatial planning and the actual permitting phase. Since this latter "permit to build and operate" is issued through a special type of plan approval procedure (*Planfeststellungsverfahren*), all these phases can be called "planning" stages in Germany. All of them involve discretion by the authorities. The actual permit, the "Planfeststellungsbeschluss" is all encompassing, meaning that no other permits are needed for the project to be implemented."[27]

[27] Zschiesche, Assessing project approval procedures as formalised forms of public participation, Poiesis Prax (2012) 9:145–156 (International Journal of Ethics of Science and Technology Assessment)

Exempt from these three phases are only those large scale projects which have been defined as "necessary" by the German legislator in the EnLaG. This is systematically illogical and has been criticized by legal scholars. This system will therefore be described below in a separate section.

3.1 The 10 Year Plan and Federal Requirement Plan

The **first phase** is the federal planning process set to determine what is needed in terms of new grid structures and capacities, culminating in the "Federal Requirement Plan". The following box explains this process which is legally enshrined in the EnWG (§§ 12 a ff):[28]

Infobox 3: Transparent and coordinated grid expansion planning (amended Energy Industry Act)

Future grid expansion planning will be a four-stage process:

1. **Scenario framework:** The grid operators present their estimates and projections for electricity consumption, the expansion of renewable energy and conventional power plant fleets, for instance, which are to form the basis to their grid expansion plans. The Federal Network Agency encourages public consultation on this scenario framework. Every member of the public is given the opportunity to voice his or her opinion. The Federal Network Agency takes the results into consideration when approving the scenario framework. (First occurred in December 2011.)
2. **10-year grid development plan:** On the basis of this framework, the four grid operators work together to create a 10-year grid development plan. This will be posted on the Internet and all members of the public again have the opportunity to comment. (First planned for summer 2012.)
3. **Environmental report:** The Federal Network Agency creates an accompanying environmental report and again gives the public the opportunity to comment.
4. **Federal requirement plan:** On the basis of the grid development plan, the Federal Network Agency creates a draft for the Federal Requirement Plan Act, which is then to be passed by the *Bundestag*.

The grid development plan is a type of cooperative investment planning[29] parallel to the European TYNDP. The 10–year plan submitted by the operators is not legally binding as such, but once it has been adopted by the Authority (§ 12 c EnWG), it interacts with the obligation of transmission line operators to secure and build adequate transmission lines (§ 11 para.1 1st sentence EnWG) in that it contains concrete projects which are assigned to concrete operators. Also, the plan has legal influence on the necessary consent by the BNetzA to any investment decisions (§ 23 ARegV[30]) and with respect to the setting of fees (*Erlösobergrenze*, §§ 4, 11 ARegV). Therefore, it can safely be said that the operators are bound by the plans and can therefore also legally challenge them in court.[31]

There is extensive public consultation attached to these stages: § 12 a para.3 EnWG prescribes that the scenario framework must be submitted to public participation before it is adopted by the Agency (BNetzA). Then the Plan submitted by the operators is subject to participation, § 12 b para. 3 EnWG. Since the plan is subject to a strategic environment assessment, the BNetzA must draw up the assessment pertaining the 10-year plan early on and consult the public, § 12 c para. 3 EnWG. This is repeated annually, § 12 d EnWG. Note, however, that this latter time line is set to be altered and the process will only take place bi-annually.[32]

[28] Taken from note 23, p. 21.
[29] Theobald/Schneider, Energierecht, 2013: § 7 Hermes, Planung von Erzeugungsanlagen und Transportnetzen, Rdnr. 64.
[30] Anreizregulierungsverordnung, „Regulation on incentives"
[31] Kober in: Danner/Theobald, Energierecht, 81. EL, 2014, § 12c EnWG, Rdnr. 40.
[32] Fn. 26, change to § 12 a EnWG.

This planning process is entirely new to German law with respect to grid infrastructure, but has parallels elsewhere, such as in terms of road and railways infrastructure. For decades, the Government has planned construction of new infrastructure through the *Bundesbedarfsplan Straßen und Schiene* (Federal Requirement Plan for Roads and Railways), which was subject to no public participation (it is now subject to an SEA and the planned Requirement Plan 2015 has been and is open to extensive consultation). One of its major purposes was federal budget planning, since such projects are financed through the federal budget.[33] However, on its basis, the necessity of a given project was also determined by the legislator, predetermining this issue absolutely for the permit granting process. This has been accepted by the German courts.

This means essentially that the necessity of a given project included in the federal plan cannot be challenged in court by anyone – unless the court can determine that the legislator has included the project due to arbitrary reasons or circumstances leading to the inclusion have radically changed.[34]

The same function is now fulfilled by the Federal Requirement Plan in accordance with § 12 e para. 4 EnWG,[35] and the same function is also guaranteed for the EnLAG projects, see below. Therefore, the real and crucial decisions, namely the need assessment, are conducted on this basis and on the basis of macro-economic data rather than on the basis of a discussion of a concrete project set in a local framework.

The first Federal Requirement Plan was enacted in 2013 and contains 36 projects, two of them being the The BestGrid projects SuedLink (Nr. 3 and 4) and Bertikow-Pasewalk (Nr 11).[36] The plan also includes 3 direct current lines which can – under certain conditions, defined in the EnWG – be implemented using the partial underground technology.

It is questionable whether this planning phase is really open with respect to its result given that the PCI must be included in this plan pursuant to the TEN-E Regulation (see above). Since the TEN-E prioritization process is only subject to stakeholder participation, and not the same kind of public participation as under the EnWG, this essentially narrows the margin of discretion for the national authorities as well as the subject of participation. Still, the public participation in the design of the first Federal Requirement Plan has been called “very successful”, at least with respect to the information component of public participation.[37] It is clear however, that this step is highly technical and will more often than not only involve stakeholders capable of assessing this level of energy planning – not the local stakeholders and private entities that will be affected by the actual lines to be erected.

The second, two-tiered phase is regulated in the NABEG and these are both to be carried out by the Federal Network Authority (BNetzA):

[33] The Federal Requirement Plan for the grid however does not concern public budgets but really plans private behavior.

[34] See only *Bundesverwaltungsgericht*, 9 A 14/12 judgement of 06.11.2013.

[35] „Mit Erlass des Bundesbedarfsplans durch den Bundesgesetzgeber wird für die darin enthaltenen Vorhaben die energiewirtschaftliche Notwendigkeit und der vordringliche Bedarf festgestellt. Die Feststellungen sind für die Betreiber von Übertragungsnetzen sowie für die Planfeststellung und die Plangenehmigung nach den §§ 43 bis 43d und §§ 18 bis 24 des Netzausbaubeschleunigungsgesetzes Übertragungsnetz verbindlich.“

[36] Gesetz über den Bundesbedarfsplan, BBPlG, 23.07.2013, BGBl. 2013, I S. 2543 und 2014 I S. 148.

[37] Steinbach, Barriers and solutions for expansion of electricity grids—the German experience”, Energy Policy, 2013, 224-229.

3.2 Corridor Finding

Phase two – 1st tier essentially represents a spatial planning exercise for each line contained in the Federal Requirement Plan in accordance with §§ 4 ff. NABEG. Up to 2011, the individual states (*Länder*) authorities were responsible for the spatial planning as well as for the licensing of extra-high voltage lines. Projects affecting more than one state meant that processes in those states would overlap and would have to be coordinated (something that works rather well with respect to roads and railroads still). By appointing one authority, Germany corresponded to the TEN-E Regulation before this was even enacted[38].

The purpose of this phase is to identify corridors (about 1000m) for each transmission line set out as necessary in the Federal Requirement Plan (§ 5.1 NABEG). There will be no discussion about the exact location of pylons etc. but a thorough discussion on possible alternative corridors. Since the need for the respective line has been determined in the Federal Requirement Plan, there is generally no room for a discussion of the need for the particular project.

At this stage, the TSO must describe their projects in detail for the first time, and submit an application containing a possible corridor as well as possible alternatives including documentation with regard to all environmental impacts and conflicts due to the spatial dimensions of the proposed transmission line (§ 6 NABEG). The process is subject to a strategic environmental assessment (§ 5.2 NABEG), as is the case for all spatial plans on the basis of the 2001 SEA directive and the German Environmental Impact Assessment Law (UVPG).

The legislator prescribes public participation in this phase as well, which mirrors the German spatial planning procedures:[39]

A scoping conference is held (§ 7 NABEG) which is mainly for authorities and environmental organizations, but is also open to the public, a new feature in spatial planning. All the documentation accompanying the application is subject to public participation on the basis of the SEA procedures (§ 9.3 NABEG), and is to be published free of charge on the internet. Comments are due within one month. The BNetzA then conducts a public hearing (§ 10 NABEG) with all relevant stakeholders. After 6 months after the complete documentation of the application has been received by the BNetzA, the corridor decision must be taken and published, again also on the internet, which has recently become more common in spatial planning laws and greatly increases accessibility. It cannot be challenged in court (§15 NABEG).

Normally, the hearing will only discuss the submissions and substantive remarks made on the various corridors. The focus of these discussions are alternative corridors and the issues to be taken into account when making a decision on which corridor is most suitable to all interests. The BNetzA will justify this decision in the written decision only, and not in the hearing.

For the SuedLink transmission line Wilster-Grafenrheinfeld (500kV) the application has been submitted to the BNetzA in December 2014, the procedure is thus to be tested. For other projects, the scoping conference has already been conducted.

[38] There is no experience as to whether this centralisation actually reduces delays, as is for example argued by Steinbach, Barriers and solutions for expansion of electricity grids—the German experience", Energy Policy, 2013, 224-229.

[39] See on the entire process: Appel/Bugehardt, The New Planning Regime for the Expansion of the German Onshore Electricity Grid – a Role Model for Europe, Renewable Energy Law and Policy Review 2013, Heft 1, 13-31.

3.3 The final Permit / Planfeststellungsbeschluss

Phase two – 2nd tier is the actual permitting phase where an individual project is applied for by the operator and will then undergo a plan approval "*Planfeststellungsverfahren*" procedure, complete with the exact location and all technicalities, including requirements to safeguard the environment and human health and safety, which are set out in the EnWG and many different sectoral laws and regulations.

The resulting permit (*Planfeststellungsbeschluss*) is often more than 100 pages long and contains all relevant information and stipulations to enable the construction and the operation of the respective line. It can only be really understood however in conjunction with the application documents, which contain the technical plans etc.

At this stage of the proceeding, the BNetzA must, in making their decision, remove all possible conflicts among interests of the various stakeholders ("*Konfliktlösungsgebot*")[40] and must ensure that all applicable laws are upheld and implemented by the TSO when building the line itself.

The public participation requirements on this level are set out in §§ 18 ff. NABEG. The NABEG replaces the already existing permit granting system in the EnWG for NABEG lines, i.e. those extra-high voltage lines crossing internal or external state borders.

Again, after the full application has been received by the BNetzA, a scoping conference is conducted to determine the scope of the environmental impact assessment (§ 20.1 NABEG). This is open to the public but again primarily open to authorities and environmental organisations. All documents accompanying the application, i.e. including the maps / graphs and any scientific expertise on environmental matters are to be made public free of charge on the internet (§ 22.4 NABEG) and the public can submit comments within 6 weeks of the publication of the formal notification (§ 22 NABEG, § 43a EnWG; § 73 VwVfG), which is also to be published in local newspapers.

This system must now be complemented with what has been set out above with respect to Art 9 of the new TEN-E Regulation. Under this (directly applicable) provision, an operator (project promoter) must

- "within an indicative period of three months of the start of the permit granting process pursuant to Article 10(1)(a)41, draw up and submit a concept for public participation to the competent authority, following the process outlined in the manual referred to in paragraph 1 and in line with the guidelines set out in Annex VI."
- carry out "at least one public consultation … before submission of the final and complete application file to the competent authority pursuant to Article 10(1)(a). … The public consultation shall inform stakeholders referred to in Annex VI.3(a) about the project at an early stage and shall help to identify the most suitable location or trajectory and the relevant issues to be addressed in the application file. The minimum requirements applicable to this public consultation are specified in Annex VI.5."
- "prepare a report summarising the results of activities related to the participation of the public prior to the submission of the application file, including those activities that took place before the start of the permit granting process. The project promoter shall submit

[40] § 43 EnWG and § 18 NABEG: „Bei der Planfeststellung sind die von dem Vorhaben berührten öffentlichen und privaten Belange im Rahmen der Abwägung zu berücksichtigen."
[41] Art. 10 refers to the permit granting process as such.

that report together with the application file to the competent authority. Due account shall be taken of these results in the comprehensive decision."

- "establish and regularly update a website with relevant information about the project of common interest"

It has been argued that the obligation to provide "at least one public consultation … before submission of the final and complete application file" is fulfilled in the spatial planning phase, i.e. phase 2, first tier as described above.[42]

This is questionable. The TEN-E Regulation looks at the permit granting level and thus, at a very concrete project level. While the phase 2 – 1st tier spatial planning also relates to specific projects, the degree of detail is not the same with respect to the material provided. At the spatial planning phase, there is still a great deal of vagueness about the project, within a 1000m corridor a person can mostly not determine whether he or she will be affected by a pylon or the line itself near their home. A 1000m corridor is also too large to really determine any effects on agriculture or on a particular ecosystem. It is therefore arguable that an early participation must relate to the concrete line, not the corridor.

However, in practice, this obligation has already been taken up by operators in Germany by organizing informal information and dialogue events at an early stage of the planning[43], and up to now these relate mostly to the corridor finding phase. It should be stressed that this should be adapted or extended into the licensing phase, in accordance with the TEN-E- Regulation.

The German legislator has introduced a new provision into the general administrative code, *Verwaltungsverfahrensgesetz*, § 25 (3) VwVfG encouraging early participation.[44] This new provision does not place an obligation on the authority to introduce "early participation" and neither on the operator, and is thus not sufficient to implement Art. 9. Such early participation in complex planning projects is well known in German law, as communities always must undertake this step when conducting spatial planning on a communal basis (§ 3 Federal Building Code, BauGB).

Also in line with this, the Ministry of Economics is now setting up „Bürgerbüros" (citizen offices) locally to enable and improve information transfer, which will be tasked to transfer knowledge on a local basis of the pertinent projects over the three planning stages and long timelines.[45]

Whether the project will be approved is a discretionary decision, i.e. the operator cannot oblige the BNetzA to grant a permit. Every issue of private or public interest is to be weighed against each other at this stage, including any alternative routes for the planned transmission line within the corridor identified in stage 2, 1st tier (§ 18.3 NABEG).

[42] Wiesendahl, Das Gesetz zur Verbesserung der Öffentlichkeitsbeteiligung und Vereinheitlichung von Planfeststellungsverfahren (PlVereinhG) – Auswirkungen der Gesetzesänderungen im VwVfG und EnWG auf Netzausbauvorhaben auf der Grundlage des NABEG", EnWZ 2013, 291-297

[43] See BestGrid Handbook

[44] See Wiesendahl, Das Gesetz zur Verbesserung der Öffentlichkeitsbeteiligung und Vereinheitlichung von Planfeststellungsverfahren (PlVereinhG) – Auswirkungen der Gesetzesänderungen im VwVfG und EnWG auf Netzausbauvorhaben auf der Grundlage des NABEG", EnWZ 2013, 291-297.

[45] http://www.buergerdialog-stromnetz.de/

3.4 Procedure for EnLAG projects

For specific projects, a different set of rules will apply:

The EnLAG was the first law introduced to speed up grid development in transposition of the 2009 EU electricity directive. It is applicable only to extra-high-voltage lines (380kV or more) and declares the 23 projects covered in the annex as "necessary" or required for energy security (§1 EnLAG) and this is binding for the subsequent planning approval procedure (*Planfeststellungsverfahren,* § 43 EnWG).

Para § 2 of the EnLAG sets out 4 projects which "can" be implemented by way of underground cables.

As mentioned, this law will be revised if the Federal Cabinett's proposals are followed. As a consequence, there will be 6 possible underground cable pilots, and sections of other projects could become underground cables, if certain conditions are met.

EnLAG projects are not subject to the planning phases 1 and 2 – 1st tier introduced above. Rather, they will be licensed according to the procedure set out in the EnWG, including, where applicable, spatial planning on the basis of *Länder* laws. §§ 43 a-g EnWG contain public participation rules very similar to the ones introduced by the NABEG. Some PCI projects are contained in the Annex to the EnLAG which means that the TEN-E Regulation is applicable, including Art. 9 and 10. It seems obvious that these provisions must now directly apply.

Therefore, the BNetzA rightly lists early participation as a first step in the planning phase in its PCI handbook, even if there is no directly applicable provision in German law.[46]

4. Substantive legal standards for grid projects

Naturally, there are not only formal or procedurally preconditions for a new transmission line, but also many substantive standards to be fulfilled. Many different EC and national safety provisions apply before a grid project is granted. While this paper is to focus on the procedural part, some issues should be noted anyway, such as protection standards and environmental standards that must be complied with, e.g.

- Nature Protection Law, including
  - Natura 2000 /Protection of special protection areas, § 34 BNatSchG (Federal Nature protection Act)
  - Species protection §§ 44 und 45 Abs. 7 BNatSchG
- Environmental Quality standards including
  - Noise (TA Lärm)
  - Electromagnetic fields (26. BImSchV)
- Spatial Planning (*Länder* level)
- Protection of the landscape (pylons, lines), monument protection
- Protection of settlements (§ 50 BImSchG, separation of spatial uses)
- Safety requirements (§ 49 EnWG, and building codes)
- Water Law (water protection areas, flood risk areas on the basis of the General Water Law (WHG)

[46] Bundesnetzagentur, PCI Verfahrenshandbuch, p. 10.

In Germany, the law differentiates between strict rules that must be adhered to by new projects substantively, often found in safety regulations, or for example, the rule prescribing the maximum allowable electromagnetic field. For example, the German high administrative court has ruled that, in general, human health will not be an issue for grid projects, as long as the legal limits as set out in the federal regulation (26. BImSchV) are upheld.[47] There will be no room to argue scientific findings suggesting health effects below those levels.

Absolute are also some rules of nature protection law, such as Natura 2000 protection, which can only be overcome following specific exemption clauses.

Other rules are not absolutely binding, but will be subject to the described planning discretion. This is, for example, the case for rules prescribing margins between high voltage lines and settlements. Also, as long as stipulated safety margins are upheld, security of inhabitants of a settlement will not be able to argue against the stability of pylons.

One very important rule in practice is that alternative routes must be assessed fully to enable a full and sound discretionary decision. Due to the separation of power (Art. 20.3 GG), courts in Germany will assess the planning decision in detail, but will not replace their discretion as regards the actual route for the new line.

When granting the actual permit (*Planfeststellungsbeschluss*) , the BNetzA will again also have to justify its corridor-decision taken in the second phase, 1st tier.

Together, these rules provide a framework for the decision to be taken especially in the licensing phase. In practice, it has become increasingly difficult to counter grid projects on the basis of substantive law, and almost impossible for indirectly affected people (neighbors).

5. Financial Regulation in new grid projects

Due to the fact that any costs associated with new transmission lines and extensions of the grid will be borne by the consumer through grid fees, both the European Union and the German legislature has made provisions to keep the costs under control, given that for Germany alone, it is estimated that new investment of well over 20 bn € until 2020 will be needed. The TEN-E Regulation states in its preamble:

> "In an increasingly integrated internal energy market, clear and transparent rules for cost allocation across borders are necessary in order to accelerate investment in cross- border infrastructure. … charges and revenues should be taken into account only insofar as they are designed to cover the costs concerned and as much as possible related to the projects.
>
> The existing internal energy market law requires that tariffs for access to gas and electricity networks provide appropriate incentives for investment. When applying the internal energy market law, national regulatory authorities should ensure a stable and predictable regulatory framework with incentives for projects of common interest, including long-term incentives, that are commensurate with the level of specific risk of the project."

In Germany, the system has now been adapted to the incentive system also favored by the EU. Through the 2007 Incentive Regulation (*Anreizregulierungsverordnung, ARegV)* fees for using the

[47] Bundesverwaltungsgericht, Beschluss vom 28.02.2013 - 7 VR 13/12.

grid will be pre-determined by the BNetzA on the basis of past costs, using through a complicated system, which assumes efficiency gains. The BNetzA pre-determines a fixed maximum charge for any user of the grid, in turn providing the grid operators with a high degree of economic security. This system is not based on the actual amount of electricity running through the respective line and it also only represents a mirror of the real costs incurred by the respective operator.

As advertised by the BNetzA, the stipulated incentive regulation currently guarantees 9% return on capital for any new investment in new or extensions to the grid. This is achieved by the possibility to raise the fixed maximum charge after an investment plan has been presented to and a budget adopted by the BNetzA pursuant to § 23 ARegV. This possibility only applies to extensions or re-structuring measures, including all EnLAG and NABEG extra-high-voltage lines, and including, under certain conditions, underground cables.

There are specific rules for underground cable costs, as now to be included in EnLAG and the ARegV, to enable a federal splitting of costs between all users, and not only those within the regional grid system., while the general methodology is upheld.

This mechanism – which is virtually impossible to grasp by the public and involves many judgement decisions on behalf of the BNetzA – is important in relation to this report since cost considerations were often used in the past to reject any suggestions from the public that would lead to rising costs, such as using underground cable technology or alternative routes avoiding sensitive areas or settlements.

In this context, it is important to note that the same authority that is responsible for determining the maximum charge is also responsible for supporting the realization of the projects set out in the Federal Requirement Plan.

6. Legal Challenges

As noted above, the consent to the grid development plan given by the BNetzA is challengeable by the TSO in court, but not by anyone else. This is even set out in the law itself (§ 12c 4 EnWG).

The Federal Assessment Plan is technically incorporated in a formal law, which can only be challenged at the Federal Constitutional Court and with high hurdles. This also applies to those decisions taken in the EnLAG as this is also a formal law.

The corridor decision taken pursuant to the spatial planning phase prescribed by the NABEG (phase two – 1st tier) is not challengeable, § 15 NABEG. German courts have persistently ruled that spatial planning decisions are only challengeable by individuals or environmental NGOs in exceptional circumstances since they do not bind the public, but only the following administrative decision.

Only the last decision – phase two – 2nd tier, i.e. the special planning decision (*Planfeststellungsbeschluss*) can be subject to judicial review, with respect to all pertinent procedures (NABEG, EnLAG or pure EnWG). It must be noted that NGOs will only have restricted access to courts on the basis of the EIA directive and the German law on access to courts (*Umweltrechtsbehelfsgesetz*), in particular only if they participated fully in the prior consultations and only if they can argue that norms of environmental law have been infringed by the decision.

A private individual can only attempt to have the decision withdrawn if he/she is a property owner and is directly affected by pylons or the lines. A person affected only indirectly through radiation, noise or other impacts will generally only be able to claim increased protection regulations to be included in the decision.

D. The planning and licensing system in the UK

1. General

In the UK, development consent ("building") for energy infrastructure is separate from the permitting required for the operation of infrastructure, including transmission. Permission for the development of infrastructure required for transmission will often be applied for at the same time as the development consent for the connected generator.

The main regulatory act is the Electricity Act 1989. The Act establishes a licensing regime and sets out the duties of the regulator, the Gas and Electricity Markets Authority (GEMA) which delegates its administrative duties to the Office of Gas and Electricity Markets (OFGEM) and the Secretary of State – i.e. the Government minister with responsibility for energy and climate change.

Under the Act, certain activities concerning electricity may only be carried out with a licence, or under a relevant exemption or exception. The activities include transmission.

Transmission is defined as a system comprised wholly or mainly of high voltage lines and electrical plant (Section 4(4), Electricity Act 1989). "High voltage" is above 132 kV. The transmission system in the UK is effectively three different systems, each owned by the holder of a transmission licence. National Grid Electricity Transmission PLC (NGET) owns the transmission network in England and Wales. Scottish Hydro Electric Transmission owns northern Scottish transmission systems, SP transmission owns central and southern Scottish transmission assets and Northern Ireland Electricity owns the transmission assets in Northern Ireland with the System Operator "SONI" licensed as the transmission operator. The transmission systems in Great Britain are operated by "NGET" in its role as NETS System Operator (NETSO).

NGET is designated as the NETSO by the Secretary of State under the Energy Act 2004 (Designation of System Operator) Order 2004 and has additional 'NETSO' licence conditions incorporated into its transmission licence, unlike the other Transmission Owners.

The NETSO has a number of functions: its main ones are 'balancing' the NETS and providing the connection between users of the NETS and the three Transmission Owners.

The content of licences is determined by Ofgem. Ofgem is the Office of Gas and Electricity Market, a non-ministerial government department and an independent National Regulatory Authority, recognised by EU Directives. Its principal objective when carrying out its functions is to protect the interests of existing and future electricity and gas consumers.

Holding a license to transmit electricity entails certain statutory duties: for example under section 9(2) of the Electricity Act 1989 (general duties of licence holders) "it shall be the duty of the holder of a licence authorising him to transmit electricity:

a) To develop and maintain an efficient co-ordinated and economical system of electricity transmission…."

Under section 38 and Schedule 9 of the Electricity Act

"(1) in formulating any relevant proposals, a licence holder or a person authorised by exemption to generate, transmit, distribute or supply electricity:

a) Shall have regard to the desirability of preserving natural beauty, of conserving flora, fauna and geological or physiographical features of special interest and of protecting sites, buildings and objects of architectural, historic or archaeological interest; and
b) Shall do what he reasonably can to mitigate any effect which the proposals would have on the natural beauty of the countryside or on any such flora, fauna, features, sites, buildings or objects."

Ofgem is about to implement a change to the planning and delivery of electricity transmission (see Integrated Transmission Planning and regulation (ITPR) Project[48]). The project is said to be a review of the existing arrangements for planning and delivering onshore, offshore and cross border electricity transmission networks, driven by the need to reduce carbon emissions and replace existing infrastructure. But despite its title, the project, proposals and conclusions do not address the consenting regime for the construction of transmission infrastructure, which may require development consent under one of the systems outlined below and which is separate from operating consent.

The main conclusion is for a greater role for NGET, the systems operator, on the basis that they are best placed to have an overarching view of the system.

The System Operator will be given additional responsibilities to identify the need for investment in the transmission network, and coordinate and develop investment options. This will include a new network options assessment process. There could be conflicts of interest associated with these enhanced roles, and we will implement measures to mitigate any such conflicts.

2. The Planning Process

The UK has a number of different regimes for consent for energy infrastructure. Consent from the Secretary of State is required before installing overhead transmission lines.

The Planning Act 2008 ("PA 2008") created a new system of development consent for major infrastructure projects in England and Wales, which it calls nationally significant infrastructure projects ("***NSIPS***").

The new system was designed to set planning policy from the top down and reduce the need for long planning inquiries. The PA introduces "National Policy Statements" ("NPS") which are designed to simplify the planning system by setting out the policy for nationally significant infrastructure.

The NPS also sets out any particular issues which should be taken into account in the planning decision. Issues, such as the need for particular infrastructure and consideration of alternatives, are dealt with in the NPS. The key sectors to which the regime applies are energy, transport, water and waste.

Projects which are in Scotland, or below the threshold for a NSIP, will be decided under a different regime but the NPS will still guide the planning decisions.

Furthermore, in relation to offshore energy projects, the Marine and Coastal Access Act 2009 provides for a UK Marine Policy Statement, which requires all public authorities taking authorization or enforcement decisions that affect or might affect the marine area to do so in accordance with the marine policy, unless relevant considerations indicate otherwise.

[48] https://www.ofgem.gov.uk/ofgem-publications/93917/itprfinalconclusionsdecisionstatementpublicationfinal-pdf

The types of energy projects that can qualify as NSIPs, subject to meeting a size threshold, include above ground electricity lines (Section 14 (1)). Section 35 of the Planning Act gives the Secretary of State the power to direct that a particular individual project should be treated as an NSIP. Projects in the energy sector may qualify under section 35, although the power applies in England and, for offshore projects, in adjacent seas.

It is the Secretary of State[49] who decides whether or not to give development consent for NSIPs, following a planning inquiry and a recommendation, which will be described below.

The NPS will be the main consideration when deciding applications for development consent for NSIPs. Effectively, they have more weight than any other policy statement. The PA provides that the Secretary of State, who ultimately determines the developer's application must determine it in accordance with the NPS unless to do so would:

- Lead to the UK being in breach of its international obligations.
- Be in breach of any statutory duty that applies to the NPS.
- Be unlawful.
- Result in adverse impacts of the development outweighing the benefits.
- Be contrary to the regulations dealing with how decisions are made.

3. Relevant NPSs

3.1 Energy NPS

The Overarching Energy NPS (EN-1)[50] sets out the government's high level objectives, policy and regulatory framework for energy and energy infrastructure. It applies to all planning applications for new major energy infrastructure. Thus, the specific NPS for Electricity Networks (see below) has to be read in conjunction with the Overarching Energy NPS.

Part 3 of the Overarching Energy NPS identifies an urgent need for new major energy infrastructure to meet climate change objectives and ensure security of supply. The decision maker is required to give substantial weight to the contribution that proposed energy NSIPs would make to these objectives when considering individual applications.

The NPS does not include a project list.[51] Rather, Part 4 of the NPS sets out key principles for the decision-maker in examining and determining individual applications. There is a presumption in favour of granting consent, the decision maker must consider environmental, social and economic benefits and adverse impacts at a national, regional and local level and it is clear that the NPS is to prevail over local development plans.

The NPS includes guidance on assessing aspects of individual planning applications. This guidance includes:

[49] The Secretary of State for Energy and Climate Change.

[50] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/47854/1938-overarching-nps-for-energy-en1.pdf

[51] The NPS could, however, include routes and sites. The Nuclear NPS includes sites. The Transmission NPS contains guidelines and aspirations only.

- Environmental statements
- Assessments under the Habitats and Birds Directives
- CCS and carbon capture readiness
- Consideration of combined heat and power
- Climate change adaptation
- Grid connection
- Considerations of national security.

Part 5 of the NPS gives guidance on how the decision maker should deal with generic impacts. It explains what the planning inspector should consider and suggests mitigation measures in the following areas:

- Air quality and emissions
- Biodiversity and geological conservation
- Civil and military aviation and defence interests
- Coastal change
- Flood risk
- Historic environment
- Landscape and visual environment
- Land use (including the Green belt)
- Noise and vibration
- Socio-economic
- Traffic and transport

3.2. Electricity Networks NPS

EN 5, the NPS for Electricity Networks covers transmission systems above certain thresholds, associated infrastructure (including, for example, substations).

The perceived task for electricity generation is set out in the first paragraph:

> "The new electricity generating infrastructure that the UK needs to move to a low carbon economy while maintaining security of supply will be heavily dependent on the availability of a fit for purpose and robust electricity network. The network will need to be able to support a more complex system of supply and demand and cope with generation occurring in more diverse locations."

EN5 covers matters that are specific to electricity networks infrastructure. It sets out specific considerations for the impacts of electricity networks on biodiversity, geological conservation, landscape, visual, noise, vibration and electric and magnetic fields.

It recognises that, while application for new generating stations and related infrastructure should normally be in one application for development consent, this will not always be the case and sets out how separate but related applications are to be assessed.

4. Consultation and the NPSs

4.1 Consultation in the law of England and Wales

In England and Wales, legal norms for the requirements of a lawful consultation have been developed in a number of cases. Most recently, the principles were confirmed and enlarged by the Supreme Court. In essence, English law requires that:

(1) consultation must be at a time when proposals are still at a formative stage

(2) the proposer must give sufficient reasons for any proposal to permit of intelligent consideration and response

(3) adequate time must be given for consideration and response and

(4) that the product of consultation must be conscientiously taken into account in finalising any statutory proposals.

If a consultation, whether required under statutory provision, or undertaken voluntarily by a public body, is carried out then it must adhere to those legal requirements.

4.2 Consultation and the NPSs

In the case of each NPS, the UK government carried out an "Appraisal of Sustainability" ("AoS") which was intended to include the requirements of the SEA Directive – see e.g. para. 1.7.1:

All of the energy NPSs have been subject to an Appraisal of Sustainability incorporating the requirements of the regulations that implement the Strategic Environmental Assessment Directive. General information on the AoSs can be found in paragraph 1.7.1 of EN-1. Habitats Regulations Assessment was also done for all the energy NPSs."

The requirements of the SEA directive and the Habitats and Species protection require public consultation, which was carried out. Two drafts of EN 5 were consulted on.

The PA 2008 also includes the following requirements for consultation:

- Such consultation and publicity "as the Secretary of State thinks appropriate" (section 7(2) PA 2008).
- Consultation with "such persons, and such descriptions of persons, as may be prescribed" (section 7(4), PA 2008).

This must now be applied in the light of Art 9 and 10 of TEN-E Regulation. As in Germany, for PCIs there is now a separate handbook for public participation, which follows Art 9 and 10 of the TEN-E Regulation.[52]

Further democratic participation is provided for by the fact that the draft NPS must be laid before Parliament (section 9(2)). Parliament may vote on it by resolution, but if it does not vote then it is

[52] Manual of Procedures: The permitting process for Projects of Common Interest in the UK, May 2014, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/311184/uk_manual_procedures_ten_e_regulation.pdf

deemed to have been approved after 21 days. The Secretary of State must provide a response to any parliamentary resolution (section 9).

Crucially, the Secretary of State must have regard to the responses to the statutory consultation undertaken in deciding whether or not to proceed to designate the NPS.

4.3 Applying for development consent and consultation

As set out above, the NPS provides the framework for development consent and is the final say on many of the matters included within it.

In England and Wales the consent itself must be applied for under the 2008 Planning Act which, in respect of transmission infrastructure, replaces the planning consent under the 1989 Electricity Act. In Scotland, the regime under the Electricity Act must still be used, but, because under devolution arrangements energy policy is a matter reserved to UK ministers, the NPS is a relevant consideration to be taken into account in Scottish planning decisions.

Under the Planning Act, before such an application is made, the applicant must carry out consultation with a number of organisations or people (section 42 PA 2008). There is a duty to consult not the general public but:

- Persons listed in schedule 1 to the IP Applications Regulations
- The Marine Management Organisation (if relevant)
- Each relevant local authority
- The Greater London Authority, if the proposed development is on London land
- Each person falling within one or more of the categories listed in section 44 PA 2008. There are three categories:
    - A person the applicant knows is the owner, lessee, tenant or occupier of the land
    - A person the applicant knows is interested in the land, or has the power to convey it
    - A person the applicant thinks may be entitled under the Compulsory Purchase Act 1965.

Before an applicant can apply for development consent, s/he must first publish a notice of the proposed application in various places, such as national and local newspapers.

The notice must contain basic details of the application (such as the name and address of the applicant), a statement as to whether or not it is EIA development and a summary of the main proposals, including the location or route of the proposed development. The documents must be available for inspection, free of charge, the statement must give details of how to respond to the publicity notice and a deadline, not less than 28 days in the future, for a response.

The application itself must consist of documents and supporting documents which are detailed at length in the regulations and is made to the Secretary of State who must keep a register of applications, available for public inspection.

The Secretary of State has 28 days within which to decide whether or not to accept the application. Ifs/he does then there follow publicity and notification procedures similar in form to those which preceded the application.

5. The Decision making process

5.1 General

Part 6 of the PA 2008 covers the process for deciding the application for development consent.

Essentially, the Planning Inspectorate ("PI") examines the proposal for a maximum of 6 months, has a further 3 months within which to make a recommendation to the Secretary of State and the Secretary of State then has three months within which to make a decision. There are opportunities for public participation, but the inquiry will deal with only the matters which were not provided for in the NPS. So, for example, the inquiry will not be able to deal with the question of whether or not there is a need for overhead lines or whether it is preferable to have underground cable. (NPS 1.7.5)

The examination may be by a panel of appointed persons or by one single person – and it is for the Secretary of State to decide, taking into account the complexity of the case and the public interest in the outcome. Electricity networks are likely to be dealt with by a single person.

The key bodies and individuals who take part in the examination of applications for NSIPs are known as "interested parties" (section 102 PA 2008 and IP Regulations 2010) and include bodies such as the local authority. Significantly for the purposes of public participation, the list also includes "a person who makes a relevant representation about the application to the Secretary of State".

A relevant representation is, essentially, an outline of submissions concerning an application, so that interested members of the public can make their views known. However, what they say is not "relevant" to the extent that it includes material about the merits of the policy set out in the NPS. It may be that people affected by proposed projects will not have known about or not have participated in the consultation on the overarching policy and be dismayed, at this stage, to discover that the question of need, or whether the transmission would be better through underground cable, have already been decided.

5.2 The examination procedure for NSIPs

The examination procedure rules are set out in statutory rules in the Planning Act.

The examination of applications for NSIPs will be carried out in public except in the interests of defence or national security. The inspector or panel must carry out an initial exercise looking into the main issues which arise from the application. They then decide how to progress. It is possible that the procedure may be entirely in writing or will be examined by an oral process.

If there is evidence that additional expertise is required, then the Secretary of State may appoint assessors to give advice at any stage of the process.

Following the initial assessment of the application a preliminary meeting is held. Notice of the preliminary meeting should include a clear statement of what the examining authority considers to be the main issues arising from the application. The purpose of the preliminary meeting is to enable the applicant, an interested party and any other person the examining authority chooses to invite, to make representations on how the application should be examined and to discuss any other matter the examining authority wants to discuss (rules 5, 6 and 7, inspectorate of planning (Examination Procedures) Rules 2010).

Following the preliminary meeting, the examining authority will decide how the application is to be examined. The examining authority should propose a timetable for the examination of the application at, or immediately after, the preliminary meeting (rule 8, IP (Examination Procedures) Rules 2010). The timetable can then be agreed or amended following representations by the attendees of the meeting. The timetable must specify the date:

- any further relevant and written representations are to be received.
- of any hearings.
- the Secretary of State is to receive the local impact report.
- the local impact report is produced by the Local Planning Authority and gives details of the likely impact of the proposed development on or within the LPA's area.
- any comments on the local impact report from interested parties are to be received.
- any statement of common ground from the applicant and any interested parties are to be received.

The statement of common ground is a written statement prepared by the applicant and any interested parties setting out agreed factual information about the application such as a description of the site and its planning history. In addition, areas of disagreement should be highlighted.

The following procedure hinges on written representations, hearings and, where so determined, site inspections, resulting in the final decision.

Written representations / submissions should include each party's detailed case and must identify those parts of the application proposals or specified matters with which they agree or disagree, stating reasons for any disagreement. The data, methodology and assumptions used to support their submission should also be provided. It is anticipated that there will be at least two rounds of written representations. This includes relevant representations and any detailed written representations requested by the examining authority at, or following, the preliminary meeting.

In cases where the examining authority decides a hearing is required, the hearing date should be fixed as early as possible. The examining authority must notify all those entitled to appear at the hearing giving at least 21 days notice of the date, time and place of the hearing. All interested parties must be invited to participate. Once a date has been fixed it can only be changed for exceptional reasons.

The applicant who may be the TSO but may also be the generator is required to:

- Publish a notice of the hearing in a local newspaper.
- Post a notice on the examining authority's website.
- Post a notice of the hearing in one or more places where public notices are usually posted in the area to which the proposal relates.
- Post a notice of the hearing on, or as close as possible to, the site itself.

At the start of the hearing, the examining authority should identify the matters to be considered and those matters which require further information. The examining authority will determine the order in which persons should appear. However, it is expected in most cases that the applicant will give evidence first and will have the right of final reply. The examining authority should allocate a specific amount of time for making oral representations and must act fairly. The examining authority may refuse to hear evidence that is irrelevant, vexatious or frivolous.

The examining authority or the legal assistance appointed to the examining authority will probe, test and assess the evidence by direct questioning. This is a major difference to the procedure in Germany, and much more like a court hearing in other countries.

Parties will be invited to summarise their case and then be questioned on the evidence they have put forward. The examining authority will allow cross examination if it considers it necessary to test representations or to allow an interested party a fair chance to put forward its case. If the examining authority rejects a request from a party to cross examine the person making oral representation, this can be challenged by judicial review.

Persons who are entitled to appear at a hearing will not have an automatic right to call witnesses to corroborate their evidence. However, the examining authority will have discretion to permit any other person to make oral representations at the hearing.

If it so deems necessary, the examining authority can either make an unaccompanied or accompanied inspection of the land before or during the examination (rule 16, IP (Examination Procedures) Rules 2010). The examining authority cannot hear evidence or other submissions during the site visit; however, particular features of the site and its surroundings can be pointed out.

6. Making the decision – development consent

The Secretary of State is the decision-maker. The examining authority will make a recommendation to the Secretary of State. The Secretary of State is then required to make a decision within three months (Section 104, PA 2008.) The Secretary of State must prepare a statement giving its reasons for deciding to grant or refuse development consent (section 116, PA 2008).

7. PCIs, consultations and the UK regime

In some ways, the complications arising from the UK regime which separates development from operating consent, where Government sets policy but leaves it to developers to propose projects and where the prime driver for regulation is to be found in a drive for competition and a role for consumer protection carried out by GEMA and OFEGEM are manifest in the attempt to accommodate interconnectors, TEN-E and PCIs.

The Government's view is that in the UK the consenting process for major energy infrastructure are broadly similar to the procedures set out in the TEN-E regulation, and that it is therefore not necessary to implement the provisions through legislation as there is no need to materially change the UK processes.[53]

DECC (Department of Energy and Climate Change) is the national competent authority under the TEN –E, but has delegated powers to the relevant consenting authorities: PINS for NSIPs, the Marine Management Organisation for submarine electricity interconnector cables and the Scottish, Welsh and Irish ministers in those countries.

DECC states that:

"Developers should note that the TEN-E Regulation does not change the consenting regimes applicable to energy installation in the UK; the consent decision remains the responsibility of the

[53] DECC The TEN-E Regulation EU347/2013

relevant UK consenting authority. Moreover, because a project is a PCI does not mean that consent will necessarily be granted. Although PCI status establishes the need for the proposed infrastructure, any permit required for a PCI to be constructed must be determined according to the requirements of the relevant consenting regime."[54]

Yet, there are additional requirements for consultation under TEN-E, as described above, such as the minimum requirements for "public participation" in Article 9(3), Annex VI (3) and Annex VI(5), including at least one public consultation. DECC explains the interaction with the pubic consultation provisions inherent in the consenting regime as follows:

"4.29 Some UK consenting regimes set out specific requirements for consultation. For example, the Planning Act 2008 and its implementing regulations have statutory obligations to consult statutory bodies, including environmental bodies such as Natural England and local authorities before submitting an application. Prospective applicants for a DCO must prepare a "Statement of Community Consultation" having first consulted relevant local authorities on a draft of this and carry out consultations as set out in the SOCC. The developer is required to submit a report on all the statutory consultation and publicity they have undertaken with an application for an order granting consent."

The guidelines require the consenting authority to approve the concept for public participation. It is likely that any legal challenge is up to the authority's decision whether to accept the concept through the mechanism of judicial review, see below.

8. Legal challenge

The PA 2008 enables a decision on an application for development consent to be challenged by judicial review. The claim for judicial review must be made within six weeks.

The NPS cannot be challenged at the development consent stage. However, the NPS itself can be challenged within 6 weeks of its designation. A decision not to review the NPS may also be challenged in Court.

[54] Para. 3.8

E. The role of SEA and EIA

As described above, in both systems SEA and EIAs will be applicable and mandatory, following the respective EU legislation. An SEA is typically applicable to a planning exercise (plans or programs), an EIA to a distinct project.

The requirement is for a SEA to be carried out for certain public plans and programmes that are likely to have significant effects on the environment.[55] The aim of the Directive is to ensure that environmental considerations are integrated into the preparation of these plans and programmes and an environmental assessment is made before they are adopted (Articles 1 and 4). The SEA Directive 2001 complements the long-standing EIA directive (originally of [56]1985). The EIA Directive 2011 applies to the types of projects specified in Annexes I and II and can cover both public and private projects.

We briefly describe the procedures here, stressing at the outset the following:

In Germany, SEA and EIA are not free-standing procedures but integrated into a particular planning or permitting procedure such as the phases of grid planning described above, essentially serving the purpose of

i) ensuring public participation in line with EU law and

ii) amassing facts and consideration for the main task of taking a fully informed discretionary planning decision.

The system in the UK is very different system, as will be seen below.

Public participation as discussed already is wider than what is done during a SEA and EIA since interests will include issues that have no environmental focus. In practice, however, the documents generated during an SEA and EIA are the most comprehensive in any consultation and are a major basis for any decision making by the pertinent authorities.

1. Germany

SEA are mandatory for several kinds of planning exercises as stipulated in the main law on environmental impact assessments (UVPG), and have an important role in any spatial planning instrument and local landscape planning.[57] Only since 2011, there is an instrument in energy planning with a mandatory SEA attached to it: The 10-year development plan (Netzentwicklungsplan) which leads to the Federal Requirement Plan (see above), § 12c EnWG and § 14g UVPG. According to Attachment 3 Nr. 1.10 and § 14b Abs. 1 Nr. 1 UVPG there is an obligatory SEA for federal requirement plans (§ 12e EnWG).

The main documentation to be set out for public participation is the draft plan and the accompanying environmental assessment (*Umweltbericht*). This as well as any result of the consultation process following the publication of the draft and the EA must be taken into account in the final

[55] Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment.

[56] Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment.

[57] See: Weiland, Strategic Environmental Assessment in Germany, Practice and open questions, Environmental Impact Assessment Review 30 (2010) 211–217.

decision by the BNetzA (§ 14k UVPG). Yet, there is no substantive requirement such as that the decision cannot be taken in case of significant environmental impacts.

Another level of SEA is required for the corridor planning phase in accordance with NABEG (§ 7 ff.) as well as under the *Länder* laws on spatial planning. In this SEA procedure, the results of the first tier SEA may be taken into account. The TSO is to provide the Environmental Assessment and again, the results of the SEA are only to be taken into account, but no specific substantive standard is attached to its results.

Deficiencies on the SEA are – to date – not challengeable in court as such, but would only serve to challenge the BNetzA's discretionary decision making itself.

The EIA is attached to specific projects and will be carried out on the last planning level, i.e. the *Planfeststellungsverfahren* in accordance with the NABEG or EnWG/EnLAG. Deficiencies on this latter level are challengeable in court.

2. UK

In the UK, energy policy is set by the Government but plans and projects are, generally speaking, developer led.

The Government chose to carry out an SEA as part of the appraisal of sustainability for the NPSs. It also carried out an SEA of the Marine Policy Statement. It is not clear that it considered that it had to do so due to EC law.

Domestic case law suggests that a strict approach is being taken to what amounts to a plan or programme which sets the framework for future development consent and that it is therefore, possible to have plans or programmes that will have considerable environmental effects but do not have to undergo an SEA.

Yet, in a recent case, the Court of Justice of the European Union (ECJ) gave a wide interpretation to the definition of plans and programmes. The court held that:

- Plans and programmes that were not mandatory under national legislation were still within the scope of the SEA Directive 2001.
- An SEA would be required for repeals of plans or programmes as well as their preparation or modification[58]

However, in one of the cases involving the proposed High Speed Railway to be built between London and Manchester the Court rejected an argument that safeguarding directions, (spatial planning decisions intended to protect the route or corridor for the railway by ensuring that new developments do not impact the ability to build or operate the HS2 or lead to excessive additional costs) should not be subject to an SEA.

The Court of Appeal said that the safeguarding directions did not:

- Constitute a plan or programme setting the framework for future development consent under the SEA Directive 2001
- Prevent the likely environmental impacts from being taken into account in applications for planning permission.

[58] Inter-Environnement Bruxelles ASBL v Region de Bruxelles-Capitale [2012] C-567/10.

The Court of Appeal considered that the safeguarding directions were a procedural addition to the legislation which governs development control decision-making in the safeguarded zone but they did not constrain the discretion of the decision-maker in making decisions about developments in that area.

This does not, however, preclude the necessity for environmental assessment under the EIA directive at the stage of applying for project permission.

In the UK, the EIA is implemented through secondary legislation that relates to the primary consenting legislation – e.g. the Planning Act 2008 and the Marine and Coastal Access Act 2009. There is also legislation which implements the EIA for particular forms of infrastructure.

Electricity interconnector submarine cables do not fall within either Annex I or Annex II of the EIA directive, although the MMO may require an environmental statement. If there is no EIA there may be no public consultation.

F. Comparison of the systems

The following table seeks to compare systems set up to enable the construction of new high voltage lines, taking into account the EC level.

sp – stakeholder participation

pp – public participation

Instrument	**EU**	**Germany**	**UK**
Licence for TSO generally	General requirements in Regulation 714/2009, no pp	EnWG, procedural step only, no pp	Electricity Act, substantive requirements for the TSO "when formulating proposals", no pp. The licence is the main instrument of regulation.
Needs assessment/policy phase	PCI/TEN-E, with sp but not pp and on a very abstract level, criteria set out in law Ten-Year Network Development Plan (TYNDP), with sp but not pp	EnWG, Federal Requirement Plan, with sp and pp with SEA EnLAG (no sp and pp)	Planning Act - National Policy Statements" ("NPS") on energy and electricity transmission, with pp (Appraisal of Sustainability" ("AoS") The AOS includes a SEA with pp.
Corridor finding/spatial planning for new projects	No requirements	Spatial Planning under *Länder* jurisdiction (EnLAG) with SEA and pp (ROG) New federal corridor finding procedure (NABEG), full pp, and with SEA	No procedure save for safeguarding Government could produce a proposal for a project which conformed to the SEA definitions and would then have to carry out an SEA.

Permit for a grid project (to build/operate)	PCI: procedural requirements for MS in TEN - E Regulation 347/2013; e.g. PCI permitting process shall only take 2 years of pre-application and 1½ years for permit granting (Art 10)	*Planfeststellungsverfahren*, EnWG and NABEG, all issues to be discussed and weighted decision to be taken, full pp Written submissions, oral hearing, but without need on behalf of the authority/applicant to state their case, only to discuss the submissions The authority seeks to settle conflicts, not to be convinced by arguments by the public, subject is the application by the operator	Planning Act, in the case of nationally significant projects. If below the threshold, then consent under Town and Country Planning Act or under Marine Management Act e.g. in Scotland decided under separate regime but with NPS as material consideration“ development consent”, issues decided in the NPS are not under discussion, full pp Examination procedure very detailed, several written and oral hearings, site inspections, etc. Real hearing with examinations of evidence, applicant needs to convince the SoS
Legal Challenges	PCI - Not possible.	TSO: Can challenge ten-year-plan but not Federal Requirement Plan (formal law) Public/Env NGOs and TSO can challenge phase two - 2st tier planning decision only, and environmental groups only with regard to environmental protection issues (*Planfeststellungsbeschluss*)	Judicial review is a flexible challenge. Challenges to the NPS must be within 6 weeks and to development consent within 6 weeks. But there could be lesser decisions along the way – e.g. to approve a concept of public participation – which could in itself be challenged following the normal principles of judicial review

While there is a very high level of public participation in both systems, and even to some extent on the removed level of EU priority setting (PCI), the system remains inherently complex and also intransparent.

This is very apparent when, as a citizen in Germany, one will not know which type of procedure applies to the pertinent high voltage line unless one has the capacity to understand the system between NABEG, EnWG and EnLAG. Similarly, a person in the UK would need to understand the thresholds set by the NPS. Moreover, a person would need to know whether the project is part of a PCI to determine whether the rules of the TEN-E Regulation apply, especially those with respect to early participation.

Also, the understandable desire to take decisions step by step, and making the first tier decisions binding on lower levels (in Germany: Federal Needs Assessment Plan is binding on all lower levels,

in the UK, the NPS are set in stone for the development consent procedure) will necessarily lead to situations where a person affected by a particular project will be faced with a "set decision", and a procedure leading to the actual permit where the pertinent decision making step will only deal with the "how" of a particular high voltage line, and not the "if". This has been described for both the German and the UK system.

This is inherently frustrating, and especially apparent with regard to the PCIs which – by definition – cannot be questioned by the Member States but are set (in principle, not in corridor) for whatever national process is to follow.

The preceding sections have also shown clearly that neither the EU or member state provide room for actual self-governance with respect to projects of grid extension. The public participation system or consultation (as termed in the UK) is set to provide information and to enable sound decision making on behalf of the authority, but any project already deemed necessary in the first planning phase will have a built-in presumption of consent. In Germany, this is a fact even if the TSO does not have an actual right to approval versus the BNetzA. In the UK, the participation process seems more open generally, but at the same time, the Government employs a very closed interpretation of SEA resulting in programmes and plans in grid design not made subject to an SEA.

In Germany, this leads to a situation where, while in theory the Federal Requirement Plan is approved and binding, local politics such as in Bavaria still question the need for projects such as the SuedLink. This is described further in the BestGrid Handbook published in conjunction with this legal report. Also, most of the larger transmission line projects have their own "resistance" group with its own internet site, advice and news section.

In the UK, the energy discussion is still very much ongoing and there is no consensus regarding the need for new transmission lines.

Thus, against this backdrop, how can any results of public participation processes be incorporated in decision making about the form (e.g. corridor) and structure of a given grid project

iii) without endangering the legality of any taken decision,

iv) to reduce conflicts, such as legal challenges to permits, and

v) to best incorporate local/regional knowledge in decision making?

We try to discuss this in a practical way, i.e. not in a sociological or academic setting, in the following section.

G. Discussion – options for strengthening public participation and the subsequent decisions

1.

Public participation as such will not lead to acceptance for projects *per se* as long as the major projects are politically debated. Rather, it is a question how and how early participation is organised. As has been described elsewhere, acceptance for a given project is the product of insight, self-efficacy, benefit and identity[59].

Acceptance is undoubtedly necessary to increase the implementation and speed of projects – should they be in the common interest and should they serve further climate protection and other environmental and economic aims.

2.

As a precondition for insight, there needs to be a transparent and well-founded justification for any new project. Generally, therefore, it seems advisable to follow up on and increase the public's grasp on the need for new high voltage lines, and to stress the importance of the macro level procedures such as the Federal Needs Assessment in Germany, leading to the federal Requirement Plan set out by law, and the NPS in the UK. The system in the UK is, in that regard, less suitable than the one adopted since 2011 in Germany.

The more abstract the level of planning, the more room there is to incorporate public opinions rather than only those of the applicants (TSOs). The abstract level, in Germany that of the Federal Requirement Plan, following the needs assessment on a national level is the one where policy arguments can most freely flow. However, given the level of such planning (strategic planning for the whole of Europe and the Member States), it is practically impossible to involve all citizens affected by the discussed major infrastructure projects at this stage.

From a structural point of view, it seems that the UK system of an inquiry which has a real discussion culture, with witnesses and oral debate might be a system of choice on this level. Certainly in Germany, the fact that there is relatively little oral debate but mostly a written submission culture, with decisions of the BNetzA not being defended orally, has been criticized.

Issues such as energy demand, energy supply, future development and markets are also rich in economic and technical assumptions which can never be right or wrong but always reflect possibilities of the future only. That is the core of policy. Therefore, it might be advisable to have these plans setting out the need of certain projects in grid development be subject not to only a regulatory (such as in Germany) procedure, but a parliamentary procedure (such as in the UK).

To further increase transparency, it could be advisable to complement this stage of planning with documents designed to explain the final decision. At least in Germany, once the Federal Requirement Plan has been adopted, it is not easy to follow the reasoning for the concrete project, once it gets to the spatial planning and permit granting phase.

It could also be advisable to open the Needs Assessment level to legal challenges to increase their credibility. This could be arguably necessary anyway on the basis of implementing the Aarhus Convention on public participation and access to justice (Art. 9.3).

[59] See: Helmholtz Gesellschaft, Öffentlichkeitsbeteiligung bei Planungsvorhaben der Energiewende, policy brief 2014/1.

Also, a particular system could be prescribed on a local level, helping groups and citizens to understand and question the final decisions on the public need, which are, both in Germany and the UK, irrefutable once set out in law or NPS.

3.

Clarity is needed with regard to PCI.

In Germany, there is today a total of 23 projects (EnLAG) plus 36 projects (Federal Requirement Plan), thus 59 projects which are deemed legally necessary to implement. 20 of them are in fact PCI projects, which have been pre-determined on the European level, without wider consultation apart from the Brussels-based NGOs and think tanks. This means that the participation on the member state level is not effective for almost 1/3 of the nationally important projects. The situation in other Member States (if not in the UK) is similar.

This is a fact that must at least be communicated and discussed, possibly to increase participation at the level of the PCI. This could be done by integrating public participation to the PCI into the national level planning, and in the UK by clearly integrating TEN-E into the NPS (deadlines and procedures allowing).

Any comments on the PCI list by the general public could be fed into the EU level by the planning authorities as well.

4.

Clarity is also needed when it comes to the mandate of any stakeholder facilitating or opening public participation.

Given the many different steps in planning for grid infrastructure and the many political interests involved, the boundaries between applicant and authority, as well as between other stakeholders get blurred. To increase acceptance, it is necessary to clearly state the interests of the TSO, which is the mandate of the authority and who else is involved.

There should also be clarity about official and inofficial processes, to enable stakeholders to focus and prioritise if needed.

5.

Public Participation is necessary on a wholly different level when looking at a specific project with respect to a specific corridor or route. It can and does increase acceptance with regard to specifics of the line or the corridor. At least in Germany, the phase of spatial planning (choosing the corridor) is often not taken seriously enough, but must be at the core of any efforts by local groups of affected citizens.

However, also on this level it must be clear that the pertinent authority, in Germany the BNetzA (for NABEG projects) or regional spatial planning authorities will have to take a decision, based on best discretion. Not everybody's opinion will be followed, even if it was heard. This is a cornerstone of planning law in Germany and the UK, and at least in Germany is set out in the separation of powers in the Constitution (Art. 20 Grundgesetz, GG). This said, a cornerstone of planning law is also that the reasons for not following certain demands be made transparent.

However, given the complexity of planning procedures it might be advisable to set up impartial bodies to facilitate the process, and who can also communicate the benefits of getting involved. This would also increase the feeling of self-efficacy.

In Germany, the BNetzA is not impartial since it is the decision-making authority for most procedures (save the ones still under the auspieces of the *Länder*). Rather, it is the authority carrying out most of the decisions related to the *Energiewende* and the improvement of the national grid. In the

UK, the Secretary of State and the examining authority in the development consent procedure are also not impartial, as soon as the NPS sets out the assumption in favor of granting consent. Environmental and other NGOs are also representing a particular interest in the procedure.

If the idea of the citizen offices in Germany, set up by the intrinsically involved ministry of economics, will serve to this effect remains to be seen. The TSOs themselves have legal obligations under the respective legislation but are not viewed to be impartial by any account and thus, only of limited use to achieve at least some impression of impartial advice given to affected citizens and stakeholders.

6.

There is a need to explain and make transparent any substantive law rules pertaining to the grid extension on development projects.

It is often perceived that while the procedural questions have been widely published and legally improved, there has been little attempt to strengthen, for example, the interests of residents, which want to see a focus on the protection of their residential or recreational areas and landscape. In practice, such considerations are wholly discretionary and only partially open to legal challenge. At least in the UK, such considerations are set out in law to be followed by the licence holder. While there is a very open discussion about margins around wind farms, and now even specific laws regulating such margins (in Bavaria), there is little transparent regulation with regard to high voltage transmission lines.

To increase credibility, the pertinent rules on electromagnetic fields might also be questioned with public participation and should not take place behind closed doors as a Governmental Regulation (in Germany: 26. BImSchV, a Government Regulation on the basis of the German “Clean Air Act”, the BImSchG).

There is also a need to develop more transparent guidelines with respect to landscape protection.

This is especially important since, at least in Germany, there is a perception that absolute standards exist for habitat and species protection, but not for human beings and their livelihood (which is often the one house the value of which will be decreased due to an infrastructure project).

7.

There is a need to increase cost transparency.

On the level of corridor and route finding for new high voltage lines and even in substitute lines for existing lines, there is a “black hole” with regard to costs, which, on the other hand, play a crucial role for the TSO and the BNetzA when granting a particular project. It appears that costs are also quite important to Ofgem in the UK, even if they are not central to the development consent phase.

At least in Germany, where the debate is more virulent, very often, alternative routes will be denied due to cost reasoning without the public being able to grasp the basics of any cost analysis. This does and will decrease acceptance.

The public debate centers on costs, but this often only pertains to the actual costs which are borne by users based on the regulatory decisions taken in earlier stages.[60] In every project, there will be several alternatives, avoiding settlement, or avoiding special protection areas. If the public cannot

[60] See for example the contribution of RAP (Regulatory Assistance Project) demanding transparency on fees for power grids http://www.raponline.org/document/download/id/7431.

understand the cost difference between the two, acceptance for the one route which entails more perceived negative impacts is impossible.

Stakeholders are often also consumers, eventually paying grid fees, and should be able to take an informed decision about the cost implications for them and others.

8.

There is a need for transparency with regard to expropriation, as well as prices for the acquisition of land for the purpose of grid projects. Since, at least in Germany, property owners have the strongest position in law to challenge and thus delay projects, there should be a transparent price, and possibly procedure to set those prices. At the moment this is done *ad hoc* between the TSO, the agricultural associations and the BNetzA.

Grid operators should also be able to support communities that are very affected by the new transmission line, such as now foreseen in Germany under § 5 Abs. 4 StromNEV.[61] While there is a thorough debate about whether the maximum of 40.000€ per km new extra high voltage line is sufficient to "compensate" the damage to landscape, and other impacts, for example, during the construction phase, this is at least one option to "compensate" for the negative effects of overhead transmission lines. This price should and can be borne by the operators, who are currently offered an extremely high return for their capital when investing in new grids. Such payments are currently not mandatory in Germany or the UK, but they could be made mandatory such as was done in the context of carbon dioxide storage. With § 42 KSpG[62] the *Länder* are allowed to install a specific levy which could benefit the local communities, as was suggested in the legislative procedure.

9.

The role and position of round tables and any other early participation tools must be clarified. Such tools have been employed recently by TSO's in Germany, and it is questionable whether any results can legally be incorporated at all.

As described above, legally, there is no scope for consensual or self-governed decision making. What is possible, however, is formalizing an agreement that has been taken between the stakeholders and the applicant in the context of the permit granting or corridor finding procedure.

In Germany, the BNetzA or the respective authority of the *Länder* have one main task: to take a balanced decision, taking into account the legal framework on the one hand, but also the interests and arguments of all stakeholders as well. If a round table leads to a consensus on a given issue, such as a particular route or locations for pylons (this can typically only occur on the last planning stage / development consent stage), the TSO can incorporate this proposal into its own application, thereby pre-empting a decision by the authority. Even if the authority is still to make a balanced and discretionary decision, there is no need for extensive weighing if there are no conflicting interests. While the authority must take care not to be biased, the applicant can propose whatever it likes (as long as the BNetzA does not oppose on cost grounds, see above).

This is also possible in the UK as the development consent application is developed. Thus, generally, such round tables are to be encouraged, even if their tasks may often not resolve due to different interests.

[61] Verordnung über die Entgelte für den Zugang zu Elektrizitätsversorgungsnetzen (Stromnetzentgeltverordnung – StromNEV)
[62] Gesetz zur Demonstration der dauerhaften Speicherung von Kohlendioxid (Kohlendioxid-Speicherungsgesetz – KSpG), 2012.

The Authors

Dr. Roda Verheyen is an environmental lawyer with many years of experience in international environmental law and policy and climate change. She has written her Ph.D. on climate change damage in international law and is now a partner in a law firm specialized in environmental and planning law in Hamburg, Germany.

She regularly represents private individuals and environmental NGOs in infrastructure procedures, such as major public roads (A14, A 20, A 26) and river development (Weser, Elbe), also including grid projects. Her firm has been / is involved in the following transmission grid procedures: Westküstentrasse, Brunsbüttel – Niebüll (380 KV), Hamburg-Dollern (380 KV), Krümmel-Gorries (380 KV), various lines for the German Railroad (*Bahnstromleitungen*, 110 KV). She also regularly works for local government (*Gemeinden, Landkreise*) and is thus familiar with infrastructure projects from this point of view.

Dr. Verheyen was previously a Director of the Climate Justice Programme, which she founded in 2002 with Peter Roderick. Before registering as an attorney, she was an independent consultant for (inter alia) the GTZ (today GIZ), the Federal Environment Ministry of Germany, Friends of the Earth, Greenpeace and Germanwatch e.V., as well as a member of the German delegation to the Climate Change Convention. She is also a board member of the Hamburg International Environmental Law Conference (HIELC, www.hielc.org), and regularly publishes on International and National Environmental Law topics.

Kate Harrison is an experienced solicitor, recognised as a leader in environmental law and litigation (e.g. Chambers directory, The Lawyer). A founder of Harrison Grant, she has taken some of the leading English cases on public consultation and the environment e.g:

- *Greenpeace v Secretary of State for Trade and Industry*, (a successful challenge, on the basis of inadequate consultation, to government policy on nuclear power)
- *London Borough of Hillingdon and other v Secretary of State for Transport*, 2010 (a successful challenge to government support for a third runway and sixth terminal at London Heathrow Airport without adequate consultation)
- *Buckinghamshire County Council and others v Secretary of State for Transport* (A Supreme Court decision on the extent of Strategic Environmental Assessment and Environmental Impact Assessment of a proposed High Speed Rail line)

Other leading cases have developed public rights of access to justice and information on matters concerning the environment.

Kate Harrison has a first law degree from Cambridge University and an LLM from London University. She has published in many different areas of law, and has been trustee of organisations such as the Environmental Law Foundation.

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