

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

Final report

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This report has been prepared by Milieu Ltd under Contract No MOVE/B3/2014-751, by Jennifer McGuinn, Sarah O'Brien, Gonçalo Moreira, Lise Oulès (Milieu Ltd), Stefanie van den Bogaerde and Francis Vansina (Tractebel Engineering).

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

Milieu Ltd (Belgium), Chaussee de Charleroi 112, B-1060 Brussels, tel.: +32 2 506 1000; e-mail: jennifer.mcguinn@milieu.be; web address: www.milieu.be.

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ABBREVIATIONS USED

AA	Appropriate Assessment
CBA	Cost-benefit Analysis
CEF	Connecting Europe Facility
CJEU	Court of Justice of the European Union
EFSD	European Fund for Strategic Investment
EIA	Environmental Impact Assessment
EIB	European Investment Bank
ESIF	European Structural and Investment Funds
EPEC	European PPP Expertise Centre
INEA	Innovation and Networks Executive Agency
JASPERS	Joint Assistance to Support Projects in European Regions
LNG	Liquefied natural gas
MSP	Maritime Spatial Planning
NGO	Non-governmental organisation
PCI	Project of common interest
PPP	Public-private partnership
RBMP	River Basin Management Plan
SEA	Strategic Environmental Assessment
TEN-E	Trans-European Network for Energy
TEN-T	Trans-European Network for Transport
WFD	Water Framework Directive

EXECUTIVE SUMMARY

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 projects¹. The study was undertaken by Milieu Ltd and Tractabel 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 proposed policy options address problems encountered at all stages of the authorisation framework for TEN-T projects – from strategic planning to the decision on development consent and procurement procedures. Some areas are governed by EU legislation as transposed into national legislation by the Member States (e.g. environment, public procurement). Other areas, such as spatial planning, land use, are the sole competence of the Member States. The policy options distinguish between these areas and aim to respect the principles of subsidiarity and proportionality whilst effectively reducing the burden of overly complex procedures. The ultimate objective is to reduce disproportionate delays, costs and uncertainties and lead to faster project implementation and better conditions for investment. Options cover five key areas and are briefly presented below.

Organisation of the permitting procedure

Delays in permitting often occur due to overly complex procedures, involving multiple steps and multiple authorities. A single permitting authority is proposed for TEN-T projects, according to the following options:

- **EU level permitting procedure:** The EU would play a direct role in the process of reviewing projects and issuing development consent for selected TEN-T projects. Variants of this option include covering all parts of the permitting procedure, or those derived only from EU legislation.
- **Single leading authority at national level:** A single leading authority in each Member State would act as a 'one-stop-shop' for project promoters, and would be responsible for issuing the legally binding development consent decision. Variants include an option to apply a common set of rules for areas governed by EU legislation, and an option to apply only national rules (including EU directives as transposed by Member States).
- **Time limits:** In both cases, an option for setting time limits for the permitting procedure overall and in distinct phases is proposed. A total of 3.5 – 4 years is suggested.

Building public acceptance

Projects face considerable delays when challenged by the public or stakeholders. This is impacted by:

¹ As referred to in: European Commission (2016), A European Strategy for Low-Emission Mobility, COM(2016) 501

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. Options proposed are:

- Requirement for public involvement before permitting application is submitted
- Principles for the conduct of public consultation procedures for TEN-T projects
- Carry out a TEN-T public information campaign
- Improvements to the process for appeals of decisions on development consent

Environmental assessment

Multiple environmental assessment procedures stemming from EU legislation² 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. Options proposed for TEN-T projects where relevant are:

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

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 directives³, which are likely to contribute to tackling some of these problems once they are fully implemented in the coming years. Separate directives⁴ govern the mechanisms for the revision of award decisions.

- Special procurement regime/rules aiming at speeding up procurement and review procedures
- Special procurement rules for cross-border projects, covering the choice of law applicable and the

² These include mainly the SEA Directive (2001/42/EC), the EIA Directive (2011/92/EU as amended by 2014/52/EU); the Birds and Habitats Directives (Directive 2009/147/EC and Directive 92/43/EEC); Water Framework Directive (Directive 2000/60/EC).

³ 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.

⁴ Remedies Directives (Directives 89/665/EEC and 92/13/EEC amended by Directive 2007/66/EC)

- use of language
- Technical assistance services for the preparation of TEN-T tenders and PPPs
- Special treatment of infrastructure investment under the Stability and Growth Plan targets

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).

- Reducing State aid decision timeframes for selected TEN-T projects

Scope of application of policy options to TEN-T projects

Different options will apply 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 priority 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.

1 INTRODUCTION

1.1 POLICY CONTEXT AND SCOPE

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. Regulation n°1315/2013 of 11 December 2013 on Union guidelines for the development of the trans-European transport network (the TEN-T Regulation) emphasises taking a coordinated, trans-national approach to the development of the TEN-T network. The TEN-T has a dual layer structure – the comprehensive network shall ensure connectivity of all regions of the EU whereas the core network consists of those elements of the network which are of the highest strategic importance for the EU. The TEN-T Regulation defines binding targets for implementation, as the core network needs to be implemented by 2030 and the comprehensive network by 2050. The TEN-T Regulation also establishes core network corridors which are operational tools to facilitate the coordinated and timely implementation of the core network.

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.

A number of measures have already been taken that support the streamlining of procedures for TEN-T core network projects.

In September 2014, two TEN-T Corridor Coordinators – Professors Bodewig and Secchi – put forward ten proposals on how to attract additional investment in TEN-T transport infrastructure. The eighth of the ten proposals put forward concerned streamlining permitting and related procedures, where they noted the following, 'Optimising the financing framework and reducing the associated political and regulatory risks linked to infrastructure development would help decrease the cost of financing. Harmonisation, simplification and acceleration of permitting and procurement procedures would facilitate the implementation of projects along Corridors, in particular for cross-border projects.'

Following a discussion of these issues at the informal European Transport Ministers meeting in Milan in September 2014, the Council of Ministers adopted Conclusions on 3 December 2014, where it was concluded 'permitting procedures are an essential part of the planning of (transport) projects, that an early consultation and coordination of parties is crucial to streamline these procedures, accelerate projects and avoid additional costs, thereby increasing investors' confidence'. The Council then invited the Commission to 'take stock of good practices and identify ways to streamline permitting procedures for projects of common interest of the core network'⁵.

This was followed, in 2015, by the publication of an Action Plan prepared by the former Vice President Christophersen and European Coordinators Bodewig and Secchi⁶. The Action Plan emphasised the importance of simplifying procedures in optimising the investment environment for transport infrastructure project. The Action Plan outlined ten actions, including three specifically

⁵ Council of the European Union, *Council conclusions on Transport infrastructure and the Trans European Network*, Council Conclusions, Brussels, 3 December 2014

⁶ DG MOVE, *Action Plan - Making the best use of new financial schemes for European transport infrastructure projects* (2015)

focussed on supporting this:

- Simplifying procurement procedures, particularly for major cross-border projects
- Simplifying permitting procedures
- Clarifying the State aid framework.

The Commission's June 2016 communication on the implementation of the European Fund for Strategic Investments (EFSI) – *Europe Investing Again: Taking stock of the Investment Plan for Europe and next steps*⁷ – emphasises the need to mobilise private investments in sectors critical to Europe's future and where market failures remain. Among these are cross-border and sustainable transport, critical for Europe to shift to a low-carbon and resource-efficient economy. Another recent Commission Communication of July 2016 – *A European Strategy for Low-Emission Mobility*⁸ – recognises the importance of the TEN-T network of transport links to enable Europe's transport sector to become more sustainable, and to catalyse the transition to a lower emission mobility. However, none of these strategic objectives can be realised without healthy levels of investment, and an investment environment that is free from regulatory and administrative burdens and delays that deter progress both in terms of project implementation but also investor confidence.

Among the actions identified by the Commission in its strategic approach to boosting investment is the possibility of a single EU authorisation framework for large projects receiving EU support with a cross-border dimension. Another 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.

In accordance with wider efforts to support investment in key areas and reduce unnecessary burden and delay related to infrastructure investment, the purpose of this study is to identify barriers in the 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 projects⁹.

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 essentially 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. 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. It has identified and analysed options that could address the barriers encountered, and deliver recommendations for the improvement of regulatory and administrative frameworks. This final study report focuses on the policy options and a proposed framework for their implementation; the detailed problem analysis, including in-depth case studies, is contained in the annexes. Section 1.3 provides a detailed overview of the report structure and contents.

⁷ European Commission (2016), *Europe Investing Again: Taking stock of the Investment Plan for Europe and next steps*, COM(2016) 359

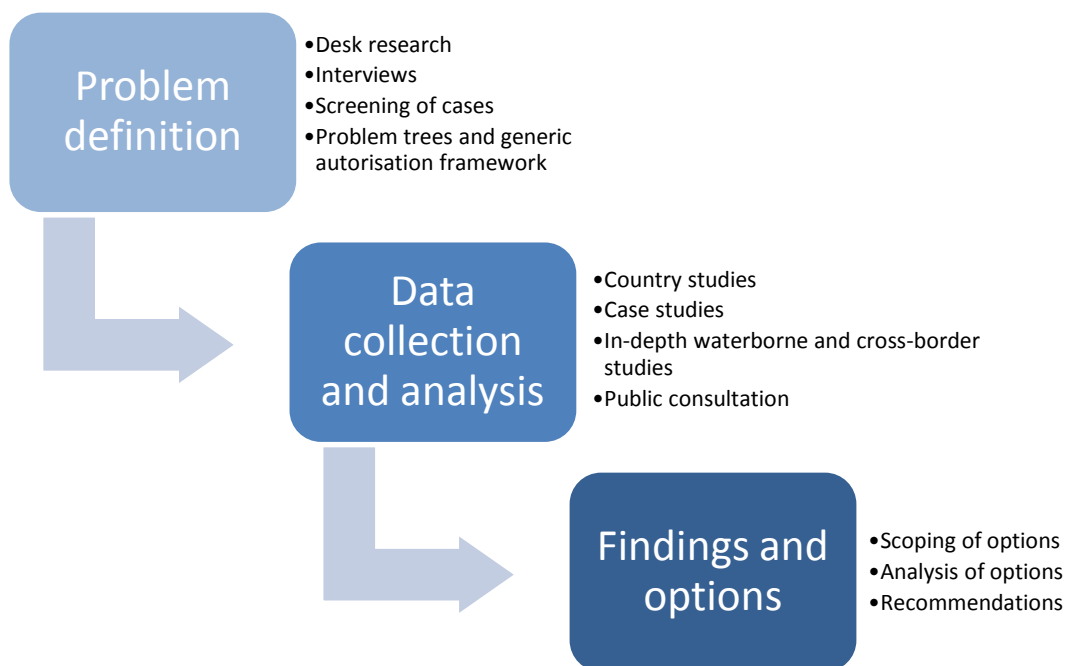
⁸ European Commission (2016), *A European Strategy for Low-Emission Mobility*, COM(2016) 501

⁹ As referred to in the Commission Communication on low-emission mobility referenced above.

1.2 METHODOLOGY

The methodology for the study was developed jointly by the Milieu/Tractebel team in close cooperation with the Commission Steering Group for the study, led by DG MOVE and based on the original technical specifications for the study. As a support study for an eventual impact assessment that will conduct more detailed analysis of policy options to reduce delays in the regulatory and administrative aspects of the preparation of TEN-T projects, the methodology has also been based on the Commission's procedures and guidelines for regulatory impact assessments, as set forth in the Better Regulation Guidelines and 'Toolbox'¹⁰. As such, it started with a detailed problem definition and analysis, resulting in the development of problem trees covering the key problem drivers and their inter-linkages. This led to the development of an intervention logic (see section 2.1) for the study, further analysis of the problems through in-depth studies, and the development and analysis of the most suitable policy options available at EU level to address the problems. The key phases of the study are summarised in Figure 1 below.

Figure 1: Key study phases



1.2.1 Problem definition

The problem definition stage of the work has aimed at better understanding of the scope and nature of the initially identified problems related to delays in the permitting and preparation of TEN-T projects. It essentially sought answers to the following questions, in line with the Better Regulation Guidelines approach to defining and analysing policy problems¹¹:

- What is the problem (or problems) to be addressed?
- What is the potential magnitude of the problem?
- When (i.e. at which stage of the project life-cycle) does the problem appear?
- What are the drivers behind the problem?
- Who are the stakeholders?
- What are the likely outcomes in the absence of EU intervention?

¹⁰ European Commission, European Commission, *Better Regulation Guidelines*, Commission Staff Working Document, SWD (2015) 111 final and *Better Regulation Toolbox*

¹¹ European Commission, 'Tool #11: How to analyse problems', *Better Regulation Toolbox*

To track and analyse the problems clearly, the study followed a problem tree approach, which allowed mapping of the key problems, their causes and drivers and the inter-linkages between these factors. To do so, the team carried out four main research and analysis activities:

- Step 1: Desk study
- Step 2: Screening of cases
- Step 3: Initial interviews
- Step 4: Development of problem trees and generic authorisation framework

Step 1 Desk study

The purpose of the desk study was to review existing studies that examine barriers to the implementation of major infrastructure projects and develop a first identification of the policy problems that may be relevant to this study. The desk study reviewed recent literature sources that examine the issue of non-financial barriers in the implementation of major infrastructure projects.

Step 2 Screening of cases

In order to review and identify key sources of problems in the authorisation of TEN-T projects, 17 pre-selected cases were screened. The results of this task assisted in the identification of drivers behind the problems faced by transport projects during regulatory and administrative processes. The 17 cases were selected out of a list of 28 potential case studies agreed with DG MOVE to allow for a representative sample of transport modes, Member States and TEN-T corridors. Cases were reviewed in brief on the basis of desk research. Sources of information for this review include project websites, TEN-T Core Network Corridor studies, and publicly available information about the permitting processes for individual projects including reports and presentations. This step was also used to select the ten case studies on waterborne and cross-border TEN-T projects to be studied in-depth as part of the study.

Step 3 Initial interviews

Step 3 involved initial interviews with those European Commission staff having experience in the selection and preparation of TEN-T projects. As with the screening of the case studies carried out under Step 2 above, the interviews have been used to refine and validate the early conclusions reached through the desk research in Step 1. The purpose of the interviews was to gather insight on how the potential policy problems identified in the literature manifest in practice in the preparation and implementation of TEN-T projects.

Table 1: Initial interviews carried out

Organisation	Date
DG MOVE, Unit B1 – Trans European Network	5 November 2015
INEA, Department C – Connecting Europe Facility	13 November 2015
DG ENV, Unit D1 – Enforcement, Cohesion Policy and European Semester	17 November 2015
DG ENV, Unit C1 – Water	17 November 2015
DG MOVE, Unit B4 – Connecting Europe – Infrastructure Investment Strategies	20 November 2015
JASPERS	23 November 2015
DG GROW, Unit – G2 Access to Procurement Markets	29 February 2016
DG COMP, Unit – F2 State aid Transport	21 March 2016

Step 4 Development of problem trees and generic authorisation framework

The purpose of this step was to develop a sound framework for the detailed research and development of policy options. For each category of problem (permitting, public procurement, state aid as well as the specific challenges for waterborne and cross-border projects), detailed problem trees were developed. The research also enabled the development of a general framework for understanding the steps and procedures involved in the authorisation process for TEN-T projects. These were subsequently revised after the completion of the data collection phase of the project and feedback from the Commission Steering Group for the study. The final generic authorisation framework is presented in Section 2.2 of this report and the problem trees are available in Annex 2.

Overall, the problem definition phase allowed for the identification of the key issues to be covered in the data collection phase, in particular the country studies and the case studies. It has also formed the basis for developing options and recommendations that correspond to a detailed understanding of the policy and problem context. The results of the problem definition stage of the research are contained in Annex 1 and Annex 2 of this report.

1.2.2 Data collection and analysis

The data collection and analysis phase enabled in-depth research through further desk study and a range of consultation measures. It consisted of four key aspects, carried out simultaneously:

- Country studies and comparative analysis
- Case studies
- In-depth studies on waterborne and cross-border projects
- Stakeholder consultation

Country studies and comparative analysis

In-depth studies were carried out by national experts to examine the regulatory and administrative frameworks for transport projects in ten selected Member States to identify the sources of delay, cost and uncertainty, as well as good practices. The following countries were covered by in-depth studies, to reflect a diversity of regulatory and administrative approaches. The selection of countries, in combination with the countries represented in the ten project case studies, has ensured that the research reflected the general picture across the EU.

- | | |
|------------------|------------------|
| ■ Czech Republic | ■ Poland |
| ■ Germany | ■ Romania |
| ■ Hungary | ■ United Kingdom |
| ■ Italy | ■ Austria |
| ■ Netherlands | ■ Spain |

To conduct the studies, national experts used a uniform country study template, which was prepared on the basis of the problem definition and analysis framework developed in the previous stage. The country studies were completed on the basis of desk research (particularly legal analysis) and interviews with competent authorities and project promoters in the Member States. A comparative analysis of the ten country studies was then prepared to identify key commonalities and differences in regulatory and administrative frameworks and the main drivers behind increased costs, delay and uncertainty in the planning and implementation of core network projects. Existing streamlining measures and good practices in Member States have also been identified and compiled. Executive summaries of the country studies are provided in Annex 3 and they have been used to develop the problem definition and define and analyse the policy options.

Case studies and in-depth studies on waterborne and cross-border projects

Two in-depth analyses on waterborne projects and cross-border projects in the TEN-T core network were conducted as part of the study, as these were identified in the study specifications as presenting specific challenges. The purpose of the in-depth analyses was to gain a better understanding of these issues as well as good practices encountered in waterborne projects and cross-border projects.

These in-depth studies were developed through the analysis of project-level case studies. The case studies also contributed to the overall analysis of the problem and development of policy options. The case studies analysed the key challenges in the preparation of TEN-T projects, including the underlying factors that contribute to these challenges. This work has been based on desk research, expert advice, and stakeholder interviews (particularly competent authorities and project promoters).

In the case studies covered ten waterborne and cross-border projects. These projects were selected to cover a representative sample of transport modes, Member States and core network corridors, as well as experiences in good practices and particular challenges in the permitting phase. These projects are:

- Railway connection Lyon-Turin
- Fehmarn Fixed Link
- Brenner Base Tunnel
- Rail Baltica (including the Warsaw-Białystok link, as an illustrative example of the implementation of rail projects in Poland)
- Seine – Scheldt
- The Danube – Common section Bulgaria-Romania
- LNG-terminal in Ruse (Danube)
- Road Brno – Vienna
- Le Havre 2000
- Weser River, including Bremen and Bremerhaven port accesses, and Elbe River, including Hamburg port access

In addition to the in-depth case studies listed above, the study has also gathered illustrative examples of problems and good practices from the following projects:

- Cross-border section Trieste/Divača/Koper
- Rail Zevenaar-Emmerich-Oberhausen
- Triligiport Liege

A comparative analysis of the case studies was then carried out, which outlined the specificities of waterborne and cross-border projects compared to other projects on the TEN-T core network and have provided a broad understanding of the main drivers behind their specific problems. This was used to develop the problem definition and the policy options. The full case studies are available in Annex 4.

Stakeholder consultation

Stakeholders were consulted throughout the project via interviews, stakeholder meetings and an open public consultation survey. Interviews with authorities and project promoters were conducted as part of the country studies and case studies. The study has been presented at four stakeholder meetings, gathering different audiences, including authorities, project promoters, NGOs and business organisations:

- TEN-T Coordinators Seminar, 27-29 January 2016, EIB (Luxembourg). Participants included TEN-T Coordinators and project promoters.
- Transport organisations and TEN-T Coordinators Seminar, 3 March (Brussels). Participants included TEN-T Coordinators, EU-level transport associations and NGOs.
- TEN-T Committee Meeting 16 March 2016. Participants included representatives of Member

- State competent authorities.
- Motorways of the Sea Forum, 17 May 2016. Participants included representatives of Member State authorities, waterborne transport project promoters, and EU-level transport associations.
- Final project workshop, 7 December 2016. Participants included national competent authorities (TEN-T Committee members), Commission services, and wider transport stakeholders. The purpose was to present and discuss policy options.

At each meeting, participants were provided with a background paper in advance of the meeting and were asked to provide comments based on their experiences of the permitting and preparation of TEN-T core network projects.

Interviews and stakeholders' platforms have been a critical input to the problem definition and ensured that the findings of this study are rigorous and informed by the experiences of stakeholders. Regarding the development of options and recommendations, stakeholders were mainly consulted through an open public consultation survey and a final project workshop.

The public consultation survey was launched on 20 June 2016 and ran for a period of 12 weeks until 5 September 2016. The objective of this consultation was to collect the opinions of stakeholders and interested parties on measures that could be adopted to streamline and facilitate the permitting and preparation of TEN-T core network projects. The feedback collected through the survey has supported the problem understanding, as well as development and analysis of some of the policy options. The results of the public consultation are presented in detail in Annex 5.

The final workshop was a half-day meeting dedicated entirely to the presentation and discussion of the policy options contained in this report. It was held on 7 December 2016 in Brussels during a week of TEN-T Corridor forum meetings and participants included national competent authorities, wider transport stakeholders and Commission services. The agenda included presentations from a project promoter, a private investor on the regulatory and administrative challenges that TEN-T projects face. The approach to project permitting for cross-border network projects in the energy sector was presented by DG Energy. The options in this report were presented by the consultant for feedback and discussion. In general participants welcomed further streamlining of procedures for projects. The top priorities that emerged from the discussion were the need for legal stability and certainty (both at national and EU levels); the capacity and resources of authorities to effectively prepare and review projects; measures to enforce rules such as time limits on procedures; measures to further enhance coordination between various responsible authorities/bodies and also across Commission services. Most participants called for practical and effective streamlining solutions that would not result in the creation of additional administrative burden.

1.2.3 Findings and options

During the final phase of the study, the team consolidated the information and analysis carried out through the problem definition, country studies, case studies and public consultation. This allowed the team to streamline the problems and drivers into a set of problem areas that could be addressed through EU action in this case. Options and sub-options were then identified for each problem, based on the following:

- Previous practice in other areas of infrastructure, particularly TEN-E which aimed to address similar problems in the 2013 TEN-E Regulation¹²
- Good practices in the Member States or in existing projects
- Input from interviews, in particular with Commission officials and the Steering Group indicating the types of options that would be feasible and/or desirable

¹² Regulation (EU) No 347/2013 of the European Parliament and of the Council of 17 April 2013 on guidelines for trans-European energy infrastructure.

- The inter-relationship with existing EU legislation in other areas (e.g. environment, public procurement, state aid) and problems that have emerged in the implementation of this legislation due to uncertainties, differences in Member State transposition and interpretation and other factors.

A preliminary scoping of policy options was proposed in the intermediate report for this project, which was finalised in June 2016. The preliminary options were discussed with the project Steering Group, and later developed in draft for the draft version of the final report in September 2016. The options were again discussed with the Steering Group and finalised in this report. The final versions of the options are presented in Section 3 of this report. For each problem area, there is a brief discussion of the problem, and a presentation of a proposed option, options or sub-options¹³.

Each proposed policy option has been assessed, based on the following issues:

- **Purpose and potential effectiveness:** explains how and why the option would be particularly effective in addressing the identified problem
- **Other relevant issues:** this considers issues of proportionality and subsidiarity, interactions with other areas of EU legislation, acceptability of stakeholders, results from the public consultation where relevant, and any other specific considerations that could impact the feasibility or workability of the option
- **Legal mechanism, applicable projects and possible sub-options:** the legal mechanism to be applied (e.g. legislative instrument, voluntary action, guidance and technical assistance, etc.); the types of TEN-T projects for which the option would be relevant or applicable; possible sub-options or alternatives for consideration

1.3 STRUCTURE OF THE REPORT

This final report focuses on the policy options identified by the study to address the problem, and is structured as follows:

- **Section 2 Objectives and scope:** This section provides the basis for developing the policy options, and key references to be used when reviewing the options. These include the intervention logic which summarises the policy goal and objectives, the study objectives, the problem and its main drivers and the proposed policy options resulting from the analysis. It also includes a diagram and summary of the generic authorisation framework for transport infrastructure projects in the EU, and distinguishes those steps that are governed by EU legislation from those that are purely national competence. Finally it provides summaries of the applicable EU legislation and the state of play with regard to review and revision of this legislation, and an overview of the EU basis for action in the area of trans-European transport networks.
- **Section 3 Policy options:** This section presents policy options for each of five identified problem areas: Organisation of the permitting procedure; Building public acceptance; Environmental assessment; Public procurement; and State aid.
- **Section 4 Applying the options to TEN-T projects:** This section summarises the options in a table, and presents mechanisms that would allow the options to be implemented in practice. It covers legal and other instruments, as well as the types of TEN-T projects to which the various options would apply.
- **Section 5 Conclusions and recommendations:** This section presents some final thoughts on the next steps for evaluating the options through a formal impact assessment.

¹³ Sub-options in this case are mutually exclusive variants of an option, where a choice should be made on how to proceed, subject to further assessment beyond the scope of this study.

2 OBJECTIVES AND SCOPE

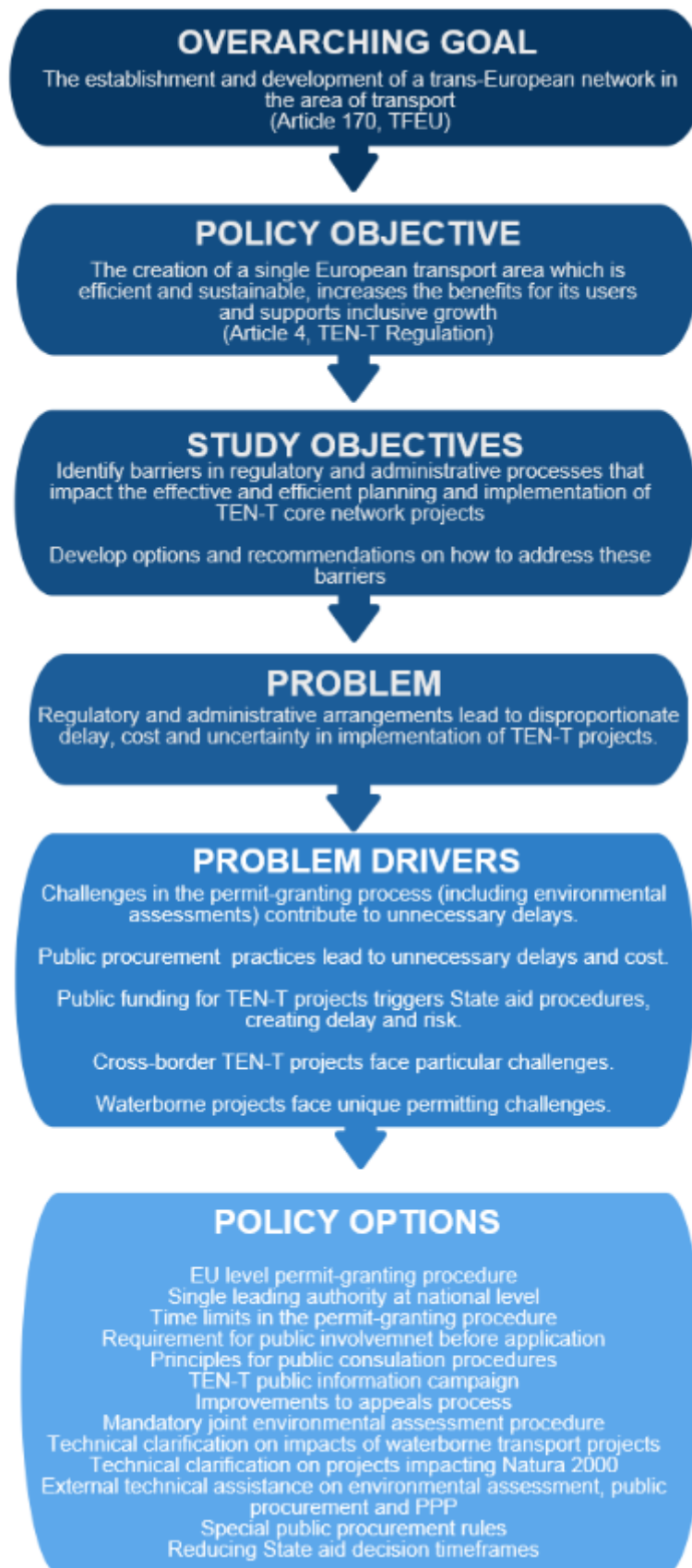
This section provides the basis for developing the policy options, and key references to used when reviewing the options, covering the scope of the policy problem under analysis, relevant procedures and legislation, and the EU basis for action in this area.

The intervention logic for the study summarises the policy goal and objectives, the study objectives, the problem and its main drivers and the proposed policy options resulting from the analysis. It has served as a guide for all stages of the project. The generic authorisation framework for transport infrastructure projects in the EU provides an overview of the procedures under consideration, including those stemming from EU legislation and those governed mainly at national level. Based on this, key applicable EU legal acts are summarised, along with the state of play as of late-2016 with regard to review and revision of this legislation. Finally, there is an overview of the EU basis for action in the area of trans-European transport networks, and considerations of proportionality and subsidiarity that will impact the proposed options.

2.1 INTERVENTION LOGIC

The intervention logic sets out the framework within which problems are analysed and options are developed. The draft intervention logic for this study was prepared during the problem definition stage of the project, and has been subsequently revised both during review with the Commission Steering Group and as the work evolved. The final version of the intervention logic, summarised in Figure 2 below, contains the proposed policy options as the final stage of the process.

Figure 2: Study intervention logic



As outlined in the figure above, the options developed in this study derive from consideration of the overarching TEN-T policy objectives. Policy options address the problems and their drivers, which negatively impact the achievement of these objectives.

The overarching goal of TEN-T policy, as stated in the TEN-T Regulation¹⁴, is the creation of a single European transport area which is efficient and sustainable, increases the benefits for its users and supports inclusive growth. More specifically, to establish this transport area in a coordinated and efficient manner, the TEN-T Regulation aims to complete the core network by 2030¹⁵. TEN-T core network projects face a number of challenges in regulatory and administrative processes that impact the effective and efficient planning and implementation of TEN-T core network projects. These challenges contribute to increased delay, cost and uncertainty during the planning and preparation of core network projects. When these challenges impact core network projects of strategic importance, they have the potential to undermine the overall objective of establishing the TEN-T core network.

The challenges faced by TEN-T core network project include challenges in permitting, environmental assessment procedures and procurement practices that lead to unnecessary delays and cost, and uncertainty and risks associated with State aid decision-making. In addition, waterborne and cross-border projects present unique or especially complex challenges. The options presented aim to contribute to the overall objectives of TEN-T policy by specifically addressing the barriers faced by TEN-T core network projects. Thus, the options seek to streamline permitting, environmental assessment, procurement and State aid processes. Together, the recommended options should improve the regulatory and administrative framework for TEN-T core networks. In addition, they should improve the regulatory and administrative conditions faced by waterborne and cross-border projects.

2.2 GENERIC AUTHORISATION FRAMEWORK AND APPLICABLE LEGISLATION

The preparation, authorisation and commissioning of TEN-T projects is governed by both EU and national legislation and procedures. EU legislation applies in the main areas where the EU has competence: in particular environment, procurement and State aid. In some cases specific rules and procedures apply linked to EU funding programmes. National laws transposing the EU Directives directly govern the procedures at Member State level, but these must be in conformity with the EU legislation, which applies equally in all Member States. The main areas for which Member State authorities have sole competence are spatial planning and land use and linked sectoral planning (e.g. transport plans); and other areas such as archaeological considerations, forestry etc.

An authorisation framework stems from the different obligations, and sets forth the process that projects must go through to apply for and receive development consent and procure the works and services necessary for implementation. This occurs at two levels: the strategic level – planning the development of the transport network at national and/or regional level; and the project level – including the planning phase and the permitting procedure, as shown in Figure 3 below. Three inter-linked and often overlapping phases can be distinguished:

- **Strategic planning:** The ministry or authority responsible for transport devises a national transport plan which provides for the long term development and modernisation of the transport network. It defines strategic priorities for different transport modes. A Strategic Environmental Assessment (SEA) is generally carried out, along with Appropriate Assessment (AA) if required according to the relevant EU Directives.
- **Project planning:** This phase assesses the timeliness and feasibility of a proposed transport project, including alternatives to achieving the objectives of the project. Feasibility studies set out the infrastructure needs and define solutions can include traffic analyses, cost-benefit analyses

¹⁴ Article 4, TEN-T Regulation

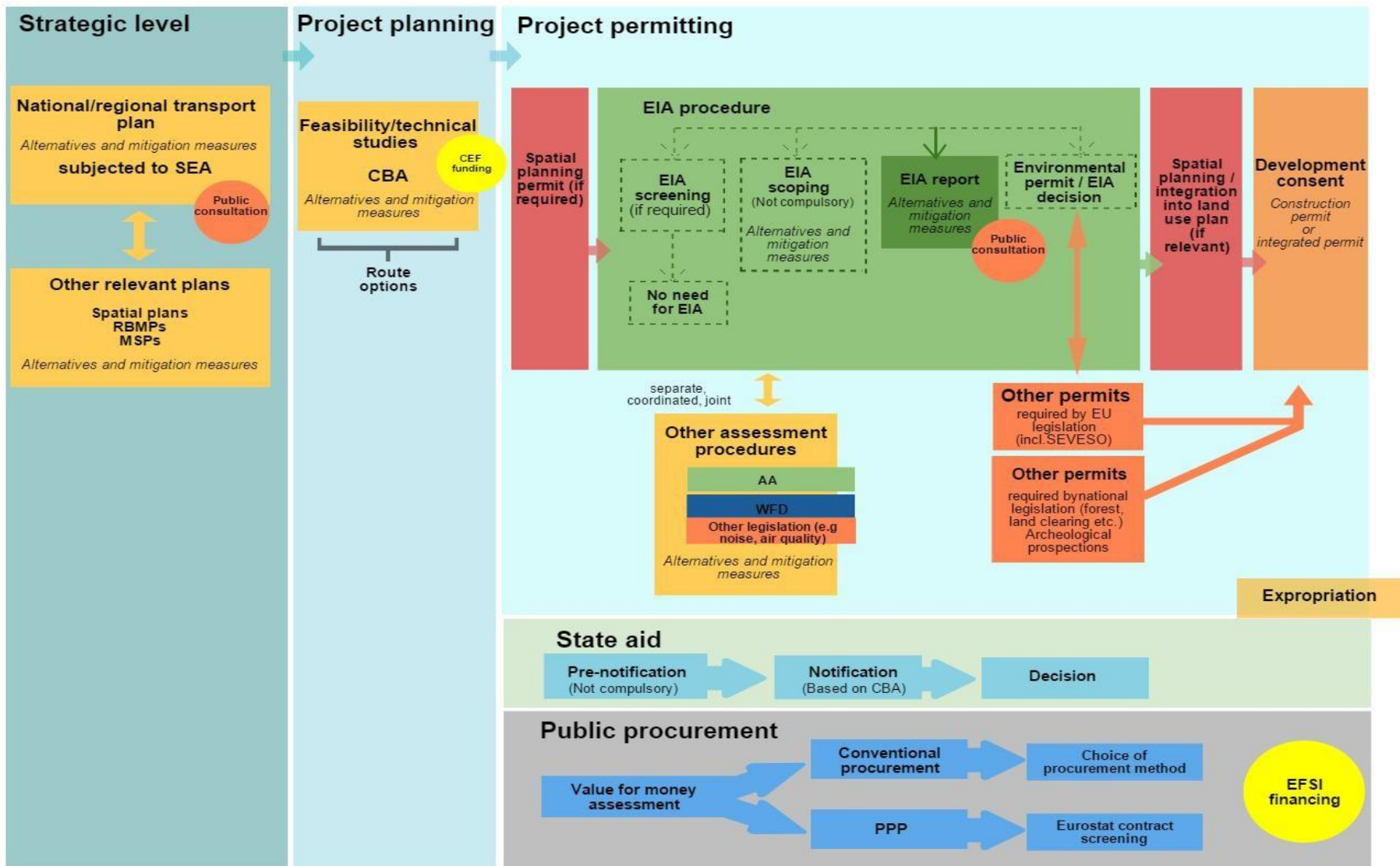
¹⁵ Article 38, Ibid.

(CBA) and environmental assessments. These may or may not be regulated by national standards, or by the requirements of EU funding programmes such as CEF or the Structural Funds. Various alternative options are assessed on the basis of economic, social and environmental criteria. The preferred option is then integrated into the spatial plan(s). In certain countries, the approval of the project will automatically result in amendments of the spatial plans, while in others, a specific land-use permit will be required in addition to the construction permit. In some cases, a major modification to a spatial or other plan to take into account a new project may require revision to the SEA.

- **Permitting procedure:** The permitting procedure generally covers the activities required to prepare an application for development consent, and follows on closely from project planning. This phase includes the EIA procedure, the spatial planning decision(s), and all the other permits to be granted. This phase concludes with the acquisition and/or expropriation of the necessary land.

Outside the authorisation framework, but still part of the preparation of an infrastructure project are the public procurement procedure, the state aid notification, and the application for funding.

Figure 3: Generic authorisation framework



The table below sets out the legislation that governs each stage of the procedure presented in the authorisation framework. Obligations deriving from national legislation – other than the transposition of relevant EU legislation – include spatial planning legislation, which sets out the rules governing land use. Permits can be required for occupying, and in certain cases clearing, certain categories of land, such as agricultural or forest land. The permitting of a TEN-T project might require changing the classification of pieces of land and updating the spatial plan(s). Obligations deriving from EU legislation cover the areas where the EU has competence – mainly protection of the environment, public procurement and State aid.

Table 2 sets out the relevant legislation applicable at key stages and steps in the procedure. An overview of each of the key EU legal instruments and how they apply to the permitting, procurement and state aid decision-making procedures is provided below.

Table 2: Relevant legislation (EU vs national) at each key step in the authorisation framework for transport infrastructure projects

Stage of procedure	Legislation
Strategic level	
National/regional transport plan	National
Spatial plan	National
River Basin Management Plans (RBMPs)	Water Framework Directive 2000/60/EC
Maritime Spatial Plans (MSPs)	Maritime Spatial Planning Directive 2014/89/EU
Strategic Environmental Assessment (SEA)	Strategic Environmental Assessment Directive 2001/42/EC
Project planning	
Feasibility studies, technical studies, CBA	National EU funding programmes (e.g. Structural Funds or CEF)
Project permitting	
Spatial planning permit	National
Environmental Impact Assessment (EIA) report report/environmental permit	Environmental Impact Assessment Directive 2011/92/EU amended by 2014/52/EU
Other environmental assessment procedures and possible permits	Water Framework Directive 2000/60/EC Habitats Directive 92/43/EEC Birds Directive 2009/147/EC Seveso Directive 2012/18/EU Others may be applicable
Other permits (e.g. forest, land clearing, archaeological etc.)	National
Public procurement	
Public procurement, including public-private partnerships (PPPs)	Concessions Directive 2014/23/EU Public Procurement Directive 2014/24/EU Utilities Directive 2014/25/EU Remedies Directive for the utilities sector 92/12/EEC amended by 2007/66/EC Remedies Directive for the public sector 89/665/EEC amended by 2007/66/EC

State aid

State aid notification

EU Regulation laying down detailed rules for the application of Article 108 of the TFEU

The most relevant pieces of legislation are the following:

Environmental legislation

- **SEA Directive (Directive 2001/42/EC):** Directive 2001/42/EC requires an environmental assessment for plans or programmes prepared in several sectors, including transport, town and country planning, or land use as well as those that set the framework for future development consent of projects listed in the EIA Directive. An SEA is also mandatory for plans and programmes which require an assessment under the Habitats Directive. For other plans and programmes, Member States must carry out a screening procedure to identify whether the plan or programme is likely to have significant environmental effects, and therefore if an SEA has to be carried out. SEA involves the preparation of an environmental report, identifying significant environmental effects of and possible alternatives to the plan or programme proposed. The Directive also requires that the draft plan or programme and the draft environmental report are submitted for public consultation, and once adopted, made available to the public. Following the adoption of the plan or programme, significant environmental effects must be monitored. At the project level, in many cases, the screening process determines that an SEA is required for transport plans at local level. An SEA is also usually required for spatial and land-use plans for small areas at local level that impact transport project planning.
- **EIA Directive (Directive 2011/92/EU):** Directive 2011/92/EU requires an environmental assessment for public and private projects likely to have significant effects on the environment. In its Annex 1, the Directive identifies types of projects that must be subject to the EIA procedures, including the following types of transport infrastructure projects:
 - The construction of lines for long-distance railway traffic and of airports with a basic runway length of 2,100 m or more
 - The construction of motorways and express roads
 - The construction of a new road of four or more lanes, or realignment and/or widening of an existing road of two lanes or less so as to provide four or more lanes, where such new road or realigned and/or widened section of road would be 10 km or more in a continuous length
 - Inland waterways and ports for inland-waterway traffic which permit the passage of vessels of over 1,350 tonnes
 - Trading ports, piers for loading and unloading connected to land and outside ports (excluding ferry piers) which can take vessels of over 1,350 tonnesOther transport projects, listed in Annex 2 of the Directive, must be screened to identify whether they are likely to have significant environmental effects, and therefore if an EIA has to be carried out. The EIA procedure may include a scoping stage, where the project promoter can request the competent authority for an opinion on the scope of the EIA. The project promoter submits the EIA report, which is made available for public consultation. The competent authority then decides on the environmental assessment. The decision on the EIA can occur prior to the granting of the for development consent or be integrated with the development consent application process.
- **Birds and Habitats Directives (Directive 2009/147/EC and Directive 92/43/EEC):** Directive 92/43/EEC requires an Appropriate Assessment of plans and projects likely to impact Natura 2000 areas (Article 6(3)). The plan or project can only be authorised if the Appropriate Assessment has demonstrated that it will not adversely affect Natura 2000 areas, or that adequate mitigation procedures have been put in place in cases of true overriding

public interest (Article 6(4)). The Appropriate Assessment may be integrated with the EIA¹⁶ or require a separate permit granted by the competent authority for nature protection. The exact procedure for determining whether a project that impacts Natura 2000 sites should be implemented, including whether the proposed mitigation measures are adequate, is up to the Member States and in some cases may require additional clarification at EU level.

- **Water Framework Directive (Directive 2000/60/EC):** Under Directive 2000/60/EC, infrastructure projects must not compromise the achievement of the good ecological status of water bodies or lead to the deterioration of the status established by the River Basin Management Plans (RBMP). Impacts on water bodies should therefore be assessed in that regard. This assessment may be integrated with the EIA. If the project has significant impacts that might compromise the achievement of these objectives, Article 4(7) of the WFD sets the conditions under which this can be accepted. This is when failure to achieve good status ‘is the result of new modifications to the physical characteristics of a surface water body or alterations to the level of bodies of groundwater’, or when ‘failure to prevent deterioration from high status to good status of a body of surface water is the result of new sustainable human development activities’. Permitting authorities have to check whether the project satisfies all conditions set out in Article 4(7) to grant the permit, as well as the conditions of Article 4(8) that the project does not permanently exclude or compromise the achievement of the objectives of the Directive in other bodies of water. This procedure is implemented by the Member States and may require additional clarification for certain types of transport projects. New projects falling under Article 4(7) must therefore:
 - Take all practicable steps to mitigate the adverse impact on the status of the body of water;
 - Ensure that the reasons for the projects are set out and explained in the river basin management plan, which is prepared and reviewed every six years;
 - Demonstrate that the reasons for any deterioration in status caused by the project are of overriding public interest, or that the benefits of the project in terms of human health, the maintenance of human safety or sustainable development outweigh the environmental objectives in Article 4(1) of the Directive; and
 - Demonstrate that the beneficial objectives of the project cannot be achieved by another technically feasible means without disproportionate costs.
- **Maritime Spatial Planning Directive (Directive 2014/89/EU):** Directive 2014/89/EU aims at improving the planning and coordination of activities at sea. It requires Member States to develop Maritime Spatial Plans, by 2021 at the latest, mapping out marine activities that are taking or will take place in different areas of the sea. Member States must transpose the Directive and designate their competent authority by September 2016. Directive 2014/89/EU is likely to affect TEN-T projects located at sea, in particular ports development, in the coming years. At the strategic level, Maritime Spatial Plans will have to be taken into account in establishing transport strategies or plans. The extent to which this will impact individual projects will not be fully understood until Member States transpose the Directive and begin adopting plans over the coming years, as the legal significance of Maritime Spatial Plans in national permitting processes is not yet known.
- **SEVESO Directive (Directive 2012/18/EU):** Directive 2012/18/EU aims at the prevention of major accidents involving dangerous substances. The Directive applies to industrial establishments where dangerous substances are used or stored in large quantities. Under the Directive, facility operators must develop a major accident prevention policy, produce a safety report for upper-tier establishments¹⁷, develop internal emergency plans for upper tier

¹⁶ Member States will have to ensure coordinated and/or joint procedures for EIA and the AA where appropriate once the amendment of Article 2 of the EIA Directive (2011/92/EU as amended by 2014/52/EU) comes into force on 16 May 2017.

¹⁷ Under SEVESO III, establishments are categorised in lower and upper tier establishments, depending on the quantity of

establishments, and provide information in case of accidents. In addition, authorities must ensure that the siting of establishments is integrated into land use planning, and develop external emergency plans for upper tier establishments. Directive 2012/18/EU affects only certain types of TEN-T projects, such as LNG terminals, classified as SEVESO facilities, if they contain quantities of LNG over a certain threshold. LNG terminals might be subjected to additional permits at national level as Member States have adopted different approaches to determine external safety in land-use planning.

Other requirements stemming from EU legislation may apply to certain TEN-T projects, such as noise standards, legislation regulating solid waste management and air pollution. These would then have to be considered in the EIA, and influence the granting of the development consent.

Public procurement legislation

- **Concessions Directive** (Directive 2014/23/EU): Directive 2014/23/EU lays down a legal framework for concessions above a threshold value. It focuses on ‘concessions’ which are partnerships between the public sector and mostly private companies, where the latter exclusively operate and provide services of general economic interest. The Directive takes into account the specific features of concessions (e.g. the fact that they tend to be high-value, complex and long-term contracts) compared to public contracts, which justify a more flexible set of rules for their award. It sets a clear and precise definition of ‘concession’ and establishes certain obligations with respect to the selection and award criteria to be followed by entities awarding concessions.
- **Public Procurement Directive** (Directive 2014/24/EU): Directive 2014/24/EU focuses on the acquisition of works, supplies or services by means of a public contract. Such acquisitions must be implemented through purchase, leasing or other contractual forms. This Directive widens the award criteria, shifting towards a longer-term, more holistic thinking and away from an over-reliance on price. Under Directive 2014/24/EU contracting authorities must award contracts only to the most economically advantageous tender, which may include the best price-quality ratio, linked to the subject matter of the public contract in question. A provision included in the Commission’s proposal for the Directive requiring each Member State to designate a single national oversight body responsible for controlling, monitoring and applying the procurement rules was dropped, due to opposition by Member States.
- **Utilities Directive** (Directive 2014/25/EU): Directive 2014/25/EU introduces more flexible public procurement rules in the utilities sectors which apply not only to public purchasers but also to public/private companies. The sectors covered by the Directive include: water, energy, transport and postal services. Companies engaged in commercial or industrial activities in the utilities sector do not need to comply with the full set of EU procurement rules but can apply a more flexible public procurement regime.
- **Remedies Directives** (Directives 89/665/EEC and 92/13/EEC amended by Directive 2007/66/EC): These Directives coordinate national review systems by imposing common standards to ensure that rapid and effective means of redress are available in all EU countries when bidders believe that contracts have been awarded unfairly. The 2007 amendments introduced a ‘standstill period’ of at least 10 days where contracting authorities need to wait before signing a contract and more stringent rules against the illegal direct awards of public contracts. The Remedies Directives are applicable to all types of public contracts, including concessions and many public-private partnerships.

State aid legislation

dangerous substances present in the establishment. Upper tier establishments are subjected to more stringent requirements.

The Treaty generally prohibits State aid unless it can be justified by reasons of general economic development. Aid measures can therefore only be implemented after approval by the Commission, following the rules of procedure laid out in Regulation (EU) 2015/1589. All new aid measure must be notified to the Commission, which triggers a preliminary investigation, where the Commission has two months to decide whether the aid is compatible with EU rules or whether there are grounds for opening an in-depth investigation. The Commission can adopt Block Exemption Regulations to exempt certain categories of State aid from the notification requirement and the Commission approval. The General Block Exemption Regulation (GBER) of 2014 specifies which categories of State aid the exemption applies to. The Commission has recently proposed to include ports and airports in the GBER.

Current and upcoming milestones in EU legislative and policy processes

Over the coming year, some of these instruments will achieve implementation milestones or undergo various policy review processes, particularly through the European Commission's REFIT programme. Table 3 below outlines upcoming milestones for these policy processes.

Table 3: Current and upcoming milestones in EU legislative and policy processes

Policy area	Milestones
Birds and Habitats Directives	December 2016: Publication of the Commission report on the results of the Fitness Check of the Birds and Habitats Directives. Policy options to be developed during 2016-17 based on outcomes of REFIT process.
EIA Directive	16 May 2017: 2014 amendments come into force, including those requiring the integration of environmental assessment procedures where appropriate (Article 2(3)), time limits for screening decisions (Article 4(6)) and minimum time-frames for public consultation (Article 6(7))
SEA Directive	2016: Second report to the European Parliament on the application and effectiveness of the Directive (required every seven years under Article 12).
Water Framework Directive	Before October 2019: Commission review of the Water Framework Directive to identify any necessary amendments (Article 19(2)).
State Aid	Early-2017: Commission decision on extension of the State aid General Block Exemption Regulation to ports and airports, following public consultation in 2016
Remedies Directives	Late-2016: Publication of REFIT evaluation report of 2007 amendments to Remedies Directives relating to review procedures concerning the award of public contracts, following public consultation in 2015.
Single Market Strategy	2016-17: Implementation of actions for major infrastructure projects, including helpdesk, voluntary ex ante procurement assessment and information exchange mechanism
Maritime Spatial Planning Directive	18 September 2016: Transposition deadline 18 September 2016: Member State deadline for the nomination of competent authorities 2021: Member State deadline for establishing maritime spatial plans
Multiannual Financial Framework 2014-2020	End-2016: Mid-term review 2017 – 2020: preparation of the next MFF (2021 – 2027) and regulations for EU funding programmes

2.3 EU RIGHT TO ACT

The analysis of the generic authorisation framework not only provides a basic reference for understanding the stages, procedures and steps, but also a basis for distinguishing between areas of competence of the EU, and those that are solely the competence of the Member States. This provides clarity on where the EU may have the right to consider a role in streamlined decision-making, based on its competence to act in relation to transport networks.

The EU's competence to act in relation to transport networks is set out in Article 170 of the TFEU, which requires the EU to 'contribute to the establishment and development of trans-European networks' in the area of transport (see **Error! Reference source not found.**⁴ below). In detailing what EU action in this area could include, Article 171(2) states that 'Member States shall, in liaison with the Commission, coordinate among themselves the policies pursued at national level which may have a significant impact' on the objective of the establishment of trans-European networks, and the 'Commission may, in close cooperation with the Member States, take any useful initiative to promote such coordination'. Furthermore, in 2014, the Council of Ministers invited the Commission to take stock of good practices and identify ways to streamline permitting procedures for projects of common interest of the core network¹⁸.

Table 4: Relevant articles of the Treaty on the Functioning of the European Union

Treaty on the Functioning of the European Union¹⁹

Title XVI – Trans-European Networks

Article 170

1. To help achieve the objectives referred to in Articles 26 [Internal Market] and 174 [Economic, Social and Territorial Cohesion] and to enable citizens of the Union, economic operators and regional and local communities to derive full benefit from the setting-up of an area without internal frontiers, the Union shall contribute to the establishment and development of trans-European networks in the areas of transport, telecommunications and energy infrastructures.

...

Article 171

1. In order to achieve the objectives referred to in Article 170, the Union:
 - shall establish a series of guidelines covering the objectives, priorities and broad lines of measures envisaged in the sphere of trans-European networks; these guidelines shall identify projects of common interest,
 - shall implement any measures that may prove necessary to ensure the interoperability of the networks, in particular in the field of technical standardisation,
 - may support projects of common interest supported by Member States, which are identified in the framework of the guidelines referred to in the first indent, particularly through feasibility studies, loan guarantees or interest-rate subsidies; the Union may also contribute, through the Cohesion Fund set up pursuant to Article 177, to the financing of specific projects in Member States in the area of transport infrastructure.

...

2. Member States shall, in liaison with the Commission, coordinate among themselves the policies pursued at national level which may have a significant impact on the achievement of the objectives referred to in Article 170. The Commission may, in close cooperation with the Member State, take any useful initiative to promote such coordination.

...

Article 172

¹⁸ Council of the European Union, Council conclusions on Transport infrastructure and the Trans European Network, Council Conclusions, Brussels, 3 December 2014

¹⁹ Treaty on the Functioning of the European Union, Consolidated version, Official Journal C 326, 26 October 2012

...

Guidelines and projects of common interest which relate to the territory of a Member State shall require the approval of the Member State concerned.

Hence, EU action to set out a framework to streamline the permitting and preparation of projects integral to the establishment of the TEN-T network would appear to be within the scope of the EU's right to act. However, because the EU shares competence in this area with the Member States²⁰, EU action must respect the principles of subsidiarity and proportionality^{21, 22}. Therefore, there is a need to justify EU action and ensure that these principles are respected.

Under the principle of subsidiarity, EU action may be desired to the extent that the policy objectives cannot be sufficiently achieved by Member State action. The transnational nature of the TEN-T network is clear. This is particularly evident in relation to cross-border projects; however, the corridor approach adopted in the TEN-T Regulation is inherently transnational – this approach is intended to 'coordinate different projects on a transnational basis and synchronise the development of the corridor'²³. This coordinated, transnational approach is unlikely to be adequately addressed by Member State action alone. Regarding the principle of proportionality, EU action should not exceed what is necessary to achieve the objectives of the Treaties – in this case, the establishment and development of a trans-European transport network.

In this context, the following sections of this report will examine the various steps of the authorisation framework for TEN-T projects, in order to understand where the key problems lie and what measures can be considered to improve the risk of delays and uncertainties in implementation. In some cases, these will cover areas where Member States retain competence – e.g. spatial planning – which may impact the role the EU can play in proposing measures aimed at streamlining. These considerations are reviewed for each of the proposed options.

²⁰ Article 4, *Treaty on the Functioning of the European Union*, Consolidated version, Official Journal C 326, 26 October 2012

²¹ Article 5, *Treaty on the European Union*, Consolidated version, Official Journal C 326

²² European Commission, *Better Regulation Guidelines*, Commission Staff Working Document, SWD (2015) 111 final, p.20

²³ Recital 43, TEN-T Regulation

3 POLICY OPTIONS

This section presents the policy options that are proposed to address the core problems causing disproportionate delay, costs and uncertainty in the preparation and implementation of TEN-T projects stemming from regulatory and administrative procedures. This section has been organized according to the problem areas identified for the purposes of carrying out the research for this study. For each area, different types of problems are briefly analysed in the sub-sections below, and options are presented and assessed as likely solutions to the problems.

Table 5 below summarises the core problems leading to specific delay, costs and uncertainty for each option area. The options discussed in the following sections are summarized in Section 4, which presents ways in which the options can be implemented in practice.

Table 5: Summary of problem analysis and option areas

Core problems	Delay, costs and uncertainty	Option areas
Multiple stages and authorities involved in permitting procedures Lack of resources and technical capacity of permitting authorities Lack of consultation and coordination between permitting authorities Absence of project strategic planning Absent or unenforced time limits	Request for further information by authority and suspension of the procedure until the documentation provided by the promoter is satisfactory Increased risk of conflict between permitting decisions Duplication of permits when obtained at regional or local level Necessity to gather decisions/opinions from a large number of authorities	Organisation of the permitting procedure (3.1)
Late or poorly timed consultation of stakeholders Ineffective stakeholder consultation Inefficient stakeholder consultation	Public opposition during permitting and preparation phase. Permitting decisions might be challenged in Court Frequent and lengthy appeals	Building public acceptance (3.2)
Poor quality and inefficient timing in environmental assessments Overlaps and inefficiencies in multiple types of environmental assessments Lack of coordination in transboundary environmental assessments Uncertainties stemming from EU environmental legislation	Duplication of work – applications and assessment procedures Amendments to poor quality environmental assessments and project design Uncertainty and delays in permitting decisions where compliance with procedures is not certain	Environmental assessment (3.3)
Complexity of legal framework Absence of time limits for the award procedure Characteristics of review procedures Limitations in capacity of contracting authority Segmentation in procurement procedures in cross-border projects	Lengthy procurement phase	Public procurement (3.4)
Deficiencies in the design of the tender	Project selected is of low quality or high costs	
Organisational barriers to PPPs Statistical treatment of PPPs	Under-exploitation of PPPs for the preparation and delivery of TEN-T	

Core problems	Delay, costs and uncertainty	Option areas
	projects	
Lateness and/or poor quality of State aid notifications	Uncertainty and risk concerning the timing of State aid decisions	State aid (3.5)

3.1 ORGANISATION OF THE PERMITTING PROCEDURE

Based on the research conducted for this study, 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. The options presented below address the key aspects of the organisation of the permitting process: the distribution of decision-making competences, the coordination between the different authorities involved, and the potential overlaps and duplication of work that can result from the involvement of several authorities, through the designation of an authority in charge of leading the permitting process – or ‘one-stop-shop’ and the setting of time limits for different stages of the permitting process for TEN-T projects.

3.1.1 Decision making and competent authorities

Factors of delay, costs and uncertainty in permitting procedures are often rooted in procedural aspects. TEN-T projects have multiple impacts on land-use and the environment, often require conducting multiple environmental assessments, and, given their size, can fall under several jurisdictions if the procedure is handled at regional or local level. Consequently, in some Member States, permitting procedures are complex, involving many steps and permitting authorities, leading to duplication of permits and applications to be submitted by project promoters, duplication of or overlaps in assessment procedures, and significant administrative burden and costs for both the project promoters and permitting authorities. The higher the number of different authorities involved in the permitting procedure (either as permitting authority or consulted authority), the more complex it becomes to gather all of the intermediate decisions required to grant the final permit.

The large number of permitting authorities involved is in part due to the wide scope of impacts considered in environmental assessments, which leads to the involvement of several sectoral authorities, either for granting permits or delivering an opinion or a decision (see Section 3.1.3 below). The level of decentralisation of the procedure, with permits granted by regional, sub-regional and municipal authorities, is another factor explaining the number of authorities involved in the procedure. This can lead to repetition in the permitting procedure, and where relevant, the public consultation involved, in all regional or local jurisdictions crossed by the project. A more decentralised procedure can also lead to additional administrative burden for project promoters, especially when the regional or local authorities handle procedural aspects differently.

In addition, the large number of authorities involved in some countries makes the process highly vulnerable to the administrative capacity of authorities to issue decisions within reasonable timeframes. Stakeholders in six of the ten Member States studied acknowledged that all authorities do not have the same level of resources to invest in permitting and that some lack human resources to carry out their duty (Czech Republic, Germany, Hungary, Italy, Poland and Romania). Lack of capacity has been identified in particular in sectoral authorities (for example, water, cultural heritage), and in regional/local authorities, in which permitting is generally dealt with along with their regular workload, without dedicated extra staff.

Cross-border projects are particularly vulnerable to the problems described above. The number of permits, the sequence of approvals, time limits, requirements for public consultation can vary greatly

between countries and can result in permitting procedures happening at different speeds on either side of the border. Any delay or obstacle on one side of a border will necessarily impact project delivery on the other side, as project promoters will not proceed with a project until the delivery on both sides of the border can be assured. A prime example is the Fehmarn Belt Fixed Link project, where the approval process went quite smoothly in Denmark, while the approval in Germany is still dependent on the completion of several rounds of public hearings.

One way of addressing this problem is to concentrate decision-making powers regarding development consent in the hands of a single authority that would review the application, be a single contact for the applicant, coordinate the consultation with relevant authorities and take the final decision. Effectively, the approach would ensure that a single authority can act as a point of entry to a network of the different authorities and institutions that are necessary to input to the design and review of a transport infrastructure project in order to ensure proper compliance with relevant legislation and contribute to the decision-making process. This can be envisaged in two different ways: via an EU level permitting procedure (option 1), or at Member State level (option 2). The two options could be applied simultaneously, with the EU decision-making procedure applying to the most critical projects, as explained in Section 4 below.

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. A similar approach was suggested in the Communication ‘Europe investing again – Taking stock of the Investment Plan for Europe and next steps’, an ‘EU single authorisation framework’ as a potential option to explore for large infrastructure projects of strategic importance for the EU. As described in the communication, it would be directly applicable and would replace a ‘broad range of authorisation procedures at EU and national level’²⁴. This option could be carried out in one of two alternative approaches:

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, as shown in the generic authorisation framework in Section 2.2 and Figure 3. For selected projects, this framework would replace all national rules and regulations related to permitting and procurement, including both those deriving from EU legislation (e.g. environmental assessment) 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. This would include mainly: environmental assessment, public procurement and 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. These national-level decisions remaining outside the EU single authorisation framework would be issued or coordinated by a single authority or ‘one-stop-shop’ as proposed in Option 2 below. Meanwhile, all procedures deriving from EU legislation (environmental assessment, public procurement and state aid) would be coordinated and issued by the relevant EU-level authority.

For both variants of this option, the EU would need to set up an institutional framework that would be capable of reviewing and issuing authorisation decisions for transport infrastructure projects. This would need to be an inter-service mechanism, allowing for coordination with the specific EU level authorities responsible for the various areas of EU legislation that projects would need to comply with

²⁴ European Commission (2016) Europe investing again – Taking stock of the Investment Plan for Europe and next steps, COM(2016) 359 final.

in order to qualify for development consent. The coordination mechanism and exact responsibilities of different authorities at the EU level would require further specification.

A key component of both sub-options would be the capability to apply the relevant EU Directives directly, meaning without taking into consideration any national provisions that might go beyond the requirements of the Directive (i.e. ‘gold plating’ of EU Directives through national transposition measures).

Purpose and potential effectiveness

Placing responsibility and authority for issuing development consent for infrastructure projects at the EU level would likely be highly effective in reducing delays and uncertainties caused by administrative procedures, particularly in the case of cross-border projects. In particular, there would be a higher-level authority in place for mediating any cross-border differences – whether related to timing and style of carrying out procedures or different incentives or preferences related to the projects. Presumably any EU level body tasked with the responsibility for carrying out review and decision-making related to high-priority EU infrastructure projects would have the authority and resources to make these procedures an absolute priority, as well as to effectively consult relevant authorities and stakeholders in the process, and work with national-level authorities in the process. Time limits would therefore be more likely to be respected. The likely effectiveness in terms of time would be higher in the first sub-option, under which responsibility for all decision-making related to selected projects was with the single EU-level body. To reduce the burden that the creation of a new procedure could place on the EU authorities, the number of projects subject to such a procedure- for either sub-option - would need to be kept relatively low, through an effective and transparent prioritisation process, as described in Section 4.

Other relevant issues

Both variants of this option would affect many stakeholders. National authorities, in particular those institutions that currently hold competence for issuing development consent or relevant permits required for development consent, would need to relinquish this decision-making power to an EU authority. This is likely to be more problematic for Sub-option 1a, where decisions that are normally the sole competence of Member States and are not based on procedure stemming from any EU legislation, such as those related to spatial or territorial planning, would be subject to an EU level decision. Procedures would need to be put in place to ensure subsidiarity concerns are met – i.e. that those closest to the substance of the decision have the possibility to contribute through consultation or another process. These could likely be done through TEN-T framework, and the corridor work plan tools, as further discussed in Section 4.

For other stakeholders and the public impacted by the project, it would be important that projects subject to EU-level authorisation and having EU-wide importance take into account the impacts on local population. This is discussed further in the following section (3.2 on Building public acceptance).

For project promoters, the EU authorisation procedure could have a variety of impacts. On the one hand, the simplification and speeding up of procedures would likely be appreciated, as well as more absolute certainty that procedures, in particular environmental assessments, were being carried out in compliance with EU requirements. On the other hand, most project promoters are accustomed to working with their national authorities on project authorisation procedures, and having an EU decision-making body taking precedence could create additional burden. For this reason, a single national authority, most likely the ‘one-stop-shop’ put in place for other TEN-T projects under Option 2 below, would need to retain a coordination function.

Concerns regarding the proportionality principle, which limits EU action to what is necessary to

achieve the objectives of the Treaties, should also be considered with regard to this option. The EU clearly has the responsibility and authority to implement the TEN-T network, as established by the TFEU Article 170 (see Section 2.3). However, the extent of the measures that the EU is required to take to carry out this responsibility is subject to interpretation. The extent of the problem analysis identified by authorities, stakeholders and experts through this study and other initiatives demonstrates that delays and uncertainty related to administrative and regulatory procedures, many of them stemming from EU legislation, are threatening the successful establishment of the TEN-T network, and in particular the implementation of the strategically important core network by 2030. This could be seen as sufficient cause to warrant the EU taking action with regard to the regulatory and administrative procedures applicable to the TEN-T projects of most strategic importance for the EU to achieve its Treaty obligations in this case.

The concept of a single EU level authorisation framework for TEN-T projects was not included in the public consultation carried out for this study, so further consultation would be required to determine the acceptability of such an option across stakeholders.

Legal mechanism, applicable projects

The EU single authorisation framework would be executed through a legal instrument addressing the streamlining of procedures. As discussed above, to be effective as well as in line with proportionality and subsidiarity considerations, the option would need to apply only to projects of highest strategic importance. A possible mechanism for this is presented in Section 4.

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 competent authority or ‘one-stop-shop’, designated by each Member State. This option would function in a manner similar to the permitting procedure established through the TEN-E Regulation for energy infrastructure projects, although with fewer sub-options to choose from, as discussed below. Sub-options 2a, 2b and 2c describe the different alternatives for the level of decision-making power to be granted to the leading authority.

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

Member States would have to establish or designate a leading authority or ‘one-stop-shop’ at national level, which would be responsible for coordinating the permitting procedure and which would issue a comprehensive administrative decision permitting the construction of the project. As with option 1a above, under this option, the ‘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 – mainly environmental and public procurement legislation. These EU rules would apply instead of the national legislation transposing the relevant EU Directives, meaning that the option would require a change not only in procedure but also in the rules to be applied for permitting selected projects. Since the rules would derive from EU legislation, they would only differ from national legislation in specific cases where the legislation has gone beyond the requirements of a directive or is otherwise somewhat different from EU norms.

Under this option, the leading authority would act as a ‘one-stop-shop’ for the project promoter, who would submit all application documents to the ‘one-stop-shop’ and go to this authority for all enquiries. The leading authority would be in charge of informing all other authorities involved and coordinating their involvement in the permitting process. The leading authority would be responsible for granting the development consent and the timely completion of the permitting procedure. Ultimately, the leading authority alone would be responsible for the legally binding decision. As a consequence, other authorities would only be asked for input in the procedure.

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

This option is similar to option 2a above, in that Member States would have to establish a leading authority or ‘one-stop-shop’ at national level, which would be responsible for coordinating the permitting procedure and which would issue a comprehensive administrative decision permitting the construction of the project. In this case, however, 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 the most preferential treatment possible under national law.

Under this option, the leading authority would act as a ‘one-stop-shop’ for the project promoter, who would submit all application documents to the ‘one-stop-shop’ and go to this authority for all enquiries. The leading authority would be in charge of informing all other authorities involved and coordinating their involvement in the permitting process. The leading authority would be responsible for granting the development consent and the timely completion of the permitting procedure. Ultimately, the leading authority alone would be responsible for the legally binding decision. As a consequence, other authorities would only be asked for input in the procedure.

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

Member States would have to establish a leading authority or ‘one-stop-shop’ at national level, responsible for the coordination of the permitting procedure of TEN-T projects, with more limited decision-making powers than those described in sub-option 2b above. 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.

Purpose and potential effectiveness

A one-stop-shop with full decision making powers applying set of rules unified across the EU (sub-option 2a) would likely be the most effective option as it would ensure equal treatment for all critical transport projects across the EU, and facilitate the implementation of cross-border projects by avoiding gold-plating of EU directives and diverging interpretation of EU rules. Both sub-option 2a and 2b would have the advantage of concentrating all decisions into one legally binding decision, and avoiding duplication of work, as well as delays related to multiple stages and decentralised procedures. Sub-option 2c, while it would not give the single authority complete control, would still provide the leading authority with means to avoid significant delays, especially in cases where one decision is a pre-condition to others and can put the whole process on hold. It however does not fully resolve decision-making problems, as the final decision-making right of the leading authority would only be triggered in some cases (and usually only after delay has been encountered).

The implementation of option 2, regardless of the rules to be applied or level of decision-making power the authority would have, does not necessarily require establishing a new authority. Member States could designate an existing body, to avoid creating an additional layer of administration that would add to the complexity of the procedure rather than simplifying it. Under the TEN-E Regulation nearly all Member States chose to designate an existing body as the one-stop-shop. In certain Member States, the one-stop-shop for transport could be the same as for energy.

Other relevant issues

Sub-options 2a, 2b and 2c are considered in line with the subsidiarity and proportionality principles, as they would not interfere with national competences, and leave Member States the possibility to create a new authority or designate an existing body as the one-stop-shop, and to nominate the one-stop-shop

at the most appropriate level of governance, depending on the distribution of competences between national, regional and local authorities at national level.

The precedent of TEN-E can provide some insights on the feasibility of this option. The impact assessment for the TEN-E Regulation²⁵ recommended the establishment of a leading authority with decision-making power at national level, responsible for issuing a comprehensive administrative decision concerning the construction of the project. In the adopted version of the TEN-E Regulation, however, Member States were given the possibility to establish either an ‘integrated scheme’ (similar to sub-option 2a above), a ‘coordinated scheme’ (similar to sub-option 2b above) or a ‘collaborative scheme’ (option not presented above). Fifteen Member States chose to implement the ‘collaborative scheme’, i.e. to give their one-stop-shop only coordinating powers, without the right to take decision on behalf of another authority in any case. Only one Member State chose the ‘integrated scheme’ and nine opted for the ‘coordinated scheme’²⁶. One of the reasons for Member States to use the ‘collaborative scheme’ was that it was the closest scheme to what was already in place in most Member States, and therefore required less changes to existing procedures²⁷. However, as discussed above, such an option does not provide the leading authority with the ability to prevent unnecessary delays stemming from other authorities’ failure to take decisions on time, nor does it resolve the problem of sequential authorisations, whereby delays in one area can stop the entire process. Therefore this option has not been considered in this study.

The establishment of a one-stop-shop is widely supported by the stakeholders who responded to the public consultation survey. 72% of respondents think a one-stop-shop would assist in facilitating and accelerating the permitting of TEN-T projects. Respondents were relatively split on the level of authority the one-stop-shop should have: nearly half (47%) support the creation of a one-stop-shop with extended decision-making power, while 36% of respondents support the establishment of a one-stop-shop with only coordination power.

Stakeholders also pointed out that the existence of a one-stop-shop would clarify the decision making process, making it more transparent for the project promoter, who would be relieved from having to submit documentation to several authorities and coordinating the process amongst them. Some stakeholders added that it would resolve issues linked to the potentially conflicting interests or policy priorities of multiple authorities, which sometimes lead to inconsistent decisions.

Legal mechanism, applicable projects

The requirement to establish a one-stop-shop for the purpose of coordinating and issuing development consent for TEN-T projects would need to be set forth in an EU legislative instrument. This option would be most effective if applied to all projects on the TEN-T core network, as it would make more sense to have a higher volume of projects eligible to justify Member States’ effort in putting the mechanism in place.

3.1.2 Time limits for 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. In the ten Member States studied, the duration of the permitting procedure (from the submission of the application to the last permit granted) was,

²⁵ European Commission, *Impact assessment accompanying the document Proposal for a Regulation on guidelines for trans-European energy infrastructure*, SEC(2011) 1233 final, 19 October 2011

²⁶ Milieu Ltd, Analysis of the manuals of procedures for the permit granting process applicable to projects of common interest prepared under Art.9 Regulation No 347/2013 Overview Report, December 2015. Prepared for DG Energy under study contract ENER/B1/FV2014-732/SI2.695177, p. 26.

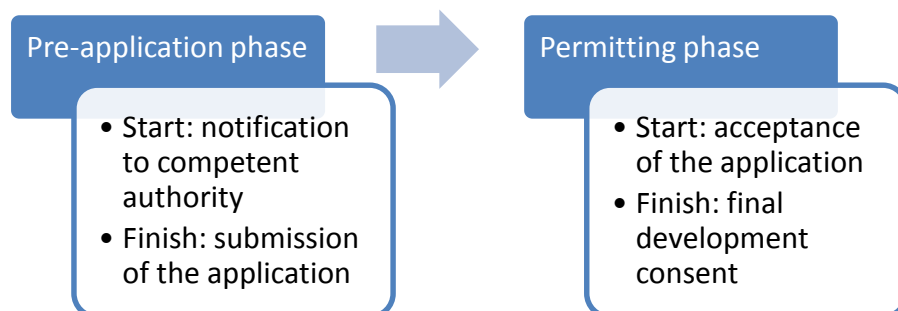
²⁷ Milieu Ltd, Analysis of the manuals of procedures for the permit granting process applicable to projects of common interest prepared under Art.9 Regulation No 347/2013 Overview Report, December 2015. Prepared for DG Energy under study contract ENER/B1/FV2014-732/SI2.695177, p. 26.

according to interviewed stakeholders, between two and five years²⁸. Regardless of the source of the problem, one way of addressing lengthy procedures is to establish time limits, to incentivise permitting authorities to adopt measures and/or administrative practices accelerating the granting of permits. In most of the selected Member States, time limits have been set out in the legislation for the main permits (EIA²⁹, spatial planning) and public consultations. However, global time limits for the entire permitting procedure have not been fixed in any Member State, even where an integrated permitting procedure exists. Time limits for expropriation procedures are also rare. In addition, interviewed stakeholders have generally commented that, although established, time limits are rarely enforced, for several reasons including the frequent need to request additional documentation or evidence from applicants. The proposed option aims to set a global time limit for the entire permitting process and individual time limits for different phases of the process.

Option: Establishing time limits in the permitting process

To ensure that time limits are applied evenly across Member States, this option would require agreement on a generic structure for the permitting process for TEN-T projects. According to the generic authorisation framework established for this study, the permitting process can be divided in two phases: the preparation of the application(s) for the permit(s) (or pre-application phase) and the permitting phase. To officially mark the beginning of the pre-application phase, an additional step might need to be created at national level, such as a notification of the start of the project to the competent authority. Time limits would be applied to both phases, with clear milestones establishing the beginning and the end of each phase. A similar approach to time limits has been adopted in the TEN-E Regulation. Figure 4 below illustrates this.

Figure 4: Key points of the permitting process to be defined for time limits



A key benefit of this option is that it would incentivise Member States to make overall efforts towards streamlining their permitting process in view of meeting the time limit. Taking into account overall durations of preparation and permitting stages in the research conducted for this study, if this option were complemented with other options aiming at streamlining the permitting process and reducing its duration, such as a one-stop-shop, it can be anticipated that a time limit of 3.5 to 4 years would be feasible.

Purpose and potential effectiveness

This option is likely to have important impact on the permitting procedure, as authorities, project

²⁸ See Annex 3. Only countries where stakeholders provided information on the duration of the permitting procedure (excluding preparation of the application) were considered in this average.

²⁹ The 2014 amendment to the EIA Directive introduced time limits for screening decisions (limited to 90 days from the date of submission by the project promoter). The competent authority has the possibility, in exceptional cases related to the nature, complexity, location or size of the project, to extend this deadline (Article 4(6)). Regarding the EIA decision, the amended Directive now specifies that Member States shall ensure that the competent authority takes any of the decisions within a reasonable period of time. These procedures will need to be in place in all Member States by the May 2017 deadline for transposition of the amended EIA Directive.

promoters and stakeholders will be required to plan their projects from the start taking into account pre-established time limits. This would have a positive impact on one of the key problems identified through this study – ineffective strategic overall project planning from the start. Time limits established by EU legislative act would also promote the harmonisation of permitting procedures between Member States, which would be beneficial to cross-border projects, where mismatched timing of procedures is frequently a key cause of complexity and delay.

Some projects will require additional flexibility due to their particular complexity or other mitigating circumstances. It will be necessary to accommodate such situations in a fair and transparent manner, so that the time limits would not seem unrealistic overall and be subject to lack of enforcement.

Finally, enforcement of the time limits will be critical. Provisions for infringement by Member States in case of failure to respect the time limits will be important. However, enforcement at national level would be even more important and the legal consequences of not meeting the time limits for the leading authority should be seen as an enforcement tool.

Other relevant issues

The establishment of an overall time limit would not directly impact the detailed content of the permitting procedure and leave the possibility to Member States to organise it according to national specificities. The option is generally considered in line with the subsidiarity and the proportionality principles.

The establishment of an overall time limit is widely supported by stakeholders. 77% of respondents to the public consultation conducted for this study find the establishment of an overall time limit for the permitting procedure useful in accelerating the permitting process. Other benefits anticipated by respondents were an increased certainty for project promoters, a more efficient management and coordination of the procedure by authorities. The majority of respondents favours the establishment of a relatively short time limit for the permitting phase – shorter than two years (37% of respondents) or up to two years (23% of respondents). The other 40% of respondents however support longer time limits, up to three years (22% of respondents) and beyond three years (18% of respondents). A number of respondents expressed concerns on the feasibility of applying the same time limit to all TEN-T projects, as projects vary greatly in scope and complexity, characteristics which can have a significant impact on the timeframe of the project.

Legal mechanism, applicable projects and possible sub-options

The requirement to establish a one-stop-shop for the purpose of coordinating and issuing development consent for TEN-T projects would need to be set forth in an EU legislative instrument. This option would most likely apply to all projects on the TEN-T core network. It could apply for both types of permitting procedures proposed in the previous section on decision-making (Section 3.1.1) – the EU single framework and the one-stop-shop at national level.

3.2 BUILDING PUBLIC ACCEPTANCE

Public acceptance has proved to be a major challenge in most projects. The research conducted for this study recognised this challenge to be present in nearly all TEN-T projects. Although stakeholders interviewed for country studies reported that early consultations were encouraged by authorities, a number of case studies indicated that late or poorly timed consultation with the public has led to missed opportunities to take public concerns into account in project planning, resulting in weaker public acceptance of projects.

The country studies also identified a number of problems related to inefficiency in carrying out public

consultations, such as requirements for multiple public consultations at regional level (in cases where projects crossed multiple regions), or by different permitting procedures without coordination between the consultation processes. This can lead to multiple and in some cases repetitive comments from the public and municipalities during public consultations, prolonging the overall duration of the project preparation.

Current public information requirements for TEN-T projects are specified in Article 50 of the TEN-T Regulation on Engagement with public and private stakeholders. Article 50 (2) requires that national procedures regarding regional and local authorities as well as civil society affected by a project shall be complied with where appropriate. It also states that the Commission shall promote the exchange of good practice in this regard. It should be noted that this article refers only to ‘directly concerned stakeholders’, defined as Member States as well as regional and local authorities, managers and users of infrastructure as well as industry and civil society. It does not refer to the general public in this regard. Other articles require regular information to be made publicly available. The work plans produced by the European Coordinator for each corridor (Article 47 (1)) and the maps of the core network coordinators (Article 44 (2)) do need to be made available to the public. These are not project specific however.

While these TEN-T requirements are aimed at ensuring that information about the TEN-T network and funding given to specific projects is generally made available, it is the EU environmental acquis that mainly govern how Member States must carry out public consultation procedures for projects likely to impact the environment, such as those in the transport sector. These legal acts however contain few specific requirements on the way in which public consultation procedures should be carried out, leaving flexibility to the Member States to determine that the public is given sufficient information about the environmental assessment procedures. The SEA Directive specifically states that the ‘detailed arrangements for the information and consultation of the authorities and the public shall be determined by the Member States (Article 6(5)). The EIA Directive, which has greater direct bearing on TEN-T projects, goes a bit further. While it also leaves the detailed arrangements to the Member States (Article 6(5)), it does specify the general content of what shall be made available, including practical concerns such as the times and places for which information will be made available and other details of the arrangements for public participation (Article 6(2)).

Article 7 of the EIA Directive contains provisions for consultations with regard to projects with cross-border impacts, and the 2014 amendments suggest that such consultations ‘may be conducted through an appropriate joint body’. The Directive also requires the establishment of time-frames for these consultations, which shall be sufficient to ‘enable the public concerned in the territory of the affected Member State to participate effectively’ in environmental decision-making procedures (Article 7 (5)).

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. The problem analysis carried out for this study found that 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.

3.2.1 Timing of stakeholder consultation procedures

With regard to the timing of public consultation, or the point at which the public is informed and consulted about the project and its options or alternatives within the project identification and preparation process, the SEA Directive currently plays an important role. Adopted in 2001, the SEA

Directive is frequently applicable for wider transport management plans, which often determine routing for specific projects. The SEA Directive requires that draft plans or programmes and the environmental report prepared as part of the SEA procedure be made available to the public, and that the public shall be given an ‘early and effective opportunity...to express their opinion...before the adoption of the plan or programme’ (Article 6(2)). This means that, in theory, the public should always be consulted at the strategic planning stage for transport projects, whether at national, regional or local level. However, it has been observed that not all strategic-level transport plans are subject to SEAs in all Member States, (see Annex 1). Furthermore, the requirement to consult applies to the environmental report rather than the plan or programme itself, meaning that at the time of consultation the plans and programmes are relatively mature and key decisions already in place. In practice, this means that this opportunity to engage the public early on can be missed.

Similarly, the EIA Directive specifies that the public concerned shall be given ‘early and effective opportunities to participate in the environmental decision-making procedures...’ (Article 6(4)). The EIA Directive also requires that reasonable time-frames shall be provided for; the 2014 amendment further specifies that these time frames for consulting the public shall not be shorter than 30 days (Article 6(6) and 6(7)).

In sum, there are no specific requirements for timing of public consultation, and leaves it up to the competent authorities in the Member States to define what is ‘early and effective’ or ‘early in the process’.

Option: Requirement for public involvement before permitting application is submitted

This option would work in coordination with the option in Section 3.1.2 on time limits in the permitting process, and 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. The time limits option proposes a ‘pre-application’ or preparation phase, which would directly precede the submission of the application for development consent.

Purpose and potential effectiveness

By requiring that public involvement begin during the pre-application phase, a legislative act governing permitting of TEN-T projects could ensure that the public is involved at a reasonably early stage in the process, with greater specificity than any of the legislation currently in place governing public participation in environmental decision-making and impacting TEN-T projects.

There is a precedent for this approach in the energy sector. Article 9 of the TEN-E Regulation sets out a series of rules that must apply to priority energy infrastructure projects, without prejudice to existing rules stemming from existing EU legislation on public participation in environmental decision-making³⁰. Among these are requirements that project promoters must carry out with regard to public participation before they submit an application for development consent to the competent authority. These include: a concept for public participation that must be drawn up by the project promoter and submitted to the leading authority or ‘one-stop-shop’; at least one public participation event to take place during the pre-application phase; and the submission of a public participation report together with the application file.

Other relevant issues

This option is considered acceptable from the perspective of subsidiarity and proportionality, as it would not be likely to conflict with existing Member State rules on public participation in the

³⁰ These include the Aarhus Convention as well as Directive 2003/4/EC on public access to environmental information and Directive 2003/35/EC on public participation.

preparation of large infrastructure projects or environmental decision-making, as it is consistent with existing EU legislation and commitments in this regard.

From a feasibility perspective, experience in the Member States with the implementation of TEN-E priority projects can provide some insight. Member States already have existing requirements for public participation in their national legislation based on transposition of the EIA and SEA Directives and other relevant EU legislation. The specific requirements of the TEN-E Regulation became directly applicable for priority energy infrastructure projects once the Regulation was adopted, and according to the 2015 compliance study, Member States had some trouble integrating the new requirements with existing procedures. The study found that in some cases project promoters raised questions about the required content and level of detail for the public participation concept, which caused delays in the process. Another serious concern involves a lack of consistent understanding across the Member States with regard to whether the pre-application consultation must be held in addition to those taking place as part of the EIA procedures or whether it could be considered part of that process. Guidance from the Commission on streamlining environmental assessment procedures for priority TEN-E projects³¹ does not clarify this issue, but takes a more principled approach, recommending early planning and road mapping of public participation procedures in any case.

Should this option be selected, it is important that clear information is provided to Member States, either through the language of the legislation and/or through additional Commission guidance, on how the procedures would fit within existing requirements for public participation, mainly with those of the EIA Directive and its 2014 amendments which have yet to come into force. Further study would be required to determine the best possible way forward for ensuring that public participation starts early enough in the process of planning TEN-T projects, and whether key stakeholders – authorities and project promoters in particular – would find such requirements easy enough to implement within in existing procedures, given the initial problematic experience in the energy sector.

Legal mechanism, applicable projects and possible sub-options

The requirement to establish a one-stop-shop for the purpose of coordinating and issuing development consent for TEN-T projects would need to be set forth in an EU legislative instrument. This option would most likely apply to all projects on the TEN-T core network.

Another consideration for this option would be to require project promoters to ensure and demonstrate that the public has been sufficiently informed about the proposed project before the application for permitting is submitted. Thus the option would not require an actual consultation event to have taken place in the pre-application phase (although it would in no way prevent them from doing so if considered appropriate). In this way, the requirement would not run the risk of causing confusion with the public consultation requirements under the EIA Directive, and would give both competent authorities in the Member States and project promoters more flexibility in meeting the requirements. At the same time, it would address the issue of the public being informed about a project too late in the process.

3.2.2 Quality of public consultation procedures

The quality of public consultation procedures is also important for securing public acceptance of large infrastructure projects. Quality of procedures generally refers to the way in which information is provided – the methods used, frequency of events and activities and type of information given all have an important influence on the outcome. The research carried out for this study found that stakeholders in about half the countries studied believed public consultation procedures were effective – and half did not.

³¹ European Commission, *Streamlining environmental assessment procedures for energy infrastructure Projects of Common Interest*. 2013, pp 28-29

Research carried out for the review of the EIA Directive found that the quality of public consultation procedures needed improvement. The 2014 amendments to the EIA Directive have made further specifications on the arrangements for public consultation procedures, with the aim of increasing quality. Member States will now need to ensure that information is made ‘electronically accessible to the public, through at least a central portal or easily accessible points of access at the appropriate administrative level’ (Article 6 (5)). The amendments also require that the time-frames for consulting the public on the EIA report shall not be shorter than 30 days (Article 6 (6)).

Generally, however, there are few specific requirements for the conduct of public participation procedures stemming from EU legislation, although it can be assumed that in some Member States, the quality of public participation procedures may improve once the revised EIA Directive comes into force in mid-2017, at least with regard to making information more easily available to the public through a website or other electronic means and with regard to ensuring minimum time frames for consultation.

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

Given the considerable impacts that TEN-T projects have on stakeholders – particularly in the local communities where the infrastructure is built – and the mixed experience with success in ongoing public consultation procedures, one option would be to propose a series of public participation principles to be taken into account for TEN-T projects. As principles, these would not be direct requirements, but rather flexible goals for Member States to set in determining the public participation requirements for TEN-T projects. Principles could be drafted to address the range of problems identified with public opposition, and having them in a legislative proposal on permitting would give them greater weight than through guidance alone.

Based on the problem analysis conducted in this study, the following principles could be proposed:

- Consultation of stakeholders at an early stage, when potential concerns can still be taken into account into project design in an open and transparent manner
- Grouping of consultations stemming from different legal requirements or addressing different issues or groups into single sessions held at appropriate stages in the processes, in order to address problems identified with the efficiency of organisation of procedures
- Limitations in the period during which comments on the project design shall be admissible, also aimed at improving efficiency in procedures
- Emphasis on the importance of transboundary consultations: convincing stakeholders and the public on both sides of the border of the necessity/benefits/importance of the project; making all materials available in multiple languages

Purpose and potential effectiveness

The principles set forth under this option would not necessarily constitute strict legal requirements, even if included in a legislative instrument. The reason for this is that the correct approach to public consultation varies considerably, based on local culture; the number and types of affected stakeholders; the nature and severity of the potential impact; existing national rules and many other factors. It could be counter-productive to attempt to specify in great detail the exact methods to be used. By providing principles based on good practice, this option would encourage the adoption of the right approach for each project.

There is a precedent from the energy sector for this approach – Annex VI (3) of the TEN-E Regulation contains principles aimed at increasing public participation in the permit granting process for priority energy infrastructure projects. The principles, combined with good practice guidance and collaborative initiatives carried out by stakeholders in the sector, have improved the degree of public acceptance for

many critical energy infrastructure projects³².

To further support the implementation of principles, good practice guidance aimed specifically at TEN-T projects could be developed at the EU level.

Other relevant issues

Principles would need to be carried out without prejudice to existing rules stemming from other international and EU legal obligations. There would be no proportionality and subsidiarity concerns as all procedures would be carried out by the Member States according to national rules.

Legal mechanism, applicable projects and possible sub-options

Principles for the conduct of public consultation procedures for TEN-T projects could be set forth in an EU legislative instrument. This option would most likely apply to all projects on the TEN-T core network.

3.2.3 Public acceptance of the TEN-T network as a priority

One of the drivers of public opposition to TEN-T projects found in the study relates to stakeholders' concerns that projects of 'European interest' would not have local benefit, or at least not enough local benefit to justify the disruption, environmental impacts etc. in their communities. Although there are important public information requirements in the TEN-T Regulation, these tend to be focused on information after the fact, and do not aim directly at demonstrating and justifying the benefits that such transportation networks offer to the EU overall and how these wider EU benefits translate to more direct, community-level benefits. As a result, some TEN-T projects struggle to achieve broad public acceptance even when public consultation procedures related directly to the project itself are well carried out by the project promoter.

The European Coordinators play an important role in facilitating the realisation of the Core Network Corridors but also in building a 'corridor approach' or 'corridor common vision' with the relevant stakeholders. In this respect, the Corridor Fora are critical vehicles to ensure effective engagement with relevant actors, including those at sub-national levels such as the most directly concerned regions. However, they cannot always reach the very local communities.

Option: 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.

Purpose and potential effectiveness

A TEN-T public information campaign would need to work within the framework of the existing TEN-T mechanism to maximise efficiency. It could be implemented through the 11 European coordinators, taking into account the information already available through the corridor work plans and TENtec. The campaign would be more effective if accompanied by research and data providing information on the impact and expected overall benefits of relevant projects of common interest for the core network corridors. This should cover benefits for the whole EU core and/or comprehensive network and also direct local repercussions. This may include information on generated economic growth, job creation, reduction of emissions or nuisance (e.g. CO₂, NO_x, noise etc.), and contributions to wider policy objectives (e.g. competitiveness, COP 21 objectives, climate change).

³² See case studies and other evidence from the Renewables Grid Initiative <http://renewables-grid.eu/>

Other relevant issues

Care should be taken to ensure the key information and communication material is translated into all relevant EU languages, and that the materials target the broader public, affected populations and relevant authorities for the permitting procedures separately and specifically.

Legal mechanism, applicable projects and possible sub-options

This option would not require a specific legal mechanism to carry out, and would apply to all TEN-T projects.

3.2.4 Legal appeals to development consent decisions

The problem analysis carried out for this study found that in some cases decisions issued by competent authorities granting development consent for projects face legal challenges by stakeholders. Such legal appeals were found to be another important cause of delays in the preparation and implementation of some TEN-T projects, and often linked to lack of public acceptance for projects. Transport projects involve very large numbers of stakeholders - for example typically thousands of landowners are impacted by a construction of 100 km of a railway line. In many cases, even a well-designed and implemented communication strategy and inclusive approach to participation of the public does prevent legal actions against the final permits.

While the right to appeal a decision is entrenched in access to justice and other legal rights and procedures and should not be compromised, it is possible that such procedures could be made more efficient.

Option: 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. In some Member States, several levels of jurisdiction for appeals exist, and ongoing appeals may have a suspensive effect on project progress. These could be reduced through a measure that 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.

Purpose and potential effectiveness

This option could have an important impact in cases where legal appeals are not handled with priority and allowed to carry on longer than necessary. By going immediately to the highest level court, the risk of multiple appeals would be prevented. Removing the suspensive effect would mean that other project activities, such as the preparation of documentation and other processes required for procurement, could continue during the period of legal review. Both would have an important impact on timing.

Other relevant issues

The legal feasibility of this option with regard to access to justice and national legal procedures would require further investigation, as well as the acceptability of such requirements by the Member State authorities. Another consideration would be one of efficiency, particularly with the regard to the use of the highest level court for projects not of national level importance. This could be mitigated however through the scope of application to projects as discussed below.

Legal mechanism, applicable projects and possible sub-options

A legal mechanism would be required to carry out this option. Given the possible impact on efficiency of courts in the Member States by requiring the use of the highest court, and the potential impact on stakeholders' rights, it would make sense for this option to be applied only to selected TEN-T projects considered of critical importance. As these projects would be few in number and the practice considered exceptional, new procedures would likely not be required in the Member States.

3.3 ENVIRONMENTAL ASSESSMENT

Transport infrastructure projects typically involve interaction with and impact on the environment, including water resources and protected areas, given the reliance on land use and natural resources. As a result, all or parts of the wide body of EU environmental legislation will apply to most TEN-T projects, requiring detailed assessment procedures and in some cases multiple authorisations from different authorities. The research carried out for this study found that delays in project preparation and permitting often stemmed from complexities in carrying out environmental assessment procedures. These procedures stem from different EU Directives that were adopted at varying points in time over the past 30 years, resulting in their transposition into national legislation at different times, and, in some cases, a complex national legal framework applying to transport projects.

Overall these complexities tend to relate to: 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. For each of these areas a summary of problems and proposed options are presented in the following sections.

3.3.1 Coordination of multiple environmental assessments

As shown in the generic authorisation framework and the applicable legislation (Section 2.2), many different environmental requirements can apply to TEN-T projects. These include requirements related to overall environmental assessment at the strategic level for plans and programmes (SEA Directive) and at the project level (EIA Directive); as well as those applicable to projects impact specific areas of the environment, such as water resources (the Water Framework Directive), the marine environment (the Maritime Spatial Planning Directive) and the prevention of accidents (Seveso Directive). Other requirements stemming from EU legislation may apply to certain TEN-T projects, such as noise standards, regulations relating to air pollution or waste management. These then have to be considered in the EIA, and influence the granting of the development consent.

In recognition of the problems that multiple environmental assessment requirements present for authorities, project promoters and other stakeholders and the fragmentation in some Member States of different procedures, the amended EIA Directive requires Member States to ensure the 'streamlining'³³ of certain environmental assessment procedures. The new provisions (Article 2(3)) of the EIA Directive require that, by May 2017, Member States establish, where appropriate, coordinated or joint procedures when the obligation to carry out assessments of the effects on the environment arises simultaneously from the EIA Directive and from the Birds and Habitats Directives. To support Member States in the implementation of these new provisions, the Commission has published a

³³ Streamlining in this case refers to coordinating or joining the environmental assessment procedures applied to a project, so as to avoid overlaps and redundancy, while also taking full advantage of synergies and minimizing the time needed for authorisation. This definition is taken from the Commission guidance document on streamlining environmental assessments under Article 2(3) of the EIA Directive (see the following footnote).

guidance document³⁴ in 2016. These guidelines are not sector-specific but would apply to transport infrastructure projects subject to multiple environmental assessment procedures.

The Commission's guidance on Article 2(3) of the EIA Directive provides further details on the two types of procedures that Member States must select and apply for projects requiring environmental assessments under the EIA Directive and Birds or Habitats Directives: the joint procedure and the coordinated procedure. Under the joint procedure, Member States arrange a single assessment of the environmental impact of a given project. The assessment must be carried out in compliance with the provisions of all relevant EU legislation. The coordinated procedure gives Member States the option of carrying out two separate procedures, but these must be coordinated by one designated authority, who acts as the single point of contact for all environmental assessments.

Streamlining under Article 2(3) of the revised EIA Directive is mandatory only as regards the EIA and the Appropriate Assessment (AA) required under the Habitats Directive (and/or the Birds Directive) for developments that would impact sites protected under the Natura 2000 network. It is up to the individual Member State to decide whether and how to extend the streamlined procedures to other EU environmental legislation, such as the Water Framework Directive, although the Commission's streamlining guidance recommends including these assessments into the joint or coordinated procedure where appropriate.

Another related problem is that of cooperation in environmental assessment procedures for cross-border projects. An important example is the Fehmarn Belt Fixed Link project where, the EIA procedure and the public consultation have not been coordinated between Denmark and Germany. As a result delays in Germany are severely impacting the timeframe of the project, already approved in Denmark.

The EIA Directive establishes that, when a Member State is aware that a project is likely to have significant effects on the environment in another Member State, or where a Member State likely to be significantly affected requests it, the Member States planning the project must provide affected Member States a description of the project, together with any available information on its possible transboundary impact and information on the nature of the decision which may be taken (Article 7(1)). The affected Member State(s) can then decide to participate in the EIA, and if so, make available the documentation to the authorities and the public likely to be concerned by the project. Member States involved in projects likely to have transboundary effects will be expected to consult with each other on these effects and measures to reduce or eliminate these effects, and agree on a reasonable timeframe for consultations. The 2014 amendments to the Directive take this a step further, and provide the Member States with the option of conducting transboundary consultations through an appropriate joint body (Article 7(4)).

In 2013 the Commission issued a guidance document on the application of the EIA procedure for large transboundary projects³⁵, which notes that the EIA legislation enables the Member States and/or parties concerned by transboundary projects that are implemented in more than one country to consider organising a joint 'transboundary' EIA and prepare a joint environmental report and non-technical summary assessing the environmental impact of the entire project.

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

The proposed policy option would make the joint procedure mandatory for those TEN-T projects; this

³⁴ 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.

³⁵ European Commission, *Guidance on the Application of the Environmental Impact Assessment Procedure for Large-scale Transboundary Projects*, 2013.

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, along the lines of the recommendation in the Commission's guidance on EIA for large transboundary projects.

Purpose and potential effectiveness

As explained in the Commission's guidance on streamlining for the EIA Directive, the purpose of streamlining is to establish a flexible, comprehensive approach to assessment that can be tailored to each project without compromising environmental objectives. The guidance also suggests that the scope of the environmental assessments to be conducted needs to be established early on. A mandatory joint assessment would broaden the mandate of the environmental assessment and would be likely to encourage the different parties to take a more strategic approach to planning and conducting the assessment, addressing the problem of lack of strategic planning early in the project preparation process, as identified in the problem analysis of this study (see Annexes 1 and 2). If conducted in a clear, organised and coordinated manner, a joint process should make data collection, public consultation and the assessment process itself more efficient, thereby reducing the time required.

Other relevant issues

This option is unlikely to be considered in breach of subsidiarity principles, as the responsibility for conducting environment assessment procedures and issuing relevant related decisions remains with the Member States. The option is similar to the requirements of Article 2(3) of the revised EIA Directive, but goes beyond this to make a joint procedure mandatory (rather than offering the choice of a coordinated procedure) and the scope is expanded to include other environmental procedures, most notably the assessment required under Article 4 of the Water Framework Directive. At the same time, very few Member States currently provide for a joint or single assessment procedure, so the approach would be new in most Member States, although it would be more straightforward in those that eventually choose the joint procedure under Article 2(3) of the EIA Directive. In many Member States different institutions and levels of governance are required to review and make decisions on the different assessments, particularly where water bodies are concerned, so this option may face some resistance in Member States.

It is also possible in some cases that Member States would need to amend national legislation, in cases where environmental impact procedures have been incorporated into existing procedures for development consent of projects or other procedures. The extent to which this option would be feasible and acceptable would merit further study, including consultation of stakeholders.

Legal mechanism, applicable projects and possible sub-options

This option would require a legal mechanism to implement, and would be part of an EU legislative instrument adopted to streamline regulatory and administrative procedures for certain classes of TEN-T projects. As the procedure is likely to be highly efficient once established, it might make sense to apply it to a broad range of TEN-T projects, potentially all core network projects. Obviously the streamlining would only apply where relevant, i.e. where projects are subject to multiple environmental assessment procedures. Possible sub-options to be considered would be allowing Member States to continue to choose between the joint and coordinated options, as provided for in Article 2(3) of the EIA Directive, but extending the mandatory streamlining to all types of environmental assessments, rather than just the EIA and AA under the Birds and Habitats Directives. This would be a critical step for waterborne transport projects as it would ensure that the EIA

procedure covers the necessary assessments of impact on water quality, including determining whether a derogation is necessary.

Sub-option: Mandatory transboundary joint procedure for environmental assessment of cross-border TEN-T projects

A sub-option here would be the requirement for a joint transboundary environmental assessment procedure in cases of cross-border projects. Given the challenges foreseen here, and the fact that so few Member States have experience with carrying out true joint transboundary environmental assessment, it is suggested at this point that this sub-option apply only to the most critical cases, as presented in Section 4.

3.3.2 Projects impacting water resources

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. As described in Section 2.2 on applicable legislation, 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.

There is a wide range of TEN-T projects that will impact water bodies. These 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; projects related to Motorways of the Sea.

Dredging is a particular challenge as these activities raise numerous legal issues. Dredging is an important part of managing inland waterways and ports, allowing infrastructure managers to maintain and improve accessibility. As detailed above, and illustrated by the Weser Case, the Birds and Habitats Directives and, in particular, the Water Framework Directive can have particular implications for dredging activities. 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 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 Directive 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 recovery. 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 Landfill Directive). 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 Landfill Directive may be interpreted and applied in relation to dredging. 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.

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 (see Section **Error! Reference source not found.** on the Water Framework Directive). 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)³⁶.

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 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 guidance³⁷, 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

³⁶ 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...’

³⁷ European Commission, *Common Implementation Strategy for the Water Framework Directive. Guidance number 20: Guidance document on exemptions to environmental objectives*, 2008, p 29.

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.

While such a guidance document will undoubtedly provide needed support in understanding how to interpret the conditions in Article 4(7) of the Water Framework Directive, it is not intended to directly address the waterborne transport sector and will not provide the specific technical clarity that project promoters and authorities require in order to carry out assessments and, where necessary, demonstrate that the benefits of the project may outweigh the potential deterioration to the status of a water body. The nature and magnitude of the complexities faced by the waterborne transport sector suggests that guidance of a more legal and technical nature is required, both to guide assessment and also to ensure greater legal certainty for project promoters and authorities at an earlier stage of the process, i.e. before negative decisions or legal challenges can occur.

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

The proposed option therefore suggests that specific technical definitions and approaches be developed that can 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 (See Section 3.1.3.4 below on this option).

Purpose and potential effectiveness

Technical clarification regarding the impacts of waterborne transport projects would address concerns about uncertainty with regard to the approach to assessment (i.e. by individual quality elements and overall status of the water body as reflected in the RBMP) as well as making the case for derogation. To be most effective, technical clarification materials would need to be directly targeted at the TEN-T core network projects in the waterborne sector, in order to capture their specificities and go into details about what would constitute serious deterioration of water quality in these cases, including, if possible for specific river basins likely to be impacted. It would also need to be prepared in consultation with a range of stakeholders, including the Commission, environmental authorities and civil society. It would need to be developed in line with the Commission's work programme for the Common Implementation Strategy for the Water Framework Directive, as well as existing 2008 guidance on exemptions. The content could also cover the scope of other relevant environmental Directives impacting the authorisation of waterborne transport projects, including in the marine spatial planning sector (maritime ports) and waste management (dredging).

Overall, having such clarity coming from the EU level would also have the advantage of reassuring relevant national, regional or river basin authorities that assessments and decision-making were proceeding in the right direction and could minimize the occurrence of challenges in court, both at Member State and EU level. This would also provide greater stability for investors, both private and public.

Other relevant issues

As discussed above, additional clarity within this legislation seems to be supported by stakeholders, as determined through the case studies and public consultation carried out for this study. Subsidiarity

and/or proportionality issues would be unlikely to be affected, unless the technical clarification came in the form of an annex to legislation on streamlining the regulatory and administrative aspects of TEN-T projects (see below), but sufficient flexibility would need to be maintained to ensure that decision-making on the conditions for project authorisation would remain clearly in the hands of the Member States. The cost or burden of development of such a document, and technical assistance to support it where required would require further study. However it is likely that in relation to the cost of delays in infrastructure caused by lengthy decision-making procedures and/or legal challenges due to legal uncertainty, the relative cost of developing this option would be minimal.

Legal mechanism, applicable projects and possible sub-options

There are two possible mechanisms the Commission could take to adopt or issue technical clarification. One would be simply to issue technical guidance. The advantage of this option is that technical guidance could go into greater detail, be more prescriptive, and provide potentially better certainty for project promoters and authorities. The disadvantage is that it would be mainly for informational purposes, and would have no legal standing with authorities or potentially before a court. For example, the Commission issued technical guidance on exemptions for the Water Framework Directive in 2008, which includes a detailed section on Article 4.7, but stakeholders still point out that they lack clarity on how to assess and put forward such requests, and now additional guidance on this is planned.

A legal approach to technical clarification could take the form of a technical annex to a legislative instrument on streamlining procedures for TEN-T projects. The annex would likely list the expected impacts of the main types of waterborne projects and how they are to be assessed with regard to deterioration of water bodies. It would not be able to guarantee any exemptions or compliance with the conditions of Article 4(7) but by setting out the possibility in a harmonised manner, this would provide some legal clarity and certainty for project promoters and authorities.

This option would apply only where relevant, i.e. to projects impacting the status of water bodies. The legislative option could be formulated in such a way to cover only the most critical projects (see Section 5), which could provide the opportunity to be more prescriptive and give greater assurance that derogation from the objectives to achieve good status could be warranted.

Sub-Option: Targeted technical assistance to determine how to comply with legislation and a Commission opinion

This sub-option would apply to particularly complex or strategically important projects, and would consist of a detailed technical review carried out by consultants or advisors highly experienced in determining the extent to which project impact water bodies and how to propose suitable alternatives, modifications, and justifications that would enable the projects to go forward and meet their objectives. This would be accompanied by a non-binding but indicative Commission opinion on the project. Due to the potential cost of such an option, it would be applied only in the most critical cases (see Section 4.3 below).

3.3.3 Projects impacting protected areas under the Birds and Habitats Directives

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. Impacts on environmental resources (other than climate) will be caused by an increase in land use for infrastructure, generating increased pressure on biodiversity and ecosystem services due to direct damage to habitats linked to construction works, habitat fragmentation and degradation and species disturbance³⁸. The negative impacts to Natura 2000 sites from transport

³⁸ European Commission, 2011. Impact Assessment accompanying the document Proposal for a Regulation of the European

projects might result from physical reduction of natural habitats, landscape fragmentation, migration barriers, collision of vehicles with animals, emissions of noise and air pollutants, changes to the water regime and other indirect effects.

Waterborne projects are 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.

Both the case studies and the public consultation carried out for this study found incidences of problems in complying with the requirements of the Habitats and Birds Directives. In many cases these are related to capacity issues – the issues to be assessed are complex, require considerable data collection and time to carry out properly. Some of these issues may be resolved by the options related to joint procedures (see Section 3.3.1 above) or capacity issues (see Section 3.3.4 below). In cases where impacts cannot be avoided through alternative approaches, however, there are often delays in determining and agreeing suitable approaches, which could be addressed through additional clarification and, where appropriate, prioritization of the necessary approval processes.

Articles 6(3) and 6(4) of the Habitats Directive address plans and projects likely to have significant effects on Natura 2000 sites, and were designed to embed flexibility for socio-economic considerations to co-exist within nature conservation and protection. Article 6(3) requires an Appropriate Assessment (AA) of the implications for the site of plans and projects likely to have a significant effect in view of the site's conservation objectives. If the AA determines that the effects will be negative, the project should not go forward, unless it satisfies the three conditions of Article 6(4): no alternative solution exists; so-called imperative reasons of overriding public interest can be established; and compensatory measures are taken by the Member States to ensure that the overall coherence of the Natura 2000 network is ensured. In such cases, Member States need to inform the Commission of the compensatory measures adopted. Where the site concerned hosts a priority natural habitat type and/or a priority species, the provisions are stricter. In such cases, the project benefits must be related to human health, public safety or the environment – unless an opinion from the Commission states otherwise.

The wording of Articles 6(3) and 6(4) of the Habitats is vague on the content and methodology required for the conduct of AAs, and the conditions for derogation in case of negative assessments. Given the vast extent of the Natura 2000 network (about 1.1 million km² or 25.6% of the EU 28 terrestrial land³⁹) and the importance of many infrastructure projects requiring land use and water resources in these areas, the CJEU has rendered many clarifying decisions over the past decades. Most of these decisions have reinforced a strict interpretation of the nature of the AA and interpretation of the conditions for derogation. For example, courts have asserted that AAs must be based on the best scientific knowledge in the field, and that findings must be complete, precise and definitive and based on reliable and up-to-date data. Projects cannot be excluded from assessment due to their small size, low value, or location outside the site if potential impacts are considered to be significant. With regard to overriding public interest, the CJEU has clarified that a lack of alternative solutions must be clearly demonstrable. To qualify on reasons of overriding public interest, the proposed plan or project must be of such importance that it can be clearly weighed up against the Directive's objectives and the specific conservation objectives of the site in question. Compensatory measures need to take into account the size and scale of the works involved in the project.

Parliament and of the Council on Union Guidelines for the development of the Trans-European Transport Network. COM(2011) 650 final, 19.10.2001.

³⁹ <http://www.eea.europa.eu/themes/biodiversity/protected-areas/facts-and-figures/number-and-size-of-protected-areas-1>

As was the case with the Water Framework Directive, it appears that the existing guidance issued by the Commission is not entirely sufficient to enable the necessary certainty in carrying out the procedures, including the determination and justification of cases where transport infrastructure may constitute a case of overriding public interest. There are two relevant existing guidance documents on Natura 2000 and TEN-T sectors: one addresses inland waterway transport⁴⁰ and another covers port development and dredging in estuaries and coastal zones⁴¹. The European Sea Ports Organisation in its statement for the public consultation confirmed that there is significant remaining legal uncertainty with regard to procedures under the Birds and Habitats Directive and the authorisation of TEN-T projects, design the existing implementation guidelines. They note that court rules tend to dominate the implementation and understanding of the Directives, delaying infrastructure projects for years in some cases.

Option: 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

It is likely therefore that additional, very specific technical clarification could be useful, either in a legislative annex or some kind of guidance note dedicated to TEN-T project types. 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.

Purpose and potential effectiveness

The purpose of such an option would be to define upfront the impacts that key TEN-T projects are likely to have on Natura 2000 sites and determine in advance 1) key parameters for assessment; 2) likely cases where no alternative solution exists and how they may be justified as being of overriding public interest; and 3) options for compensatory measures. Such a document would need to be prepared by technical experts and consulted with relevant stakeholders, including environmental authorities and the European Commission. Because the TEN-T projects are likely to go forward in one form or another, such a 'pre-review' of their possible impacts and interactions with Natura 2000 sites could save time during the process of preparation by 1) guiding the substance of the assessment procedure as a sort of 'scoping' step; and 2) by providing some additional legal certainty about the course of action that the projects should take.

Other relevant issues

As discussed above, additional clarity within this legislation seems to be supported by stakeholders, as determined through the case studies and public consultation carried out for this study. Subsidiarity and/or proportionality issues would be unlikely to be affected, unless the technical clarification came in the form of an annex to legislation on streamlining the regulatory and administrative aspects of TEN-T projects (see below), but sufficient flexibility would need to be maintained to ensure that decision-making on the conditions for project authorisation would remain clearly in the hands of the Member States.

Legal mechanism, applicable projects and possible sub-options

⁴⁰ European Commission, *Guidance document on sustainable inland waterway development and management in the context of the EU Birds and Habitats Directives*, 2012

⁴¹ European Commission, *The implementation of the Birds and Habitats Directives in estuaries and coastal zones with particular attention to port development and dredging*, 2007

As with the option related to the Water Framework Directive above, there are two possible mechanisms the Commission could take to adopt or issue technical clarification. One would be simply to issue technical guidance. The advantage of this option is that technical guidance could go into greater detail, be more prescriptive, and provide potentially better certainty for project promoters and authorities. The disadvantage is that it would be purely for informational purposes, and would have no legal standing with authorities or potentially before a court. Current guidance on inland navigation and ports exists as noted above, but stakeholders continue to claim that complexities and legal uncertainties persist and cause lengthy delays.

A legal approach to technical clarification could take the form of a technical annex to a legislative instrument on streamlining procedures for TEN-T projects. The annex would likely list the expected impacts on Natura 2000 sites of the main types of projects and how they would need to be assessed in terms of data collection, best scientific evidence and other relevant considerations. In cases where no alternative is likely to be available (e.g. cases where a river or other water resource is the only option to complete a transport corridor), some scoping of the case for overriding public interest could be agreed as well as the nature of compensatory measures. Given the more substantive technical detail that might be required for such an activity, it could make sense for this to be carried out in the framework of the TEN-T Committee through implementing powers or updates to the core network corridor plans, in consultation with relevant environmental authorities.

Sub-Option: Targeted technical assistance to determine how to comply with legislation and a Commission opinion

This sub-option would apply to particularly complex or strategically important projects, and would consist of a detailed technical review carried out by consultants or advisors highly experienced in determining the extent to which transport projects impact nature conservation objectives and how to propose suitable alternatives, modifications, and justifications that would enable the projects to go forward and meet their objectives. This would be accompanied by a Commission opinion on the project aimed to provide as much legal certainty as possible to the project promoters in a form of a 'comfort letter'. Due to the potential cost of such an option, it would be applied only in the most critical cases (see Section 4.3 below).

3.3.4 Capacity to carry out high-quality environmental assessment procedures

In many cases, environmental assessment procedures are complex. They involve the collection of large amounts of data, some of which may be unavailable from existing national or regional databases or need to be collected on a seasonal basis (e.g. biodiversity data). Procedures are often vague in both EU and national legislation, designed to allow for flexibility of the many different plans, programmes and projects subject to different types of environmental assessment. In short, one of the issues that was constantly raised in the literature, case studies and consultation carried out for this study was a lack of capacity to carry out high-quality environmental procedures. Poor quality environmental assessment reports were cited as a very frequent cause of delay in permitting procedures. In the case studies conducted for this study, the main grounds for legal actions were the failure to assess the environmental impacts of the whole project, often referred to as 'salami slicing', poor assessment of alternatives and failure to assess the transboundary effects of the project in the EIA. This often leads to requests for further information evidence or documentation by permitting authorities, and in some cases can completely stop all progress in the permitting procedures.

Many stakeholders called for additional external technical assistance to support the preparation of complex TEN-T projects. Often authorities, project promoters and the experts called upon to carry out environmental assessment procedures are not regularly exposed to the complexities of such projects, as they themselves deal with only a small number. In such cases, dedicated experts – legal, technical, economic – who regularly work with large infrastructure projects that must comply with multiple EU

procedures can be important assets in ensuring that assessment procedures and associated documentation are completely compliant with all requirements. This is crucial when projects must derogate from compliance with the objectives of some environmental legislation and justify the reasons for doing so (e.g. provisions under the Water Framework Directive and the Habitats Directive).

Some TEN-T projects already receive such support from the JASPERS (Joint Assistance to Support Projects in European Regions) programme. Offered by the European Commission, the EBRD and the EIB, JASPERS supports the preparation of major⁴² infrastructure projects to be co-financed by two of the EU Structural and Investment Funds – the European Regional Development Fund (ERDF) and the Cohesion Fund (CF). Launched in 2005, JASPERS assists EU Member States and candidate countries with project preparation and capacity building support, as well as independent quality review of project documentation. The assistance is provided free of charge based upon requests from the Member States for support for eligible projects. Most of the assistance has been provided in countries that are eligible for support from the ERDF and the CF for large infrastructure projects: these are the twelve Member States that joined EU in 2004 and 2007 and countries that are eligible for the Cohesion Fund. JASPERS assistance is also available in Croatia, Greece and eligible regions in France, Italy and the United Kingdom. Stakeholders noted that the preparation of large TEN-T projects that are co-financed by the ERDF or CF and receive JASPERS support is often of higher quality and more compliant with all details of the relevant EU legislation than those which do not receive such support.

Option: 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. As JASPERS offers support beyond the preparation or review of documentation related to environmental assessment, such as project screening and development of technical feasibility documentation; analysis of specific State aid or environmental issues; this could also be considered as part of the package offered to TEN-T or CEF projects. Links with the European Investment Advisory Hub of the EIB could also be envisioned.

Purpose and potential effectiveness

Additional technical support from professionals highly experienced in the preparation of complex infrastructure projects in compliance with EU and national legal requirements would likely be highly effective in resolving regulatory and administrative delays related to the preparation of TEN-T projects in cases where lack of capacity of all stakeholders involved is likely to be a major problem. This would have to be assessed in advance by the relevant Member State authorities, but could be done in coordination with the TEN-T committee or corridor network.

Other relevant issues

The offer of support could be made obligatory for projects which are planned to be co-funded from EU sources. For other projects, technical assistance would be voluntary, however recommended to ensure the high quality of projects crucial for the TEN-T development.

Efficiency in providing the services is another consideration. Given that the JASPERS programme is already in place, a likely simple approach could be to extend the option of receiving the service to a

⁴² ‘Major’ projects are defined under the EU Cohesion Policy as those with total investment cost exceeding EUR 50 million.

wider range of TEN-T projects, such as those receiving funding from CEF, EFSI as well as other projects. Further study would be required to determine whether a dedicated set of services for the transport sector should be developed as part of CEF II, if this would be cost-effective.

Legal mechanism, applicable projects and possible sub-options

No dedicated legal mechanism would be necessary here, although mention of the availability of such assistance could be part of a legal instrument addressing regulatory and administrative delays for TEN-T projects. The option of support of current JASPERS type could be extended to all TEN-T core network projects.

3.4 PUBLIC PROCUREMENT

Public procurement can bring major challenges to TEN-T projects. The research carried out for this study showed that problems in the procurement phase can result in delays and increased costs for projects. Delays in the completion of the procurement phase appear to be the consequence of a complex legal framework, the absence of time 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.

The legal framework for public procurement within the EU is set out in 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 ‘new’ EU Public Procurement Directives had to be transposed into the Member States’ national legal orders by 18 April 2016. The main objective of the new Directives is to simplify procedures and at the same time make these procedures more flexible⁴³; this is likely to contribute to tackling some of the problems identified above. However, as the Directives were only very recently transposed, there is very limited experience of their implementation. This includes the quite serious problems linked to cross-border cooperation and differences in the ways in which Member States have transposed the legislation. The full extent of potential problems linked to partial or incorrect transposition, gold-plating, and differences across Member States will only be known once a conformity-checking exercise of transposition of these new Directives has been completed⁴⁴. It may therefore be the case that the new measures will improve the situation regarding complexities and delays related to public procurement procedures for TEN-T projects, and this needs to be taken into account when assessing policy options in this area.

Separate directives – the Remedies Directives – govern the mechanisms for the revision of award decisions: Directive 92/13/EEC, coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors; and Directive 89/665/EEC, on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts. The Remedies Directives

⁴³ The simplification of procurement procedures is envisaged to take place through the establishment of shorter procedural deadlines or the resort to e-procurement and other measures to reduce paperwork. Flexibility is improved through the possibility of using innovation partnerships, broader possibilities for negotiation with tenderers (competitive procedure with negotiation) and the use of best quality-price award criteria (including the total lifecycle cost). See for instance DG MARKET leaflet “New Rules on Public Contracts and Concessions – Simpler and More Flexible”, available at http://ec.europa.eu/internal_market/publications/docs/public-procurement-and-concessions_en.pdf.

⁴⁴ A conformity checking of the three Directives will be conducted by DG GROW in 2017. The contract notice for consultancy services for completeness and compliance checks of national transposition measures and other legal assessment services in the field of EU public procurement law, no. 2016/S 125-222903, was published on 21 June 2016. The notice is available on TED.

were amended in 2007 by Directive 2007/66/EC with regard to improving the effectiveness of review procedures concerning the award of public contracts, and have not been impacted by the entry into force of the new procurement legislation.

3.4.1 Delays in procurement award and review procedures

Based on the case studies, country studies and literature review conducted for this project, certain key elements of EU procurement rules were identified as contributing to a longer procurement phase and, consequently, resulting in delays and increased cost for projects. These elements concern the (absence of) time-limits for the authorities involved in the procurement and review procedures to take a decision and other tools envisaged in the EU legislation aimed at speeding up these procedures.

There is no specific rule at EU level prescribing a time limit for the contracting authority to take a decision on the award of the contract. The three new EU Procurement Directives all contain a similar provision on informing candidates and tenderers (Article 40 of Directive 2014/23/EU, Article 55 of Directive 2014/24/EU and Article 75 of Directive 2014/25/EU), stating merely that the contracting authorities must inform each candidate and tenderer of the decisions reached concerning the award of the contract ‘as soon as possible’. Therefore, it is up to the Member States to define what ‘as soon as possible’ exactly means. The study found that there is a legal time limit for the contracting authority to take a decision in four out of the ten Member States covered, varying between 15 days to 5 months. These limits can normally be extended in exceptional and justified cases. In addition, stakeholders reported that very often, the legal time limits are not complied with.

A similar approach to the one taken in the EU Public Procurement Directives on the time limit for the decision on the award of the contract is used in Article 1(1) of the Remedies Directives for the review decisions of the contract award procedure, which states that Member States must ensure that such decisions must be taken ‘as rapidly as possible’. The study found that in three out of the ten Member States covered there is no time limit for the review procedure prescribed in law; where a time limit is set, this varies between 15 days and 60 days.

Two other elements of the Remedies Directives and which can have a significant impact in the total duration of the project preparation were analysed in this study: the automatic suspensive effect of appeals and the time-limit to initiate the review of award decisions. Article 2(4) of the Remedies Directives states expressly that review procedures do not necessarily have an automatic suspensive effect on the contract award procedures. It is therefore up to the Member States to decide whether the application for review of the decision of the contracting authority will automatically suspend the public procurement. Our study found that six out of the ten Member States covered go beyond what is required by the Remedies Directives and automatically suspend the contract award procedure upon appeal.

Under Article 2c of the Remedies Directives, any application for review of the decision of a contracting authority must be made before the expiry of a standstill period of least 10 or 15 calendar days depending on the specific characteristics of the case. The period during which the application for review can be submitted corresponds to the standstill period defined in Article 2a of the Remedies Directives. This minimum period exists in order to ensure that appellants have sufficient time to request the review of the award decision before the conclusion of the contract. However, the Remedies Directives only provide for a minimum number of days and Member States are free to go beyond this. The study found that in seven out of the ten Member States covered, the period to initiate the review corresponds to the 10 or 15 day standstill period as defined in the Remedies Directive. In the remaining countries, the appellant has up to 30 days to submit its request for review.

As the examples above demonstrate, there are a series of issues which are not regulated in an exhaustive manner by the EU Procurement Directives or the Remedies Directives - some of these are not regulated in detail at EU level; for the others, the EU rules set only minimum thresholds.

Therefore, on a series of procurement-related matters that can impact the length of the award and review procedures it is up to the Member States to define specific rules at national level.

Option: Special procurement regime/rules applicable to all projects aiming at speeding up procurement and review procedures

The proposed policy option to be considered here 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.

Purpose and potential effectiveness

Contracting authorities often take a long time to award contracts as do review bodies when reviewing award decisions. Moreover, in some countries there is a general perception that it has become routine for the losing candidates to appeal the contracting authority's decision, which makes the need for a quick review procedure even more relevant. This option would aim at accelerating these procedures, with a special focus on the review procedure.

The existence of a time limit or at least the definition of indicators to specify what 'as soon as possible' and 'as rapid as possible' should mean could function as an incentivizing factor for the relevant authorities to deliver their decisions more rapidly. In addition, measures aiming at the enforcement of these rules could also be discussed.

The lack of an automatic suspensive effect of review procedures would also contribute for reducing delay, as the court (or the competent body) would only allow for the suspension when strictly necessary.⁴⁵ A standstill period limited not only at its minimum but also at its maximum, and corresponding to the period for initiating review, would also speed-up the review procedure (an even limit the number of parties appealing award decisions), while at the same time still ensure that appellants have sufficient time to request the review of the award decision before the conclusion of the contract.

Other relevant issues

The public consultation carried out for this study showed that stakeholders support both the simplification of procurement procedures and the establishment of standard procurement procedures. This option would likely address these concerns as clearer and common rules would be adopted. At the same time, it is unlikely to be considered in breach of subsidiarity principles, as while it goes beyond the current rules - by providing clarity on existing open clauses, making some choices mandatory and setting additional thresholds -, it does not intend to regulate issues that are not already governed at EU level. Further study would be required to determine whether the measures necessary to ensure that the award and review decisions are given within a determined time-limit would be feasible, cost-effective and not create additional burden on Member States. The burden on Member States resulting from the prohibition of an automatic suspensive effect and the adoption of a maximum limit for the standstill period and the initiation of the review appears less significant.

Legal mechanism, applicable projects and possible sub-options

⁴⁵ In accordance with Article 2(5) of the Remedies Directives, the review body 'may take into account the probable consequences of interim measures for all interests likely to be harmed, as well as the public interest, and may decide not to grant such measures when their negative consequences could exceed their benefits'.

This option would require a legal mechanism to implement. The deadline for the transposition of the new EU Public Procurement Directives has only recently passed and there is not yet enough evidence to justify re-opening the process of revision of the EU Public Procurement Directives. At the same time, the Commission is expected to publish a REFIT evaluation report of 2007 amendments to Remedies Directives relating to review procedures concerning the award of public contracts, following public consultation in 2015. Therefore, it is suggested that the legal mechanism would be part of an EU legislative instrument adopted to streamline regulatory and administrative procedures for certain classes of TEN-T projects (that could also benefit from the findings from the REFIT of the amendments to Remedies Directives). As the procedure is likely to be highly efficient once established, it might make sense to apply it to a broad range of TEN-T projects, potentially all core network projects.

3.4.2 Complexities in cross-border procurement procedures

The DG MARKT evaluation of the old EU Public Procurement Directives in 2012 showed that there was a low level of cross-border procurement procedures carried out. It is acknowledged in the evaluation that ‘direct cross-border procurement has not increased as much as was anticipated’ and that ‘regulatory guarantees established by the Directives may be a necessary but not a sufficient condition to break down the barriers to cross-border participation in public procurement markets’⁴⁶. The research carried out for this study confirms this understanding: even though (or for this reason) there is still little experience with cross-border procurement, this is perceived as one of the most complex issues of public procurement.

Many of the reasons presented in the DG MARKT evaluation for not organising cross-border procurement procedures have been confirmed in the public consultation carried out for this study. These include legal barriers, language barriers and lack of experience in doing business in other countries. The case studies also showed that differences in national legislation can lead to significant delay. The complex legal framework for procurement applied in France and Italy in the Lyon-Turin case gave rise to prolonged discussions between both countries on the implementation of the applicable EU rules. The implementation of specific measures to prevent criminal infiltrations in public procurement was one of the specific points of discussion, since French and Italian law did not implement European law in a similar way at national level.

One of the novelties introduced with the reform of EU public procurement legislation were the rules on ‘procurement involving contracting authorities from different Member States’ (see Article 39 of Directive 2014/24/EU and Article 57 of Directive 2014/25/EU). These rules address the joint contracting by authorities from different Member States and bring clarity on the applicable national law (paragraph 5 of both provisions). Nevertheless, there are other issues that are still not regulated at EU level, as noted in the 2015 DG MOVE Action Plan,⁴⁷ namely ‘the use of a single language in tender and contracting documents’.

According to the new rules, the participating contracting entities can agree to apply the national procurement rules of the Member State where the joint entity has its registered office or the national provisions of the Member State where the joint entity is carrying out its activities. In addition, they can choose to apply this agreement for an undetermined period, when fixed in the constitutive act of the joint entity, or limit its application to a certain period of time, certain types of contracts or to one or more individual contract awards. As the new rules allow a great flexibility in the choice of law, it is likely that the participating contracting entities struggle to decide on which law to apply and that the

⁴⁶ DG MARKT, EU Public Procurement Legislation: Delivering Results – Summary of Evaluation Report, p. 13 – 17 and 21, available at http://ec.europa.eu/internal_market/publicprocurement/docs/modernising_rules/executive-summary_en.pdf

⁴⁷ DG MOVE, Action Plan - Making the best use of new financial schemes for European transport infrastructure projects (2015), available at http://ec.europa.eu/transport/themes/infrastructure/ten-t-guidelines/doc/2015_06_03_cbs_action_plan_final.pdf

scope of application of the agreement ends up being significantly reduced (e.g. applying only during a certain period of time).

As previously mentioned, there is not yet any experience of the implementation of the legislation based on the 2014 Procurement Directives, since Member States have recently notified their transposing acts and a conformity checking has not yet been conducted. It can, however, be expected that differences in transposition and implementation will continue to affect cross-border procurement procedures in cases where national transposing acts would be particularly complex or go significantly beyond the provisions of the Directive.

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

The proposed option suggests a special procedure for cross-border projects, which would make mandatory the 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).

Purpose and potential effectiveness

As mentioned above, legal and language barriers have been identified as two of the main obstacles to cross-border procurement, with the former appearing to be particular problematic. This option would aim at simplifying procedures by the use of a single law and a single language. This would likely increase legal certainty - not only because the same rules would apply to the whole project and this would be known early in the process, but also because there would be less room for problems in the interpretation of the relevant documents, as they would be published only in a single language. It is expected that this option would result in the speed-up of procedures (including review procedures), reduce costs and overall impact positively in the levels of cross-border procurement.

The option would effectively reduce gold plating concerns in cross-border public procurement procedures, as the rules of only one Member State would apply and differences in legislation would not cause delays.

Other relevant issues

The public consultation conducted for this study reveals a general call for more standardised procedures between Member States for cross-border projects and for the simplification of procurement procedures in general. This option would likely address these concerns as clearer and common rules would be adopted. The option is similar to the requirements of Article 39(5) of Directive 2014/24/EU and Article 57(5) of Directive 2014/25/EU, but goes beyond this to make the use of the application of the national procurement rules of the Member State where the joint entity has its registered office mandatory (rather than offering the choice of the applying national provisions of the Member State where the joint entity is carrying out its activities). The public consultation carried out for this study did not address this issue directly, nor did it cover the question of the use of a single language in cross-border procurement procedures.

This option would require in some cases that Member States change their usual procedures for TEN-T projects to which these rules would apply. This could require legislative changes in some cases. The extent to which this option would be feasible and acceptable would therefore merit further study, including consultation of stakeholders.

Legal mechanism, applicable projects and possible sub-options

This option would require a legal mechanism to implement. For the reasons explained above, it is suggested that it would be part of an EU legislative instrument adopted to streamline regulatory and administrative procedures for certain classes of TEN-T projects, rather than re-initiating the revision process of the EU Procurement Directives. As the procedure is likely to be highly efficient once established, it might make sense to apply it to all cross-border TEN-T projects. Possible sub-options to be considered would be to give the participating contracting entities the possibility to choose a single applicable law based on other factors than the location of registered office of the joint entity.

3.4.3 Capacity to carry out public procurement procedures

Carrying out high-quality public procurement procedures for large, complex infrastructure projects requires that the contracting authorities are well equipped in terms of resources (staff, technical knowledge, etc.). A considerable amount of knowledge and experience is required to draft the terms of reference, evaluate the proposals and manage contracts. The lack of capacity of the contracting authorities in terms of public procurement expertise (which can have impact, for example, on the time spent to take the award decision or on the quality of the terms of reference) has been noted in the literature⁴⁸ and other research carried out for this study.

In five out of the ten Member States covered, the stakeholders interviewed – which included contracting authorities – were of the opinion that there was not sufficient capacity to properly conduct public procurement procedures, i.e. draft the terms of reference and evaluate the proposals. In two of these, the understanding was that there was also not sufficient capacity to manage contracts resulting from tenders. In most of the Member States analysed for this study, the contracting authorities have specialised public procurement departments; where this is not the case, or where specialised departments exist but only to address occasional shortage of staff or lack of specific expertise, the contracting authorities usually resort to sub-contractors. In some cases, stakeholders have also mentioned the existence of guidance or special procedures to ensure compliance with the necessary requirements.

The results of the public consultation carried out for this study confirm the perceived need to reinforce the capacity of contracting authorities – additional guidance and the dissemination of best practices were two of the preferred tools to make the public procurement of TEN-T projects more efficient. Technical assistance from professionals highly experienced in the preparation of tenders for complex infrastructure projects could help to strengthen the capacity of contracting authorities. Some TEN-T projects already receive that type of support from the JASPERS programme.

Option: 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 Strategy⁴⁹ 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

⁴⁸ See e.g. OECD, Transport Infrastructure investment – Options for efficiency (2008), available at http://www.oecd-ilibrary.org/transport/transport-infrastructure-investment_9789282101568-en; DG MOVE, Action Plan - Making the best use of new financial schemes for European transport infrastructure projects (2015), available at http://ec.europa.eu/transport/themes/infrastructure/ten-t-guidelines/doc/2015_06_03_cbs_action_plan_final.pdf; European Commission, Commission Staff Working Paper: Accompanying the White Paper - Roadmap to a Single European Transport Area – Towards a competitive and resource efficient transport system (2011), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52011DC0144:EN:NOT>

⁴⁹ European Commission, Communication “Upgrading the Single Market: more opportunities for people and business” COM(2015) 550 final.

aspects of projects, to be in place by 2017.

Purpose and potential effectiveness

The purpose of this option would be to strengthen the capacity of contracting authorities for TEN-T projects in cases where lack of capacity is likely to be a major problem. This would have to be assessed in advance by the relevant Member State authorities, but could be done in coordination with the TEN-T committee or corridor network. The legal technical assistance provided to Member State should help to alleviate any lack of capacity of the contracting authorities with positive consequences on the preparation of the tender and eventually on the length of the award procedure.

Other relevant issues

The public consultation carried out for this study showed that stakeholders support the provision of additional support to deal with the procurement of TEN-T projects (e.g. through additional guidance and the sharing of best practices). This option would not breach the subsidiarity and proportionality principles as the offer of support would be voluntary, contingent upon request from the Member State(s) involved to the support programme. The suggested approach would be to extend the option of receiving the service provided under the JASPERS programme to a wider range of TEN-T projects, such as those receiving CEF funding. Further study would be required to determine whether a dedicated set of services for the transport sector should be developed as part of CEF II, if this would be cost-effective and not create additional burden on Member States.

Legal mechanism, applicable projects and possible sub-options

No dedicated legal mechanism would be necessary here, although mention of the availability of such assistance could be part of a legal instrument addressing regulatory and administrative delays for TEN-T projects. Further study would be required to determine what would be necessary to allow TEN-T projects not eligible or planned for support from ERDF or CF or below the major project investment cost threshold to receive support from JASPERS. The option of support could be extended to all TEN-T core network projects in such a case.

3.4.4 Public-private partnerships

Broadly defined, a public-private partnership (PPP) is an agreement between a government authority and a private firm for the delivery of a public infrastructure project and service under a long-term contract. Defining characteristics of PPPs are that the private partner assumes significant management responsibility and operating risk and that its remuneration is linked to its performance in delivering the asset and/or service⁵⁰. The public authority either makes a performance-based payment to the private partner for the provision of the service (e.g. for the availability of a road) or, in the case of concessions, grants the private partner a right to generate revenues from the provision of the service (e.g. tolls from users of a bridge)⁵¹. PPPs can be an important mechanism for facilitating private sector investment as well as management capacity into public infrastructure projects; however complexities surrounding legal mechanisms, capacity to manage contracts and other issues can be a deterrent.

A paper published by the European PPP Expertise Centre (EPEC)⁵² highlights seven barriers to the use of PPPs: Lack of long-term political commitment to engage in PPPs; regulatory barriers (e.g. laws that put excessive restrictions on PPP activity or raise bankability issues); capacity constraints in the public sector (weak demand and affordability analyses, poor contracts etc.); private sector capacity

⁵⁰ Adapted from Public-Private Partnership in Infrastructure Resource Centre (PPPIRC) definition, <http://ppp.worldbank.org/public-private-partnership/overview/what-are-public-private-partnerships>

⁵¹ European PPP Expertise Centre (EPEC), *Hurdles to PPP investments: A contribution to the Third Pillar of the Investment Plan for Europe*, November 2016, http://www.eib.org/attachments/thematic/epec_hurdles_to_ppp_investments_en.pdf

⁵² Ibid.

constraints (e.g. lack of domestic financiers or contractors); inefficient procurement (e.g. overly prescriptive tender requirements that limit private sector innovation, or lack of clarity on whether a project should be procured as a concession or public works/services contract); statistical treatment of PPPs (see below); and lack of funding (rather than financing) stemming from fiscal constraints. According to the EPEC, EU funds could, where eligible, help address the funding gap of projects delivered as PPPs.

The research carried out for this study found that PPPs are not frequently utilized as a financing, procurement and management mechanism for TEN-T projects, and that this may constitute a lost opportunity to attract additional investment capital to the sector, which will in turn delay progress on the completion of the TEN-T core network. One key reason uncovered by the research was lack of technical capacity for carrying out such complex contracts. Another was the fact that PPPs are often recorded on the government's balance sheet.

In addition, permitting is often perceived by potential contractors as a risk in PPPs. Often in PPPs, final permit acquisition occurs following award of the contract to the contractor (as permit applications are based on the contractor's final design), which holds uncertainty and risk due to possible obstructions and delay in the permitting and possible claims or contract renegotiations. If, in such cases, the contractor is assigned permitting and mitigation/compensation responsibilities, uncertainty regarding permit acquisition will be shifted to the post-procurement phase. This risk can often result in project bids involving an unacceptably high price or a renegotiation of the contract post-award.

While PPPs have never been defined in EU public procurement legislation, the recently revised EU Concessions Directive is likely to provide some support⁵³. This Directive governs how concession contracts are advertised and awarded and aims to set standard, fair and transparent procedures in all Member States. This legislation also ensures that the Remedies Directives would apply to all concessions, meaning that appeals or challenges to procurement awards for many PPPs would have the rapid and effective means of redress ensured by these Directives.

While the new legislation and the options proposed to address other problems such as permitting delays for TEN-T projects would promise to improve the regulatory and administrative environment for PPPs in the transport sector, they would not address the issue of technical capacity, nor obstacles related to the statistical treatment of PPPs on Member States fiscal balance sheets.

3.4.4.1 Capacity to develop sound PPPs

Technical capacity emerged frequently as a barrier to using PPPs in the research conducted for this study. The task of achieving an appropriate allocation of risk creates an additional layer of complexity in the design of PPPs which requires a certain level of technical expertise and previous experience. In some cases, PPPs are also considered by authorities likely to be unsuccessful due to limited interest among tenderers. Guidance and capacity building on PPPs is already provided by EU institutions and programmes such as the EIB's European PPP Expertise Centre (EPEC), the European Investment Advisory Hub and the Joint Assistance to Support Projects in European Regions (JASPERS) programme. The challenge is to steer and tailor this guidance to those TEN-T core network projects best suited for financing and implementation through PPPs.

Option: Technical assistance for PPPs

Under this option, a technical assistance programme, modelled on the JASPERS assistance programme, would provide targeted support for TEN-T projects that are likely to develop into PPPs. This support would simultaneously aim at developing contracting authorities' capacities in technically and financially assessing infrastructure projects and their suitability for diverse project finance

⁵³ Some PPP contracts may qualify as concessions.

schemes, and in developing bankable projects and high quality project documentation. These measures could also specifically address the challenge of the statistical treatment of PPPs under Eurostat rules, allowing contracting authorities to draw on the lessons of similar projects. Such support would be available to all TEN-T projects regardless of their eligibility for ERDF and CF co-financing. This capacity building programme could be accessed via the European Investment Advisory Hub, as JASPERS currently is.

Purpose and potential effectiveness

Assistance from experts in project finance schemes would be effective in helping contracting authority build sounder PPPs, suitable for attracting potential investors, where technical capacity is likely to be the major problem.

Other relevant issues

This technical assistance mechanism would be voluntary and provided upon the request of the contracting authority, and therefore would not interfere with Member States' procurement procedures.

The provision of enhanced capacity building measures is widely supported by stakeholders. In supporting the development of PPPs in TEN-T projects, respondents to the public consultation consider most useful the exchange of good practices between authorities implementing TEN-T projects (51% of respondents), and capacity-building activities for authorities implementing TEN-T projects (49% of respondents).

Legal mechanism, applicable projects and possible sub-options

A legal instrument would not be required to implement the assistance programme. Further study would be required to determine whether the support provided by JASPERS would be sufficient in the area of PPPs, and what type of support would need to be established, if any, under the European Investment Advisory Hub to meet the demand from contracting authorities. If the option of extending JASPERS support was envisaged, it should be determined what would be necessary to allow TEN-T projects not eligible to ERDF or CF or below the major project investment cost threshold to receive support from JASPERS. The option of support could be extended to all TEN-T core network projects in such a case.

3.4.4.2 Statistical treatment of PPPs

The statistical treatment of PPP contracts can create additional complexity and uncertainty for contracting authorities, contractors and investors in the contract negotiations process for transport infrastructure PPPs, and may discourage the utilisation of PPPs in Member States seeking to avoid public debt. Contracting authorities do not have access to a database of past decisions allowing them to draw on the lessons from previous decisions on similar cases, as in the past, decisions were rarely published, due to Member States' opposition.⁵⁴ This increases uncertainty and might prevent authorities to resort to PPPs. In addition, private project sponsors have indicated that the lack of a timely ex-ante assessment from Eurostat often leads to negotiations being launched on the basis of documentation that does not meet the conditions for off-balance sheet treatment, where this is sought, therefore requiring substantial changes during tender procedures and sometimes even leading to the abandonment of a project at the end of a tender procedure. They suggest that contracting authorities seeking off-balance sheet treatment for a PPP project should be given access to preliminary Eurostat ESA 2010 assessment mechanisms.

⁵⁴ This practice has recently been reversed and Eurostat now generally publishes its decisions.

In response to calls for more transparency, Eurostat and the European PPP Expertise Centre of the EIB (EPEC) published, in September 2016, detailed guidance explaining Eurostat's interpretation of the European System of National and Regional Accounts from 2010 (ESA 2010) and the Manual on Government Deficit and Debt (MGDD) from 2016 rules, as well as its approach to assessing whether a PPP project should be recorded on or off the government's balance sheet. This document constitutes official Eurostat guidance and would prevail over the MGDD in case of divergence. Feedback from stakeholders has so far been positive. However, the implementation of the guidance will need to be reviewed when more experience has been gathered. In particular, a few provisions potentially impacting the bankability of a project might still act as barriers and should be reassessed in light of practical experience.

Eurostat and EPEC also plan to publish a similar guidance document on concessions in the coming 9-15 months, after Member States have approved the revised chapter of the MGDD about concessions. The main principles applying to PPPs are also expected to apply to concessions. Affected stakeholders see the publication of this guidance as an important step towards the clarification of applicable rules.

Option: Flexibility under the Stability and Growth Pact – technical assistance

In January 2015, the Commission published a communication on the use of the flexibility that is built into the existing rules of the Stability and Growth Pact (SGP)⁵⁵. This guidance clarifies how the Commission will apply the SGP rules to strengthen the link between structural reforms, investment and fiscal responsibility in support of jobs and growth. Notably, the 'investment clause' allows Member States in the preventive arm of the SGP to deviate temporarily from their medium-term budgetary objectives, under certain conditions. Eligible investments are national expenditures on projects co-funded by the EU.

Under this option, Member States could request additional technical advice on the use of the investment clause for TEN-T projects. In particular, voluntary ex-ante assessments could provide clarity on the eligibility of planned projects; moreover, there would be a possibility to ask for technical assistance for designing specific projects.

Such a measure – not strictly limited to PPPs since it would concern all strategic public investments – would be beneficial for stimulating the project pipeline and facilitating their realisation also in the form of public private partnerships.

Purpose and potential effectiveness

Assistance from experts in designing project schemes to take advantage of the 'investment clause' would be effective in helping Member States to use innovative financing schemes more often, especially in cases where lack of clarity regarding statistical treatment is likely to be a major deterrent. Moreover, this measure would not concern PPPs alone, but would be beneficial for all projects using the 'investment clause'.

Legal mechanism, applicable projects and possible sub-options

This option can take advantage of existing initiatives within the European Commission to set up a single point of contact for Member States and project promoters where it comes to technical assistance at the Commission's level – involvement of Eurostat and other Commission's services. If another type (e.g. external experts) of support is chosen, no legal instrument would be required to implement the assistance programme. Further study would be required to determine whether the support provided by

⁵⁵ Commission Communication of 13/01/2015: *Making the best use of the flexibility within the existing rules of the Stability and Growth Pact*.

JASPERS would be sufficient in the area of statistical treatment, and what type of support would need to be established, if any, under the European Investment Advisory Hub to meet the demand from contracting authorities.

3.5 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. Any uncertainty about State aid decisions potentially contributes to significant uncertainty among promoters and investors. In addition, a State aid decision can occur at any point in the project preparation process. While the Commission applies a two-month time limit to decisions from the point of receiving a complete notification⁵⁶, often it takes quite some time at the Member State level to complete the full notification file, including time to get any required guidance or assistance from the Commission.

The study determined that 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). Cases of late notification generally come from a lack of awareness from authorities or project promoters of the need to notify potential State aid cases to the Commission, in particular because until relatively recently investments in transport infrastructure was considered to fall outside State aid rules. In addition, the lack of experience with State notifications may lead to notifications that are of a lower quality. This can result in the Commission requesting further information, delaying the final decision. Project promoters that are uncertain about the applicability of State aid rules to their project may also need to seek expert opinions⁵⁷, contributing to additional project costs.

Finally, due to the inherent nature of State aid procedures and the focus on the impact of the funding on competition, the information requirements are very different to those for other project processes. As a result, Member States may find it burdensome to prepare the information necessary required to submit in a State aid notification.

In recent years, a number of measures have been taken at the EU-level to modernise State aid procedures and to provide specific and up-to-date guidance on State aid and transport. Detailed guidance is currently available for railways and aviation. Analytical grids are available and provide guidance on ports, airports and local rail transport infrastructure⁵⁸. In addition, the Commission recently published guidance on the notion of State aid⁵⁹, which includes specific guidance on the public funding of infrastructure, including transport infrastructure (ports, airports, rail and roads). This guidance provides a welcome clarification on the application of state aid rules and should further assist authorities in assessing whether proposed transport investments give rise State aid issues, and can be expected to promote earlier consultation between authorities and the Commission on these issues and improve the quality of State aid notifications.

The Commission is also currently reviewing whether to extend of the State aid General Block Exemption Regulation to ports and airports. If this exemption is extended, it would greatly reduce the impact of State aid procedures on promoters of such projects, who only need to notify the Commission in cases where they do not meet the exemption criteria. Responses to the public consultation indicate that recent Commission measures have improved certainty in State aid procedures for transport

⁵⁶ EC, *State Aid Manual of Procedures – Internal DG Competition working documents on procedures for the application of Articles 107 and 108 TFEU*, Section 5 Notification, Para 30

⁵⁷ Stakeholder interview, Germany

⁵⁸ European Commission, *Analytical Grids on the application of State aid rules to the financing of infrastructure projects*, September 2015.

⁵⁹ European Commission, *Commission notice on the notion of State aid as referred to in Article 170(1) of the Treaty of the Functioning of the European Union*, C/2016/2946, 19.07.2016

infrastructure projects. While almost half of respondents expressed no opinion, 37% of respondents reported that recent Commission action increases legal certainty, with 14% reporting recent actions are not sufficient. Support for recent Commission actions was particularly high among Member State authorities, with 57% reporting that recent measures are sufficient to increase legal certainty, 7% reporting recent measures are not sufficient, and 36% expressing no opinion.

Option: 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.

Purpose and potential effectiveness

A shorter timeframe for State aid decisions would increase legal certainty for project promoters and investors as regards the financing of infrastructure projects.

Other relevant issues

This option would appear to have support among some stakeholders; a fast-track procedure was proposed by respondents to the public consultation when asked to suggest additional measures that could be taken at EU or national level to improve the efficiency of State aid procedures for TEN-T projects.

Legal mechanism, applicable projects and possible sub-options

This option could be implemented through a legislative instrument, and be part of an EU legislative instrument adopted to streamline regulatory and administrative procedures for certain categories of TEN-T projects. As the procedure could have an important impact on the Commission's procedures, it would be relevant to apply this option only to a small number of selected projects.

4 APPLYING THE OPTIONS TO TEN-T PROJECTS

The options proposed in the previous section, once further assessed and refined, have a high potential to effectively address a range of problems identified in this study as key drivers of costly delays and uncertainties impacting the successful implementation of the TEN-T core network infrastructure. In order to function properly, these options will need to be grouped together according to similarity in type of instrument to be used. It will also be necessary to determine to which types of TEN-T projects the various options, and in some cases selected sub-options, should apply.

This section summarises the options identified for each substantive problem, and presents ways in which they may be re-combined to work together via applicable instruments and how they would be applied to different types of TEN-T projects in practice.

4.1 SUMMARY OF OPTIONS

The first step in determining the scope of application of the options is to summarise all of the options identified in response to specific problems and group them according to the type of instrument that would be required to implement them and the likely projects to which they would be applicable. This stems directly from the presentation and analysis of options in the previous section and is shown in Table 6 below.

Types of instruments for implementing the options include:

- **Permitting procedure:** These are mechanisms for determining which authorities will have the power to issue development consent for various types of TEN-T projects, and what the procedure will cover, including time limits.
- **Special rules or legal requirements:** These are requirements that would apply to selected TEN-T projects, regardless of the permitting regime chosen, depending upon relevance. They would be applicable without prejudice to existing EU legislation, but would seek to streamline the implementation of this legislation in specific cases.
- **Technical assistance and capacity building:** These options would enable TEN-T projects to benefit from technical assistance programmes either already in place in the EU for large infrastructure projects or dedicated to TEN-T or CEF funded projects.

Instruments for implementing the options are discussed in more detail in section 4.2 below.

With regard to applicable projects, the analysis of options has distinguished two main areas where options or groups of options could apply differently:

- **All TEN-T core network projects:** as identified through the TEN-T framework
- **Projects of high EU significance:** these would be the critical cases, in terms of necessity for the functioning of the TEN-T core network, or complexity to implement such as bottlenecks and cross-border projects
- **Projects benefitting from Union support through CEF or EFSI**

The scope of application to TEN-T projects is discussed in more detail in section 4.3 below.

Table 6: Overview of options, instruments and applicable projects

Option	Type of instrument	Applicable projects
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Option	Type of instrument	Applicable projects
Organisation of the permitting procedure		
EU level permitting procedure <ul style="list-style-type: none"> Covering all parts of the permitting procedure Covering parts of the permitting procedure derived from EU rules 	Permitting procedure	Projects of high EU significance/EU
Single leading authority at national level <ul style="list-style-type: none"> Leading authority with comprehensive decision-making powers Leading authority with limited decision-making powers 	Permitting procedure	All TEN-T core network projects not considered highest priority
Establishing time limits in the permitting process	Special rules or legal requirements	All TEN-T core network projects in either permitting procedure
Building public acceptance		
Requirement for public involvement before permitting application is submitted	Special rules or legal requirements	All TEN-T core network projects
Principles for the conduct of public consultation procedures for TEN-T projects	Special rules or legal requirements	All TEN-T core network projects
Carry out a TEN-T public information campaign	Special rules or legal requirements	All TEN-T core network projects
Improvements to the process for appeals of decisions on development consent	Special rules or legal requirements	Projects of high EU significance
Environmental assessment		
Mandatory joint procedure for all environmental assessment procedures stemming from EU legislation Sub-option: Mandatory cross-border joint procedure for environmental assessment of cross-border TEN-T projects	Special rules or legal requirements	All TEN-T core network projects Projects of high EU significance where relevant
Technical clarification and/or guidance on defining and understanding the impacts of waterborne transport project activities on water bodies Sub-Option: Targeted technical assistance to determine how to comply with legislation and a Commission opinion	Special rules or legal requirements	All TEN-T core network projects where relevant Projects of high EU significance where relevant
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 Sub-Option: Targeted technical assistance to determine how to comply with legislation and a Commission opinion	Special rules or legal requirements	All TEN-T core network projects where relevant Projects of high EU significance where relevant Key projects of EU importance
Provide more dedicated external technical assistance services for the preparation of TEN-T projects, focused on environmental assessments	Technical assistance programme	All TEN-T core network projects
Public procurement		

Option	Type of instrument	Applicable projects
Special procurement regime/rules applicable to all projects aiming at speeding up procurement and review procedures	Special rules or legal requirements	All TEN-T core network projects
Special procurement rules for cross-border projects, covering the choice of law applicable and the use of language	Special rules or legal requirements	All TEN-T core network projects where relevant
Technical assistance services for the preparation of TEN-T tenders	Technical assistance programme	All TEN-T core network projects
Capacity building measures for public contracting authorities (PPPs)	Technical assistance programme	All TEN-T core network projects where relevant
Flexibility under the Stability and Growth Pact – technical assistance	Special rules or legal requirements or Technical assistance programme	Projects of high EU significance where relevant
State aid		
Reducing State aid decision timeframes for selected TEN-TA projects	Special rules or legal requirements	Projects of high EU significance where relevant

4.2 SCOPE OF APPLICATION OF THE OPTIONS: INSTRUMENTS

In order to implement the options, they would need to be combined into a series of instruments that could be adopted by the relevant authorities and/or institutions. Table 7 below shows the options by type, and the following sections discuss how an instrument could be developed for each type of option.

Table 7: overview of proposed instruments for applying options

Instrument	Options
Permitting procedure	<ul style="list-style-type: none"> ■ <i>EU level permitting procedure</i> ■ <i>Single leading authority at national level</i> ■ <i>All other measures proposed for other categories of projects</i>
Special rules or legal requirements	<ul style="list-style-type: none"> ■ Establishing time limits in the permitting process ■ 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 ■ Sub-option: Mandatory transboundary joint procedure for environmental assessment of cross-border TEN-T projects ■ Technical clarification and/or guidance on defining and understanding the impacts of waterborne transport project activities on water bodies ■ Sub-Option: Targeted technical assistance to determine how to comply with legislation and a Commission opinion ■ 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

Instrument	Options
	Habitats Directive <ul style="list-style-type: none"> ■ Sub-Option: Targeted technical assistance to determine how to comply with legislation and a Commission opinion ■ 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 ■ Flexibility under the Stability and Growth Pact – technical assistance* ■ Reducing State aid decision timeframes
Technical assistance programme	<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) ■ Flexibility under the Stability and Growth Pact – technical assistance*

*This option can be implemented via special rules or technical assistance, depending on the final path chosen.

Analysis of the options has determined that most will need to be carried out via a legislative instrument in order to take effect within the Member States and be binding on authorities and project promoters. A legal instrument enacted purely for the purpose of determining special rules for TEN-T projects could be envisioned in this regard. It could function in a similar way to the current TEN-E Regulation, which, inter alia, prescribes special permitting rules for energy infrastructure projects of common interest.

Essentially, the legal instrument would combine two key functions. First, it would set forth special procedures for decision-making in granting development consent for selected TEN-T projects. Second, it would set forth special rules that would be applicable to TEN-T projects, where relevant, during various specific stages of the project authorisation framework. These rules would aim to streamline procedures where problems have been found to occur in the past. While they would be applied without prejudice to existing relevant EU legislation, and would be consistent with the objectives and aims of that legislation, these rules would aim to clarify existing uncertainties or inconsistencies across Member States in the implementation and application of that legislation.

The type of legal instrument to be employed by the Commission for the purpose of implementing these options will also have an important impact. In the public consultation, respondents were asked to rank the effectiveness of four options for EU level implementing measures to facilitate the permitting and preparation of TEN-T projects: a regulation; a directive; a funding conditionality; and guidelines. The regulation option was labeled ‘effective’ by 56% of the respondents, the highest out of the four options – more details are available in the public consultation report in Annex 5. The reasoning behind this choice is somewhat clear – a regulation would be directly applicable in the legal order of the Member States upon adoption and would not require a long transposition period before coming into force (usually several years), which is very much in line with the objective of removing discrepancies resulting from the transposition of EU directives and of speeding up the time required for project preparation and authorisation procedures.

Finally, several of the options focus on the provision of technical assistance and/or capacity building services for public authorities and project promoters, to guide and/or provide additional expertise in the preparation of TEN-T projects. These focus on two main areas: environmental assessment procedures required by EU legislation, and procurement procedures, including PPPs. Many technical assistance services already exist in these areas. The options suggest that such services could be extended to all TEN-T projects that request assistance, or, if this is deemed unworkable, that special services be set up for TEN-T or projects funded through CEF (or CEF II). It would make sense that these different options addressing environment, procurement and PPPs be combined into a single

technical assistance approach available for TEN-T projects.

4.3 SCOPE OF APPLICATION OF THE OPTIONS: PROJECTS

The analysis of the options has determined two distinct ways in which the options would apply to different categories of projects, based on EU significance. As shown initially in Table 5 above, most of the options would be applicable to all TEN-T core network projects. A select number of options, however, would need to be reserved only for the projects of high EU significance.

There are several reasons behind the need to distinguish the degree of EU significance; these are linked to the nature of the options proposed. 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 – will have significant 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 EU significance 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

A process is required to determine how such critical cases or projects would be selected. Such a process needs to be credible and transparent, and would ideally be part of the existing TEN-T framework, which already has in place participatory mechanisms for assessing transport infrastructure needs across the EU.

The TEN-T Regulation plans the development of the trans-European transport network through a dual-layer approach, consisting of a comprehensive network and a core network. The comprehensive network is the ‘basic’ layer of the TEN-T transport network covering all European regions; the core network is a subset of the comprehensive network, including the strategically most important nodes and links of the TEN-T network. The TEN-T Regulation sets the objective of developing the core network by 2030, and the comprehensive network by 2050. The location of projects on the core network corridors is a first element of broad prioritisation based on the EU significance of projects.

Annex I of the CEF Regulation lists pre-identified projects on the core network that may benefit from CEF funding, thereby establishing their importance for the TEN-T network’s completion. This list has however been drawn from the perspective of eligibility to EU funds and might not be exhaustive in identifying the most critical projects for the achievement of transport policy objectives, or those that are particularly at risk of delays related to administrative and regulatory procedures.

The core network corridor work plans identify critical issues on each corridor, such as missing links or major bottlenecks at national level, as well as the objectives for the development of the corridor. They do not, however define concrete development priorities or identify specific projects. In their current state, these work plans are not detailed enough to be a suitable tool for selecting projects benefitting from special treatment. However, the process that is in place for identification of priorities within the core network corridors is likely the most effective way to determine which projects should benefit from which streamlining options under a dedicated legislative proposal. For this to work, it would be necessary to revise the corridor work plans, and establish through this process a list of projects qualifying for the special procedures. As Member States must approve the work plans, after

consultation of the corridor forum, gathering all relevant stakeholders interested in the development of the corridor, this would constitute a reasonably transparent selection process. The next revision of the work plans is planned for 2017.

A complementary approach would be to use the possibility offered by the TEN-T Regulation of adopting an ‘implementing act for the cross-border and horizontal dimensions of the core network corridor work plans’ (Article 47(2)). Implementing acts would identify projects qualifying for special procedures and indicate deadlines for completion of these projects. Considering the wording of Article 47(2), these implementing acts would be limited to cross-border projects and projects linked to horizontal priorities (such as telematics applications, motorways of the sea, or new technologies). This process would duly take into account the opinion of the Member States as those implementing acts must be adopted through a qualified majority vote of the TEN-T Committee, which gathers representative of transport ministries of all EU Member States. In addition, draft implementing acts are subjected to a four-week public consultation. So far, there is little experience with implementing acts under the TEN-T Regulation. Only one draft act regarding the deployment of ERTMS has been proposed by the Commission and is currently undergoing public consultation. The use of implementing acts for the selection of project therefore deserves more consideration within the Commission.

For projects benefitting from Union support through CEF or EFSI, additional criteria (i.e. cross-border projects or bottlenecks, or projects facing particular barriers to implementation) could be set to indicate significance.

Ultimately, whichever process is adopted, categories of projects would emerge and benefit from different packages of streamlining options. The current structure of the options proposed in this study envisions three possible sets of projects and applicable options. The first would be all TEN-T core network projects; most of the options would apply to these projects. The second category of projects would be those of particularly high EU added value, such as bottlenecks and cross-border projects. This would be a smaller number of projects, which would render more feasible those options that have been evaluated as highly effective but more challenging to implement. A third set would be those receiving support from CEF or EFSI. This approach is shown in Table 8 below.

Table 8: Applicable options for proposed project types

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

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 Flexibility under the Stability and Growth Pact – technical assistance 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 Flexibility under the Stability and Growth Pact – technical assistance Reducing State aid decision timeframes</p> <p><i>All other options applicable to TEN-T core network project as appropriate</i></p>

5 CONCLUSIONS AND RECOMMENDATIONS

This study marks a first step in identifying a way forward towards resolving problems related to delays in the permitting and preparation of TEN-T projects. The options presented are clearly linked to detailed problem analysis, but themselves require more analysis, consultation and agreement across impacted parties in order to be selected and formulated into concrete actions for proposal. A number of key next steps can be recommended at this stage:

Close monitoring of the TEN-E experience: As this study has pointed out, there are some similarities in the problems facing permitting and preparation of large network infrastructure projects in different sectors, particularly with regard to EU legislation which applies across sectors. Several of the key options proposed in this study are based on options that were designed to address very similar problems in the energy sector with regard to the development of grids, pipelines and other network infrastructure in the areas of electricity, gas and oil. While some of the problems are quite different in the transport sector (e.g. the incidence and magnitude of impacts on water resources and specific legislation; the context of routing, etc.), many of the challenges such as coordination of multiple authorities; streamlining of environmental assessment procedures; and inefficient public consultation procedures are quite similar. The rules related to permitting procedures⁶⁰ for TEN-E projects of common interest were adopted in 2013 and there are now several years of experience in place to review the effectiveness and efficiency of these options for specific energy infrastructure projects across the Member States. DG Energy and the multi-stakeholder regional groups set up as part of the TEN-E framework are monitoring this progress closely and the results of such monitoring should be taken into consideration when planning similar measures for TEN-T. The question of whether the requirement for Member States to designate a one-stop-shop with powers to make or coordinate decisions on behalf of other relevant authorities adds efficiency to the permitting procedure should be monitored carefully. Issues with regard to the capacity to enforce rules such as time limits for procedures should also be taken into account.

Careful exploration of legislative instrument: Assuming a legislative option is proposed, the choice of instrument is likely to have a critical impact on outcome. As explained in Section **Error! Reference source not found.** of this study, there are a range of advantages and disadvantages to the choice of a regulation versus a directive. In this respect, the experience from the TEN-E Regulation should be considered. The complexity of existing permitting regulations in the Member States should not be underestimated, both in terms of legislation and procedure, as well as the fact that many actors – both authorities and project promoters – are accustomed to doing things a certain way and will require some learning curve to make changes, even if these ultimately aim at optimising the process. At the same time, most key TEN-T infrastructure projects are cross-border projects with significant impacts on multiple Member States. Fragmented rules across these different Member States, including those derived from EU legislation, frequently hamper the realisation of these critical infrastructure projects, resulting in the need for harmonised rules that can be rapidly applied for selected projects. Given these considerations, it may make sense to use a directly applicable instrument and to extend the scope of instrument beyond that currently envisioned by the TEN-E Regulation.

Further consultation on all aspects of the proposed options: The public consultation carried out for this study did not specifically address all the proposed options; some of the questions also reviewed aspects of problems. Issues related to environmental assessment and public participation were not included in detail in the consultation questionnaire. If a full impact assessment is prepared for a legislative option, care should be taken to consult stakeholders on the most important aspects of the proposed options. This would enable more detailed assessment of the expected environmental, economic and social impacts of the options on a range of stakeholder groups.

⁶⁰ The TEN-E Regulation does not specifically address the issue of public procurement or State aid.

Maximise efficiencies with regard to technical assistance: The study already mentions the JASPERS initiative, which has been highly effective in improving the quality of preparation of large infrastructure projects for EU funding, including ensuring their compliance with relevant EU legislation in the complex areas of environmental assessment, public procurement and State aid. While the current structure of JASPERS does not allow it to offer assistance to projects outside Cohesion Policy funding, the mechanism in place could be very useful if extended to the types of projects identified in this study, only some of which are currently funded by Cohesion Policy. Even if JASPERS itself is not extended to TEN-T projects, it would be important that the experience and expertise concentrated there is shared. Links and cooperation with the European Investment Advisory Hub of the EIB should also be further explored.

Integration with ongoing Commission initiatives to support and promote efficient project preparation and approval procedures for large, strategic infrastructure investments: The introduction to this study refers to 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. It may be the case that such an initiative - or similar efforts – at Commission level focusing on strategic infrastructure projects across different sectors would be very complementary to the options proposed in the present study. In particular, 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.

LIST OF ANNEXES

ANNEX 1: PROBLEM DEFINITION

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