

FRIENDS OF THE IRISH ENVIRONMENT

BRIEFING NOTE

FIE's challenge to the Shannon LNG Project as a 'Project of Common Interest'

What the case is about

Friends of the Irish Environment [FIE] are seeking leave from the Irish High Court to challenge the decisions of Ireland and the European Commission to adopt the proposed Shannon LNG Terminal and connecting pipeline as a 'Project of Common Interest' [PCI].

The importance of the PCI designation

PCI designation assures developments of "the most rapid treatment legally possible" and the "highest status" possible for permitting. PCI projects are 'of public interest from an energy policy perspective and may be considered as being of overriding public interest', as well as qualifying for financial support. 'Imperative Reasons of Overriding Public Interest' (IROPI) is the qualifier to allow projects to proceed which may damage sites protected under the Habitat's Directive Article 4.

The importance of the location for nature conservation.

This mouth of the Shannon has been designated as a SAC [Natura 2000] for the protection of the bottle nosed dolphin; the LNG jetty site has been identified as the only breeding area for this species in the Shannon SAC. It is also within an area protected for birds under Natural 2000 designations.

The history of the challenges

Notwithstanding FIE's original challenge, permission for the terminal was granted in March of 2008 but remained unbuilt during the 10 years of its permission. An application for an extension was granted in 2018 until 2023. That was challenged by FIE and referred by the High Court to the Court of Justice of the European Union in February 2019. An Opinion from the Advocate General is expected on 20 April 2020.

This challenge: failure to assess the project

In its new action, FIE alleges that the Irish Minister for Climate Action and the Environment and the Attorney General failed to do the independent sustainability/climate and cost-benefit analysis required by the PCI legislation (the TEN-E Regulations: 'Trans-European Networks – Energy') before the Regional Group of which it was a member approved the bi-annual list submitted to the European Commission for inclusion on the final EU-wide list.

The Commission delegated this act to the 4 Regional Groups coordinating the Gas Projects and approved it by way of an Annex to the PCI Regulation. Only the European Court of Justice can review such an EU legislative amendment.

But the only parties allowed to bring cases before that Court are 'natural or legal person' against an act of 'direct and individual concern to them'. Thus FIE, as an NGO seeking to protect the environment, is seeking a Reference from the Irish Courts (where we have standing) to the European Court of Justice (where we do not have standing) as the only way

to ventilate the validity of a decision of the European Commission, a right ensured by the Treaty on the Functioning of the European Union [TFEU: See NOTES]

Novel legal procedure

There is however no clear procedure available to FIE under the Rules of the Superior Courts to challenge acts of the institutions, bodies, offices or agencies of the European Union, although this right is enshrined in Article 267 TFEU. It is a part of FIE's case that Ireland is in default of its obligations to provide a detailed and suitable mechanism by which the validity of a decision by the Commission can be raised by way of reference to the EU Court irrespective of whether there is or is not an infringement by the National Authorities.

Until this time the only References from member state Courts have arisen when these Court seek advice from the European Court on a question arising from a challenge to a national implementation or interpretation of EU law. This novel case seeks to establish national NGO rights to directly challenge decisions of the European Commission before the European Court of Justice via the national Courts.

Failures in assessment under the PCI Regulations rules and the TEN-E regulation, and The Agency for the Cooperation of European Regulators, ACER

The Commission is obliged to assess the project under the PCI Regulations and required to take on board the opinion of the Agency of the Cooperation of European Regulators [ACER] and to ensure that the TEN-E Regulations have been met

The PCI Regulation 347/2014 require four Assessment Criteria of Candidate PCI Projects in order to determine if the benefits of each project outweighs its costs: "Market Integration", "Competition" and "Security of Supply", whilst DG Energy omitted the fourth criteria of "Sustainability". The PCI Regulation defines sustainability as "[...] *the contribution of a project to reduce emissions [...] taking into account expected changes in climatic conditions*".

In addition, a candidate PCI project must also have cross-border impact with another Member State, which is clearly not the case here since the physical reverse flow of the interconnector was not approved as a PCI.

The Agency for the Cooperation of European Regulators, ACER clearly identified the shortcomings of DG Energy's assessment methodology obligations under PCI Regulation 347/2014, noting that the Commission was 'Not properly considering the merits of the projects in terms of potential contribution to sustainability'.

The PCI assessment methodology of reliance solely on non-monetised indicators obscures a fundamental feature of the proposed projects, namely the balance of costs and benefits which projects are expected to bring. The absence of a sound assessment of the projects' contribution to sustainability leads to great uncertainty and doubts about the viability (or even the need) for the projects in the long run.

The Agency for the Cooperation of European Regulators, ACER, concluded the PCI Selection methodology was "Not properly considering the merits of the projects in terms of potential

contribution to sustainability". They noted that the assessment was 'suboptimal, as it leads to a large lacuna in the assessment of important merits or disadvantages of the projects. **The absence of a sound assessment of the projects' contribution to sustainability leads to great uncertainty and doubts about the viability (or even the need) for the projects in the long run'.**

The Deputy Director General of DG Energy stated publicly on October 17th, 2019: in relation to the sustainability or Climate Impact Assessment 'Unfortunately, we are not doing it. This is certainly a missing link that is in our current catalogue of criteria which need to be added. And the Commission knows it'. **Ditte Juul Jørgensen, Director General for Energy, has said that "the available data were not sufficient to consider sustainability in a meaningful manner in the selection process".**

Ireland's Minister for Climate told the Oireachtas that Ireland itself has questioned if the 'implications of importing LNG has been examined in terms of a sustainable, secure and competitive European energy policy and if not that should be undertaken.' Thus this action includes Ireland's Attorney General. Ireland failed to assess the project before approving its inclusion on the Regional PCI list, including having regard to Climate Change and Low Carbon Economy Act 2015.

The Agency for the Cooperation of European Regulators, ACER, both the Deputy Director General of DG Energy and the Director General for Energy, and the Irish Minister for Climate Change and the Environment all agree the project was not assessed under the PCI Regulation 347/2014 Assessment Criteria which defines sustainability as "the contribution of a project to reduce emissions ... taking into account expected changes in climatic conditions".

What do we seek?

- A reference to the European Court of Justice to determine the validity of the delegated act adopting Shannon LNG as a PCI
- A declaration that the State is in breach of their obligation to provide a clear mechanism to allow the applicant to contest the validity of a decision of the Commission for Article 267 TFEU.
- A Judicial Review seeking to quash the approval decision by Ireland
- A declaration that Ireland failed to carry out the required analysis before approving the project
- A declaration that Ireland failed to take account of the Climate Action and Low Carbon Development Act 2015
- A declaration that the process breached the right to participate in the decision-making process or to provide written reasons for its decision.

NOTE: While noting that the European Parliament voted on February 12th, 2020 to adopt the 4th PCI list, there is, however, a mechanism in Article 5 of the PCI Regulation to have a project of common interest removed from the Union list 'if its inclusion in that list was based on incorrect information which was a determining factor for that inclusion, or the project does not comply with Union law'.

FIE is represented by Fred Logue, Solicitor, James Kenny BL and James Devlin SC

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Notes

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

<https://eur-lex.europa.eu/legal-content/en/TXT/?uri=celex%3A32013R0347>

Article 267 TFEU.

(ex Article 234 TEC)

The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:

- (a) the interpretation of the Treaties;
- (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union;

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court.

SEE ALSO

Client Earth's 20 January 2020 publication: 'Non-compliance of the 4th PCI List with EU Law and the Paris Agreement'

<https://www.documents.clientearth.org/wp-content/uploads/library/2020-01-20-non-compliance-of-the-4th-pci-list-with-eu-law-and-the-paris-agreement-ce-en.pdf>