

Study on permitting and facilitating the preparation of TEN-T core network projects

Permitting and facilitating waterborne transport projects

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The views expressed herein are those of the consultants alone and do not necessarily represent the official views of the European Commission.

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1 INTRODUCTION

The EU's Trans-European Transport Network (TEN-T) policy recognises the importance of a strategic approach to developing a Europe-wide network of transport infrastructure. Experience with the implementation of projects has shown that the efficient completion of these network corridors is sometimes impacted by complex regulatory and administrative arrangements, which can contribute to increased costs, delay and uncertainty for infrastructure projects. Notwithstanding the relevance of regulatory and administrative requirements, unnecessary costs and delays can arise when regulations or policies are not clear enough or are inconsistent with other regulations or policies (including those in other Member States). Unclear regulation can lead to sub-optimal investment choices, while legal uncertainty can deter private investment in projects.

In 2015, the European Commission DG MOVE commissioned a study to identify barriers in these regulatory and administrative processes that impact the effective and efficient planning and implementation of TEN-T core network projects, and deliver recommendations on how to address these barriers, including proposed policy options. The proposed options will be considered for an eventual Commission proposal for a legislative instrument on streamlining measures for swifter implementation of TEN-T projects. The study was undertaken by Milieu Ltd and Tractebel Engineering from September 2015 – December 2016. It was carried out in close cooperation with DG MOVE and reviewed at key points by an inter-service Commission Steering Group.

The waterborne transport sector – which includes maritime ports, inland ports and inland waterways – faces unique challenges in the permitting of projects, particularly in relation to environmental permitting. While the study covers regulatory and administrative challenges applicable to all TEN-T core network projects, it has placed focus on the complexities faced by waterborne and cross-border projects, through in-depth studies into the frameworks for these types of projects. This document summarises the specific challenges encountered by waterborne transport projects in project preparation and permitting and presents the proposed policy options for each identified problem area as well as the ways they could be applied to different types of TEN-T projects, with a focus on those projects in the waterborne sector.

2 STUDY SCOPE AND METHODOLOGY

The study focuses on problems occurring at the preparation and permitting stages of a TEN-T project, leaving aside problems occurring at the construction and operation stage. It looks at regulatory and administrative processes impacting projects in three different areas: permitting, procurement and the State aid framework. The research carried out for this study has evaluated existing procedures, and identified the barriers faced by transport projects during their planning and implementation, as well as good practices and opportunities to encourage the adoption of these good practices.

The study was carried out in three main phases. A problem definition phase mapped the key problems, their causes and drivers and the inter-linkages between these factors, and developed an intervention logic as a framework for the overall exercise. It was supported by literature review, initial scoping interviews with EU officials and the screening of project cases. A data collection and analysis phase included in-depth study of national procedures, project cases and an open public stakeholder consultation survey. During the final phase of the study, potential solutions for the key problem areas were developed as policy options.

The full results of the work are contained in the final report for the project, which contains the presentation and analysis of proposed policy options. Earlier work is covered in the report Annexes, including covering the problem analysis, country studies, case studies and consultation report.

3 SPECIFIC CHALLENGES IN PREPARATION AND PERMITTING OF TEN-T WATERBORNE TRANSPORT PROJECTS

Waterborne transport projects face specific challenges in preparation and permitting. Because of their greater impact water bodies and surrounding environment, waterborne projects need more than other transport projects to take into account the complex interactions between multiple environmental objectives. These projects include infrastructure required to develop inland waterways: e.g. construction of waterways; upgrade, widening and extension of waterways; construction of new locks and embankments. They also include maritime transport infrastructure: e.g. construction and extension of port infrastructure; modernisation / upgrade of port infrastructure; construction of embankments, berths, platforms, dredging operations; and projects related to Motorways of the Sea.

Challenges linked to the status of water bodies

Challenges in the permitting of waterborne projects mainly stem from the provisions of the Water Framework Directive. Under this Directive infrastructure projects must not compromise the good ecological status of water bodies or lead to their deterioration. Impacts on water bodies need to be assessed with regard to the desired status as established by River Basin Management Plans (RBMPs), which are revised every six years by dedicated management authorities for the river basins. These authorities are specific to the river basin, and often cut across national, regional and other administrative boundaries and institutions. If a project has significant impacts that might compromise the achievement of objectives, an alternative should be found. If no suitable more environmentally friendly alternative can be found, then the project can only go ahead when it can demonstrate that the reasons for deterioration are of overriding public interest or that its benefits otherwise outweigh the relevant environmental objectives.

The research conducted for this study has indicated that some waterborne transport projects face challenges in complying with the requirements of the Water Framework Directive generally and in particular its Article 4(7), which sets forth the conditions under which new modifications to the physical characteristics of water bodies may be undertaken. Many waterborne TEN-T core network projects will inevitably impact the status of water bodies and will therefore need to meet these conditions in order to receive development consent from the relevant national authorities. Experience so far has shown that there is complexity and uncertainty in interpreting the conditions. For example, the determination of what constitutes a deterioration in the status of a water body is not always clear. The recent CJEU ruling in the Weser case has made it clear that a decline in status of any quality element can be considered a deterioration with regard to the conditions stated in Article 4(7), even if there is no identified deterioration in the classification of the water body as a whole. The views expressed by stakeholders in the case studies carried out for this study suggest that there is uncertainty among project promoters and permitting authorities in the implications of this decision in applying Article 4(7) to waterborne projects. Some reported that EIA procedures will most likely become more exhaustive, potentially leading to increased cost and delay. This includes the claim that carrying out an assessment at the level of individual quality elements makes the process of project preparation extremely complex and generates additional costs. Similarly, in the cross-border Fehmarn Belt Fixed Link project the promoter reported that the consequences of this new jurisprudence in permitting procedures are not yet clear. Uncertainty was also expressed about the methods that should be used to assess and demonstrate that benefits of projects outweigh impacts on the environmental objectives of the Directive in order to meet the condition described in Art 4(7)(c)¹.

Another issue relates to the determination of objectives for the status of water bodies as carried out in the RBMPs. In the public consultation, promoters of waterborne projects expressed concerns about the

¹ This article states that ‘the reasons for those modifications or alternations are of overriding public interest and/or the benefits to the environment and to society of achieving [the water-related objectives] are outweighed by the benefits of the new modifications or alternations to human health, to the maintenance of human safety or to sustainable development...’

practical implications of the requirement to include projects that result in the deterioration of the status of a water body river basin management plans, given the six-year review cycle for these plans. Existing guidance², however, states that ‘this is a reporting obligation and does not mean that Member States must wait until the publication of the RBMP before allowing a new physical modification or new sustainable development activity to proceed. In many cases projects will be developed within the RBMP six-year cycle. (...) If a modification or alteration goes ahead in the middle of a river basin planning cycle, the reason for that modification or alteration must be set out in the subsequent (update of the) RBMPs.’

There are in many cases inherent contradictions between transport objectives and environmental objectives, and these are often very clear in the waterborne transport sector, which relies upon natural resources and often lacks alternatives. EU legislation is in place which aims to take conflicting objectives into account and provide for assessment and informed decision-making, but as the court cases and stakeholder complaints demonstrate, there is uncertainty in implementation of the legislation when applied to the preparation and authorisation of key waterborne transport infrastructure projects. Indeed, given these uncertainties, Member States and the Commission have agreed in the 2016-2018 Work Programme of the Common Implementation Strategy for the Water Framework Directive to prepare a Guidance Document on the application of Article 4(7) of the Water Framework Directive. The stated purpose is to identify opportunities and to improve the clarity of this Article and avoid unintended consequences, and the document will be prepared with the involvement of waterborne transport stakeholders.

Challenges linked to protected areas

Waterborne projects are also particularly likely to impact Natura 2000 sites, as many of Europe’s most valuable natural areas are situated in the valleys of its main rivers – and those rivers are priority axes for inland waterway transportation. Similarly, the extension of ports generally requires deepening and maintenance of fairways and reclamation of land. Many ports are located in estuaries, or close to nature reserves, which consist of tidal flats and wetlands that provide habitat for vulnerable plant and animal species. These habitat zones are also home to - often dredged - access channels and newly constructed port developments. Projects that are likely to have a significant impact on protected areas are subject to an Appropriate Assessment, under Article 6(3) of the Habitats Directive, to review the implications of the project for the site. Authorities may only approve a project if they have ascertained that it will not adversely affect the site (Article 6(4)) or, in cases of projects necessary for reasons of overriding public interest, if compensatory measures are taken. Projects in protected areas can be impacted in terms of additional time and cost during the Appropriate Assessment phase, or in terms of additional cost for potential mitigation or compensatory measures. A recent CJEU decision on the application of Article 6(4) of the Habitats Directive in the development of the Port of Antwerp³ suggests that project promoters continue to face challenges in the application and interpretation of this provision.

The recent 'Fitness Check' evaluation of the EU Birds and Habitats Directives⁴ published on 16/12/2016 indicates that the long conflict between transport projects and nature has led to improvements in the way in which environmental considerations are now reflected in TEN-T policy. Transport planners increasingly see the importance of identifying impacts and agreeing mitigation measures in order to prevent legal and public challenges. The integration of nature concerns into

² European Commission, *Common Implementation Strategy for the Water Framework Directive. Guidance number 20: Guidance document on exemptions to environmental objectives*, 2008, p 29.

³ Court of Justice of the European Union, *Judgement in Case C-387/15 Orleans and others*, 21 July 2016, <http://curia.europa.eu/juris/liste.jsf?num=C-387/15&language=en>

⁴ Commission Staff Working Document Fitness Check of the EU Nature Legislation (Birds and Habitats Directives) Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds and Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora SWD(2016) 472 final

http://ec.europa.eu/environment/nature/legislation/fitness_check/docs/nature_fitness_check.pdf

strategic and spatial planning for the transport sector, brought about in part by requirements of the Nature Directives, has been seen to have a positive impact. Earlier conflicts in relation to port developments and dredging in Natura 2000 estuaries have been reduced, which may have been facilitated by guidance from the Commission Services. As there have also been conflicts in relation to inland waterway transport and maritime ports and Natura 2000 the Commission Services have likewise developed guidelines on this subject.

Nonetheless, some conflicts still exist. Several NGOs referred to examples of transport infrastructure projects, sometimes implemented with the use of EU funds that threatened biodiversity and nature. Best practice suggests that appropriate assessments under article 6(3) Habitats Directive that are carried out at the strategic planning stage rather than at project level have the potential to result in the selection of transport routes that are more favourable to habitats and species. Such conflicts can also affect waterborne transport projects of European interest that contribute to developing multimodal transport and decarbonisation. Many of Europe's most valuable natural areas are situated in the valleys of its main rivers. Implementation of the requirements of the Habitats and Birds Directives for waterborne transport projects can therefore be a challenge to the sector even if they have an important contribution to European sustainability objectives.

Challenges linked to dredging activities

Dredging activities are a particular case, which raises legal issues related both to water protection and the waste legislation. Dredging is an important part of managing inland waterways and ports, allowing infrastructure managers to maintain and improve accessibility. The designation of protected areas under the Habitats Directive poses limitations on both the dredging and disposal of dredged material. The Water Framework Directive may also limit dredging in certain water bodies, given that turbulence resulting from dredging could impact the quality of water bodies.

In addition, the treatment or disposal of dredged material can give rise to certain legal obligations under the Waste Framework Directive⁵ and related EU waste legislation. Under the Waste Framework Directive, waste is defined as any substance or object which the holder discards or intends or is required to discard. Thus, under the Directive, dredged material may be considered waste if an operator cannot identify suitable options for re-use, recycling or recovery⁶. The relocation of sediments within surface waters for the purpose of managing waters and waterways is not considered waste within the meaning of the Directive under Article 2(3), provided the sediment is not hazardous. This means that, provided the dredged material is non-hazardous and relocated within the surface water, it is not subject to the requirements of the Waste Framework Directive. However, if an operator seeks to dispose of the material elsewhere (for example, on land), it will be subject to the Directive (and potentially, the Landfills Directive⁷). These legal considerations may lead to additional compliance costs for projects involving dredging. While the need for these legal protections is well understood, particularly when dredged substances concern hazardous materials, stakeholders report uncertainty to how the requirements of the Waste Framework Directive and the Landfills Directive may be interpreted and applied in relation to dredging⁸. Stakeholders reported that there are inconsistencies in the application of waste classifications to dredged materials across Member States, with potential additional costs in countries where dredged materials are more likely to be classified as waste.

Application of options to waterborne projects

The proposed set of policy options has been developed based on research and analysis related to the entire TEN-T core network, with particular emphasis on the challenges faced by waterborne and cross-

⁵ Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste

⁶ In addition, the European Waste Catalogue categorises 'dredging spoil' as waste; Annex, 2000/532/EC, Commission Decision of 3 May 2000 replacing Decision 94/3/EC establishing a list of wastes

⁷ Directive 1999/31/EC of 26 April 1999 on the landfill of waste

⁸ Stakeholder interview. See also European Dredging Association, *Dredged Material and Environmental Regulations in the EU*, 2005 Working Paper, http://www.european-dredging.eu/pdf/05-0271_Dredged_Mat_and_Env_reg_EU.pdf

border projects. The options are therefore applicable to all TEN-T projects wherever relevant. Options in the area of environmental assessment (Section 4.3) are likely to have particular relevance for waterborne transport projects.

4 OVERVIEW OF PROPOSED POLICY OPTIONS

Based on the relevant legislation and stages of the process for permitting and implementation of TEN-T projects, the study identified five main problem areas for which solutions in the form of policy options could be identified. For each area, the rules governing procedures stem from a mix of national and EU procedures, an important distinction for the development of EU-level policy options. One of these areas is environmental assessments and address specifically the problems highlighted in section 3. The policy options presented below are not limited to waterborne transport projects but apply to all types of transport infrastructure.

4.1 ORGANISATION OF THE PERMITTING PROCEDURE

The organisation of the permitting process has been considered as a critical source of delays in some Member States, and one that can be effectively addressed through EU action. Delays often occur as a result of overly complex procedures, involving multiple steps and multiple authorities. Permitting procedures in the Member States stem from a mix of EU rules (e.g. environmental legislation) and national rules (e.g. institutional authority, administrative procedures and spatial planning). The proposed options presented below provide for a streamlined approach using a single competent authority, either at EU or Member State level.

Permitting procedure option 1: EU level permitting procedure

Under this option, the EU would play a direct role in the process of reviewing projects and issuing development consent for selected TEN-T projects. This could be done through an inter-service mechanism, and would allow EU directive to apply directly, avoiding the impacts of differing national transposing measures, including any ‘gold plating’ of EU legal requirements. Two variants are proposed:

Sub-option 1a: EU level procedure covering all parts of the permitting procedure

A single decision-making framework at EU level would cover every step of the permitting procedure. It would replace all national rules and regulations related to permitting and procurement, including both those deriving from EU legislation (e.g. environmental assessment, public procurement, State aid) and those which are of national competence (e.g. spatial planning, cultural heritage).

Sub-option 1b: EU level procedure covering parts of the permitting procedure which are derived from EU rules

A single decision-making framework at EU level would apply only to those parts of the authorisation procedure that derive from EU legislation, i.e. are within the areas of legislation and policy under EU competence (e.g. environmental assessment, public procurement, State aid). Other permitting sub-steps, including spatial and sectoral planning, cultural heritage / archaeological permitting, and others would remain subject to authorisation at national level.

Permitting procedure option 2: Single leading authority at national level

A second option for addressing organisation of the permitting procedure would leave the responsibility and authority for development consent at the Member State level. The procedure would be handled by a single leading authority designated by each Member State. This authority would receive all documents and enquiries from project promoters, acting as a ‘one-stop-shop’. This authority alone would be responsible for the legally binding decision and would coordinate the input of all other competent authorities in the process. Three variants are proposed:

Sub-option 2a: Member State leading authority with comprehensive decision-making powers directly applying rules derived from EU legislation

The single leading authority or ‘one-stop-shop’ would apply rules directly designed and approved at

EU level for those parts of the authorisation framework which derive from EU legislation – similar to option 1a above. National rules not derived from EU procedures would apply as usual under the competence of the single leading authority.

Sub-option 2b: Member State leading authority with comprehensive decision-making powers applying national rules (also those transposed from directives)

The single leading authority or 'one-stop-shop' would apply the full range of applicable national rules (including those resulting from transposition of EU directives) to the permitting procedure. Member States would nevertheless have to automatically apply the most preferential treatment possible under national law.

Sub-option 2c: Member State authority with limited decision-making powers

The leading authority would have the same competences as described in sub-option 2b, but would not be solely responsible for granting the development consent. The development consent would comprise multiple legally-binding decisions, issued by different authorities. However, the leading authority would be entitled in justified cases (for example, excessive delay), take decisions on their behalf.

Permitting procedure additional option: Establishing time limits in the permitting process

Case studies conducted for this project showed that large cross-border infrastructure projects generally exceed ten years from early planning to construction. While time limits exist in many Member States for the main permits (e.g. EIA, spatial planning) and public consultations, global time limits for the entire permitting procedure have not been fixed in any Member States. When applied in conjunction with a single leading authority and other streamlining measures, binding time limits could have the advantage of incentivising authorities to avoid delays in completing procedures.

The option proposed would set a limit of 3.5 to 4 years for the entire permitting procedure, from notification of project concept through submission and review of the application for development consent to issuing of the final decision.

4.2 BUILDING PUBLIC ACCEPTANCE

Public acceptance has proved to be a major challenge in most projects. Given the frequent delays that projects face when challenged by the public or stakeholders, the study has considered ways in which improvements to public consultation procedures can be integrated to streamlined procedures for TEN-T projects. There are two key aspects to the problems related to the way in which public participation procedures are carried out for transport infrastructure projects in the EU: 1) the quality of the procedures used to engage the public; and 2) the timing, i.e. the point at which those procedures take place during the process of project preparation, from concept to final development consent. The options presented below aim to improving the effectiveness and efficiency of public consultation procedures to reduce time lost in the permitting procedures and afterwards due to lack of acceptance of projects by the public and stakeholders.

Requirement for public involvement before permitting application is submitted

This option would require that project promoters allow for public involvement in the project before submitting the application for permitting to the competent authority for TEN-T projects.

Principles for the conduct of public consultation procedures for TEN-T projects

Under this option, EU legislation would provide a series of public participation principles to be taken into account for TEN-T projects. These would remain flexible goals for Member States to set in determining the public participation requirements for TEN-T projects. They would address e.g.: early stage consultation of stakeholders; grouping of consultations for efficiency; limitations on consultation periods; and the importance of consultations in cross-border projects.

Carry out a TEN-T public information campaign

An option to mitigate the inherent resistance that some stakeholders may have to the idea of ‘European’ projects would be to conduct public information and awareness raising activities dedicated to the aim of explaining the relevance of EU transport networks for particular stakeholders.

Improvements to the process for appeals of decisions on development consent

This option would seek to limit the scope or timing of legal recourse allowed for certain TEN-T projects. It would contain two elements for TEN-T projects: 1) the responsible court should be the highest level court possible; and 2) an appeal against a decision regarding a TEN-T project would not have a suspensive effect on the permit. A time-limit applicable to court decision-making could also be proposed.

4.3 ENVIRONMENTAL ASSESSMENT

Multiple environmental assessment procedures stemming from EU legislation⁹ apply to most TEN-T projects. Delays are frequently caused by 1) lack of coordination across multiple types of environmental assessment procedures and legal requirements; 2) uncertainties related to specific provisions of certain pieces of legislation, in particular the Water Framework Directive and the Birds and Habitats Directives; and 3) the capacity of authorities, project promoters and environmental experts to carry out high-quality environmental assessment studies in a timely manner in compliance with all relevant requirements.

Mandatory joint procedure for all environmental assessment procedures stemming from EU legislation

The proposed policy option would make the joint procedure envisioned in the Commission’s guidance on Article 2(3) of the EIA Directive¹⁰ mandatory for those TEN-T projects; this joint procedure would apply to all environmental assessments stemming from EU legislation, rather than only the EIA and the AA under the Birds and/or Habitats Directives. Critically, this would also include the Water Framework Directive for TEN-T projects that may require modifications to water bodies. The option could also be extended to require joint environmental assessment procedures for the most critical cross-border projects.

Technical clarification and/or guidance on defining and understanding the impacts of waterborne transport project activities on water bodies

The waterborne transport sector – which includes maritime ports, inland ports and inland waterways – faces unique challenges in the permitting of projects, particularly in relation to environmental permitting. These mainly stem from the provisions of the Water Framework Directive. Under this option, specific technical definitions and approaches would be developed to both guide and provide a sense of certainty to project promoters and authorities that the right kinds of impacts are being assessed in the most efficient way possible, and that reasons for possible overriding public interest and/or the benefits to the environment that would outweigh any deterioration to the water body are set out properly. In some specific cases where projects are particularly complex or of critical importance, this approach should be combined with technical assistance targeting carrying out the assessment in line with EU regulations.

⁹ These include mainly the SEA Directive (2001/42/EC), the EIA Directive (2011/92/EU as amended by 2014/52/EU); the Bird Birds and Habitats Directives (Directive 2009/147/EC and Directive 92/43/EEC); Water Framework Directive (Directive 2000/60/EC).

¹⁰ European Commission (2016) Commission guidance document on streamlining environmental assessments conducted under Article 2(3) of the Environmental Impact Assessment Directive (Directive 2011/92/EU of the European Parliament and of the Council, as amended by Directive 2014/52/EU), O.J. C273, p.1 of 27 July 2016.

Technical clarification and/or guidance on defining and understanding the impacts of TEN-T project activities on Natura 2000 sites and the procedures for compliance with provisions of the Habitats Directive

The potential impacts of transport projects on sensitive and complex ecosystems, and on Natura 2000 protected areas, create unique challenges for project promoters and authorities in the planning and preparation of projects. Under this option, very specific technical clarification could either in a legislative annex or guidance note dedicated to TEN-T project types would be issued. This could take the form of a joint document issued with the one recommended in the option projects impacting the quality of water bodies under the Water Framework Directive above, but would focus on impact to Natura 2000 sites. In some specific cases where projects are particularly complex or of critical importance, this approach should be combined with technical assistance targeting carrying out the assessment in line with EU regulations.

Provide more dedicated external technical assistance services for the preparation of TEN-T projects, focused on environmental assessments

This option would be modelled on the JASPERS assistance programme, to help project promoters, experts, authorities and other stakeholders address the challenges of preparing high-quality TEN-T projects that are in compliance with all legal requirements. The option would extend such support to all applicable TEN-T projects, rather than only those considered as major projects for ERDF and CF co-financing.

4.4 PUBLIC PROCUREMENT

Public procurement can bring major challenges to TEN-T projects. Delays in the completion of the procurement phase appear to be the consequence of a complex legal framework, the absence of limits for the award procedure and, in particular, the long review procedures to challenge the award decision. Increased costs are directly related to delays but also to the selection of poor quality projects, which appears to be mainly driven by the lack of capacity of contracting authorities to conduct procurement procedures. Challenges related to legal complexity and capacity also extend to public private partnerships (PPPs), resulting in a reluctance among authorities, promoters and investors to use this mechanism – potentially a lost opportunity to attract additional investment capital to the transport sector.

The legal framework stems mainly from the EU package of public procurement directives¹¹, which are likely to contribute to tackling some of these problems once they are fully implemented in the coming years. Separate directives¹² govern the mechanisms for the revision of award decisions.

Special procurement regime/rules aiming at speeding up procurement and review procedures

This option would define in more detail the open clauses in the EU Public Procurement Directives and the Remedies Directives concerning the time limits for the contracting authority to take a decision on the award of the contract and for the reviewing body to review decisions of the contract award procedure. It would also provide for the prohibition of an automatic suspensive effect of review procedures and set a maximum period during which the application for review can be submitted.

Special procurement rules for cross-border projects, covering the choice of law applicable and the use of language

This option suggests a special procedure for cross-border projects, which would make mandatory the

¹¹ Directive 2014/23/EU, on the award of concession contracts; Directive 2014/24/EU, on public procurement; and Directive 2014/25/EU on procurement by entities operating in the water, energy, transport and postal services sectors. The transposition deadline for these Directives was 18 April 2016.

¹² Remedies Directives (Directives 89/665/EEC and 92/13/EEC amended by Directive 2007/66/EC)

application of the national procurement rules of the Member State where the joint entity has its registered office and the publication of the tender and contracting documents in a single language (e.g. English, French or German).

Technical assistance services for the preparation of TEN-T tenders

This option would be modelled on the JASPERS assistance programme, to help contracting authorities address procurement-related challenges for TEN-T projects. The option would provide support to all applicable TEN-T projects, rather than only those considered as major projects for ERDF and CF co-financing, and could be channelled through the European Investment Advisory Hub. In addition, it could benefit from the experience in implementing the measure proposed in the Single Market Strategy¹³ to set up a voluntary ex ante assessment mechanism of the procurement aspects of certain large-scale infrastructure projects to provide assistance and advice on the legality of the procurement aspects of projects, to be in place by 2017.

This option could also be extended to provide targeted support for TEN-T projects that are likely to develop into PPPs.

Special treatment of infrastructure investment under the Stability and Growth Plan targets

It is frequently argued that investments in strategic infrastructure should not constitute public debt for the purpose of measuring Member State performance against the 3% budget-deficit-to-GDP ceiling in the Stability and Growth Pact¹⁴. Under this option, strategic public investments in infrastructure would not be counted within Member States' public debt for the purpose of compliance with the Stability and Growth Pact. A ceiling (for example, 1% of GDP) could be established for such investments to be counted as off balance sheet.

4.5 STATE AID

Given their links to the financial structure of an investment, State aid procedures are a potential source of risk and uncertainty for TEN-T projects. The two key problems at the Member State level driving delays and uncertainty in State aid notifications are late notification and the poor quality of notifications (including information gaps). Recent efforts by the Commission to provide guidance on State aid, including analytical grids to guide public funding of infrastructure, are a welcome clarification on the application of State aid rules and should further assist authorities in this area.

Reducing State aid decision timeframes for selected TEN-T projects

The proposed option would establish a fast-track State aid assessment process. It would be similar to the approach taken to investments receiving EFSI financing, under which the Commission aims to complete assessments within six weeks of receiving a complete notification.

¹³ European Commission, Communication "Upgrading the Single Market: more opportunities for people and business" COM(2015) 550 final.

¹⁴ For a recent such proposal, see, for example, Bogaert, H., *Improving the Stability and Growth Pact by integrating a proper accounting of public investments: a new attempt*; Federal Planning Bureau, Belgium, 2016, accessed online at http://www.plan.be/admin/uploaded/201601211007080.20151221_WP_EN_golden_rule.pdf

5 SCOPE OF APPLICATION OF POLICY OPTIONS TO TEN-T PROJECTS

Different options will apply to different projects based on relevance as well as their significance for the completion of EU transport networks and overall transport policy objectives. Certain options would be highly effective at speeding up procedures, but would be more challenging to find politically acceptable or cost-efficient if applied to a large number of projects, such as all TEN-T core network projects. Some options – such as the EU level permitting procedure – could have an important impact on competences that usually remain with the Member State authorities. Others – such as the detailed technical clarification for projects impacting water bodies or Natura 2000 sites under the relevant environmental legislation – would require costly expertise and management to carry out. It therefore makes sense to apply these potentially highly effective but challenging options only in the most critical cases.

This degree of relevance for such critical cases can be determined by several factors:

- Importance for the functioning of transport networks / core network corridors in the EU
- Particular complexity to implement, either because of cross-border activities; complex environmental impacts; suitability for complex PPP arrangements or other factors
- Projects benefitting from Union support through CEF or EFSI

The study suggests to use the corridor work planning procedure be used to determine which projects would qualify as those of high EU significance or of particular complexity. This would in turn allow those options that would entail greater impact on Member States' competences or impose higher costs to apply only to those projects with corresponding significance for EU transport networks.

The table below provides an overview of different project types and the policy options that might apply.

Project type	Applicable options
All TEN-T core network projects	<p>Options via legislative instrument:</p> <ul style="list-style-type: none"> ■ Single leading authority at national level ■ Requirement for public involvement before permitting application is submitted ■ Principles for the conduct of public consultation procedures for TEN-T projects ■ Improvements to the process for appeals of decisions on development consent ■ Mandatory joint procedure for all environmental assessment procedures stemming from EU legislation ■ Technical clarification and/or guidance on defining and understanding the impacts of waterborne transport project activities on water bodies ■ Technical clarification and/or guidance on defining and understanding the impacts of TEN-T project activities on Natura 2000 sites and the procedures for compliance with provisions of the Habitats Directive ■ Special procurement regime/rules applicable to all projects aiming at speeding up procurement and review procedures ■ Special procurement rules for cross-border projects, covering the choice of law applicable and the use of language ■ Special treatment of infrastructure investment under the Stability and Growth Plan targets

Project type	Applicable options
	<p>Options via technical assistance programme:</p> <ul style="list-style-type: none"> ■ Provide more dedicated external technical assistance services for the preparation of TEN-T projects, focused on environmental assessments ■ Technical assistance services for the preparation of TEN-T tenders ■ Capacity building measures for public contracting authorities (PPPs)
<p>Projects of high EU significance (where relevant)</p>	<p>EU level permitting procedure Sub-option: Mandatory transboundary joint procedure for environmental assessment of cross-border TEN-T projects Sub-Option: Targeted technical assistance to determine how to comply with legislation and a Commission opinion for both projects impacting water bodies under the Water Framework Directive and projects impacts Natura 2000 sites under the Habitats Directive Reducing State aid decision timeframes</p> <p><i>All other options applicable to TEN-T core network project as appropriate</i></p>
<p>Projects benefitting from Union support through CEF or EFSI</p>	<p>EU level permitting procedure Sub-option: Mandatory transboundary joint procedure for environmental assessment of cross-border TEN-T projects Sub-Option: Targeted technical assistance to determine how to comply with legislation and a Commission opinion for both projects impacting water bodies under the Water Framework Directive and projects impacts Natura 2000 sites under the Habitats Directive Reducing State aid decision timeframes</p> <p><i>All other options applicable to TEN-T core network project as appropriate</i></p>

6 CONCLUSIONS AND RECOMMENDATIONS

Given the particular complexity of waterborne projects, especially with regard to environmental legislation, it is likely that such projects will fall into the category of critical cases. This would be important for projects that face legal uncertainties with regard to compliance with the procedures specified within the Water Framework Directive and the Habitats Directive, as discussed in Section 3 above. If the proposed options were applied to such projects, they would be eligible for special technical assistance and treatment from authorities to manage the process of ensuring that assessment of environmental impacts is completed satisfactorily and review of whether the conditions for allowing projects to proceed have been met according to the terms of the Directives. Such assistance could also have the effect of reducing legal challenges, both from stakeholders, interest groups and environmental authorities at all levels.

Furthermore, as waterborne projects are prone to legal uncertainty stemming from EU legislation in the field of environment, it will be essential that the solutions proposed here are integrated with ongoing Commission initiatives to support and promote efficient project preparation and approval procedures for large, strategic infrastructure investments. One such possibility is a European Commission ‘one-stop shop’ for large infrastructure projects, where the Commission services will work in parallel towards a common approval date with respect to internal European Commission decision-making processes. This concept was still under development at the time of writing, but would aim at further facilitating the internal coordination across the Commission services. This could provide a useful framework for the coordination of initiatives aimed at providing guidance, technical assistance and where appropriate sufficient certainty with regard to the application of EU rules.