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NOTE

From:	General Secretariat of the Council
To:	Working Party on Transport - Intermodal Questions and Networks
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Subject:	Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on streamlining measures for advancing the realisation of the trans-European transport network - Comments by delegations

Delegations will find attached written comments by Germany on the above proposal.

**Proposal for a
REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL
on streamlining measures for advancing the realisation of the trans-European
transport network**

Comments provided by the Federal Republic of Germany

1. General

The Federal Ministry of Transport and Digital Infrastructure has prepared a departmental draft on speeding up the planning process. The legislative procedure is to be launched in the summer of 2018. In principle, both initiatives – the European initiative for projects on the TEN Core Network and the national initiative – pursue the common objective of appreciably accelerating the permit granting procedures for infrastructure projects. We thus welcome the Commission's proposal.

An initial review of the proposal has shown that essential provisions of the Regulation are inconsistent with the principle of proportionality. This applies to the prescribed structure of the authority (Article 5), provisions governing the permit granting procedure (Article 6) as well as rules regarding the priority status of projects (Article 3). Moreover, it is questionable whether the principle of subsidiarity is complied with. The Bundestag is currently considering a subsidiarity objection.

From a proportionality angle, the type of legal instrument chosen (regulation) should also be reviewed. Rules that are uniform throughout Europe could also be achieved by a legal instrument in the form of an EU directive or EU guidelines. In addition, there is the risk that special European rules governing projects on the TEN-T core network could result in the procedures becoming more complicated and fragmented in Member States.

To make the legal instrument easier to understand, it is suggested that references to the principal provisions to be integrated (for instance footnotes) be included at appropriate places in the description of the procedure. Should this result in duplications, it should be clearly stated which provisions are to apply in any given case. In the interests of consistency and efficiency, Germany would welcome proposals by the Commission on streamlining the provisions.

The following comments are designed to help identify an approach for uniform rules in the Union that is acceptable to the Commission and Member States and at the same time does not affect the sovereignty rights and functioning administrative structures of the Member States. To achieve this, however, fundamental amendments are required.

2. More specific remarks

Article 1

Is Article 1 to be taken to mean that every project on the TEN core network is automatically a project of common interest? The wording should be more precise here. Alternatively, lists of specific projects could be drawn up, like in Regulation (EU) No 347/2013.

To take account of the possible formation of sections or component projects, the following amendment is proposed:

*“This Regulation sets out requirements applicable to the administrative procedures followed by the competent authorities of Member States in relation to the authorisation and implementation of all projects of common interest **or integral components of projects of common interest** on the core network of the trans-European transport network.”*

Article 2

We suggest the following amendment to point (d).

*"single competent authority" means the authority which, ~~the Member State designates as as a one stop shop, is~~ responsible for performing the duties arising from this Regulation **for each project or integral components of a project of common interest;**" (cf. also comments on Article 5).*

In the case of large-scale projects, it is normally necessary to form sections. Minor projects, which constitute an upgrade under national law but do not result in any increase in transport capacity (for instance the construction of noise barriers) should be excluded. It is therefore suggested that an additional point be added – point (f).

"(f) "Project of common interest" means a project according to Article 3(a) of Regulation (EU) No 1315/2013 or integral components of such a project that lead to improvement of the capacity and efficiency of the infrastructure."

Article 3

Paragraphs 2 and 3 should be deleted.

Prioritization (para. 2) is a matter solely for Member States; rapid treatment (para. 3) can be taken for granted and is expressed in the following specific provisions of the Regulation.

Paragraph 2

Paragraph 2 should be replaced by a new paragraph 2 stating how any reviews by the Commission that become necessary during the process will impact on the time limits defined by this Regulation and how the procedure can be accelerated at European level.

If a Commission opinion is necessary in a procedure, the time limits defined in Article 6 shall be extended by the duration of the review by the Commission plus two months for an appraisal by the single competent authority. The Commission opinion shall be deemed to be in favour of the project promoter if the Commission does not issue an opinion within two months after receipt of the request for an opinion.

Article 4

Paragraph 1

The draft EU Regulation provides for all administrative procedures in connection with the project that result from national and Union law to be integrated into one comprehensive decision. We welcome this rule. Nevertheless, upstream and downstream procedures may be necessary in addition to this.

This concerns, for instance, spatial planning procedures, timely public participation or the consideration of alternative route alignments. This should be reflected by including a second sentence in Article 4(1): *"This shall be without prejudice to procedures upstream or downstream of the permit granting procedure under national law"*

Paragraph 2

A footnote to para. 2 should specify, at least in the form of examples, what environmental legislation is to be complied with. (Reference is made to Article 2(3) of the EIA Directive for guidance regarding the provision of examples).

Article 5

Paragraph 1

The purpose of the Regulation is that the project promoter should receive a single "comprehensive decision" from only one authority and there should only be one authority responsible for the project, which will coordinate and control everything else as a "one-stop shop". In principle, this is a sound approach. However, if the text is interpreted in this manner, the designation of one single competent authority per Member State is not only superfluous but also counterproductive. The only function that this authority would have to perform would be to regularly delegate applications to the agencies that are actually responsible. Delegation does not per se produce any advantage or time gain but results in delays. Thus, the single competent authority would be a useless level that did not provide any benefit with regard to the acceleration of procedures. The objective of the Regulation of having one single point of contact for the project promoters can also be achieved without the additional level of a single competent authority.

For this reason, Germany opposes the designation of a higher-level single competent authority. This does not change anything about the objective of establishing a "one-stop shop" for the project promoter. The proposed addition to Article 2(d) should also be seen in this sense.

Paragraph 2

In all Member States, there are permit granting authorities that are responsible for all aspects of infrastructure projects. For this reason, use should be made of the existing structures. What is important is that only one competent body should be responsible for a project in a mode of transport. In Germany, the permit granting authorities responsible for each mode of transport carry out the permit granting procedures for their respective modes. For ports, airports and terminals, it is the federal state authorities that are responsible. They all possess the expertise that is necessary and meet the conditions listed in paragraph 2(a) to (c). Additionally establishing a (in this case) higher-level cross-modal authority without functions of its own will result in neither acceleration nor simplification (see above). It is true that, in the case of an ongoing project, the Commission could be informed that these authorities have been designated as competent. However, it is not apparent what the general added value of such designation or the advantage for the procedure is supposed to be.

Article 6

Article 6 contains the main provisions governing the procedure and is therefore viewed especially critically with regard to both proportionality and feasibility.

Paragraph 1

Instead of the division into a "pre-application phase" and a "phase of assessment of the application and the decision-making", there should be a "phase of assessment of the application" and a "phase of decision-making". The "pre-application phase" would be replaced by the "phase of assessment of the application". This would mean that the competent authority initially had the task of reviewing the application (3+21 months) and could then take its decision (12 months).

Paragraph 2

"Pre-application phase" should be replaced by "phase of assessment of the application". This amendment would have further effects on various provisions in the text of the Regulation, but they are not listed in detail here.

Paragraph 3

In our opinion, the permit granting procedure cannot start until the complete project application has been submitted. In place of the "notification in writing" and the "detailed description of the project", the complete project application should have to be submitted. It is imperative that this application contain the outcome of the environmental scoping and the EIA report. In particular, it would scarcely be possible to conduct the necessary environmental assessments properly within 24 months. The first sentence should thus be amended to read as follows:

In order to launch the permit granting procedure, the project promoter shall ~~notify~~ provide the single competent authority of the Member States concerned with a comprehensive application file ~~about the project in writing, and shall include~~ing a detailed description of the project and the outcome of the impact assessment by the project promoter as well as the environmental impact assessment report.

The authority would then have 2 months' time to review the application file. If it accepts this file, the procedure would commence with the phase of assessment of the application.

Paragraph 4

The requirement that a resilient schedule be developed in cooperation with the project promoter within three months is only realistic on the aforementioned assumption, namely that the authority receives the complete application file, including the outcome of the impact assessments by the project

promoter. If this condition is met, a "detailed ~~application~~ **assessment** outline" as referred to in 4(a) and 4(b) could be developed. This relates in particular to the participation of the authorities and the public required by Article 6 of Directive 2011/92. Within the scope of this public participation, provision is usually made in Germany for an oral local inquiry to be held.

Paragraph 5

Replace "pre-application phase" by "phase of assessment of the application" and "detailed application outline" by "detailed assessment outline". In terms of their meaning, paragraphs 4 and 5 could be swapped.

Paragraph 6

It is imperative that the *single competent authority* be able to prolong the period (final sentence). This is especially important because, during the public consultation procedure, it is often the case that objections made by affected parties and comments provided by other authorities (public agencies) can necessitate modifications to the plan.

Proposal:

*The ~~project promoter~~ **single competent authority** shall ~~submit~~ **assess** the application file ~~based on the detailed application outline~~ within the period of ~~21~~**24** months from the receipt of ~~that~~ **the comprehensive** ~~detailed application file outline~~. After the expiry of that period, the detailed ~~application~~ **assessment** outline is no longer considered applicable, unless the single competent authority decides to prolong that period, on the basis of a justified request ~~from the project promoter~~.*

Paragraph 7

Not until the complete application file has been submitted can the participation of the authorities and the public required by Article 6 of Directive 2011/92/EU be launched. The competent authority cannot take a decision until the participation of the authorities and the public has been concluded, because the comments and objections made by public agencies and members of the public have to be evaluated and their pros and cons weighed up in the decision-making process. If further questions arise during the participation of the authorities and the public and in the subsequent weighing-up process, it is important, if the procedure is to withstand legal scrutiny, that the single competent authority be given the right to request all the files necessary for the procedure. The final sentence should thus be amended to read as follows:

*Any additional request for information ~~shall~~ **may only be made** ~~result from exceptional and unforeseen new circumstances~~ **if this is necessary for conclusion of the procedure** and ~~shall be~~ is duly justified by the single competent authority.*

In addition, allowance has to be made for problems that may arise from the fact that new findings or actual developments have to be taken into account at any time. Thus, for instance, in the case of possible effects on Habitat Directive sites, it may even be necessary take account of new findings and developments after a permit has been granted if action is brought against the permit. This aspect is also important with regard to the validity of procedural time limits.

Thus, if files – for instance updating the compatibility of a (TEN-T) project with the Habitats Directive – are subsequently requested, time limits previously running can no longer apply. In these cases, the permit granting procedure would have to start again with new time limits.

Paragraph 8

It is not clear when the period of one year is to commence for the competent authority. Proposal:

***Within a period of one year from the date of finalising the participation of the authorities and the public concerned,** the single competent authority shall ~~assess the application and~~ adopt a comprehensive decision ~~within the period of one year from the date of submission of the complete application file~~ in accordance with paragraph 7. Member States may set an earlier time-limit, where appropriate.*

Paragraph 9

Public participation and the provision of comments are governed by statutory time limits that have to be complied with in all cases. It is therefore suggested that paragraph 9 be augmented as follows:

*The time limits in the above provisions shall be without prejudice to obligations arising from Union, **national** and international legal acts, **including requirements regarding the participation of other authorities and the public** as well as to administrative appeal procedures and judicial remedies before a court or tribunal.*

Article 11

The Regulation will apply to projects to be submitted as of the twenty-first day following its entry into force. Given that the Regulation establishes new procedures in the Member States, this transitional period is too short. This will be especially true if it is necessary to actually establish new official

structures with the corresponding equipment and manpower. Appropriate precautionary measures will require a budgetary lead time of one to two years.

The rules we have proposed would obviate the need for this lead time.

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