UNITED STATES AGENCY FOR INTERNATIONAL DEVELOPMENT

Energy Investment Activity (USAID EIA)

Contract Number
AID-168-C-14-00002

Analysis of the legal framework and practice for granting the status of public interest for the construction of energy infrastructure in FBiH

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September, 2017

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This document is made possible by support from the American People sponsored by United States Agency for International Development (USAID). The contents of this document were prepared by and are the sole responsibility of Advanced Engineering Associates International, Inc., and do not necessarily reflect the views of USAID or the United States Government.
1. GRANTING THE STATUS OF PUBLIC (COMMON) INTEREST FOR THE CONSTRUCTION OF ENERGY INFRASTRUCTURE AT THE LEVEL OF THE EUROPEAN UNION AND THE REGION

1.1. European Union (EU)
Designing energy infrastructure projects as being of public (common) interest (public interest) can significantly accelerate and simplify the permitting procedure and thus facilitate faster implementation of the investment. According to the findings of the EC Roland Berger Report\(^1\) that analyzed the permitting procedures for energy infrastructure projects in 13 EU Member States, granting the status of public interest to an individual project is the first and crucial step in the overall energy infrastructure permitting procedure.

Designating a project as being of public interest is not itself part of the permitting procedure, but it has significant influence on the rapidity and streamlining of all subsequent procedures for individual permits. The research conducted by EC Roland Berger Consultants found that in countries that have a list of projects\(^2\) designated with the status of public (common) interest, such projects, generally speaking, enjoy many advantages, such as:

- **Increased transparency and public participation in the implementation of the project from an early stage:** This helps speed up all subsequent steps in permitting procedures. Given that public interest status already determines the need for the construction of such projects, subsequent permitting does not require additional and repeated justification for the project. The effects of public interest status are particularly prominent in countries with complex structures, where each administrative level has separate competences to decide on whether a project is justified.
- **Better project monitoring and management:** In most countries, designating a project as being of public interest is accompanied by determining a state authority responsible for monitoring and managing the permitting procedure, which facilitates a quicker and coordinated response from all competent authorities in the procedure.

That is why one of the main recommendations of the EC Roland Berger Report is to establish an EU-level list of priority energy infrastructure projects that will have the status of public interest, and for EU Member States to consider establishing national lists of priority projects.


\(^2\) According to the findings of the EC Roland Berger Report, examples of countries that have lists of priority energy projects include: England and Wales, Germany, Italy, Poland, and Slovenia.
infrastructure and repealing Decision No 1364/2006/EC and amending Regulations (EC) No. 713/2009, (EC) No 714/2009 and (EC) No 715/2009\(^3\) (Regulation (EU) 347/2013), which established the legal framework for granting authorization for the construction of priority energy infrastructure at the EU level. Regulation (EU) 347/2013 defines the legal framework for the authorization of “Projects of Common Interest” (PCI) and thus also implements the recommendations from the EC Roland Berger Report. Projects of common interest are large energy projects with potentially strong influence on the stability of the EU energy market, energy supply to the population, and contribute to achieving the goals of energy efficiency and reduction of pollution.

A special, expedited permitting procedure is applied to projects of common interest. According to Regulation (EU) 347/2013, the main characteristics of the expedited permitting procedure for PCIs are that it may not exceed three years and six months, all public consultations are to be conducted at the earliest possible stage, and the whole permitting procedure is to be managed or coordinated by a single national competent authority. The powers of the national competent authority in the permitting procedure may depending on the model chosen by the state; for example, the national competent authority may be legally authorized to issue permits for the construction of PCIs in place of other competent authorities, or it may be responsible for coordinating the permitting procedure within the allowed time frame of 3.5 years. All of the above results in reduced administrative costs and an expedited permitting procedure for the investor.

The Decision of the Ministerial Council of the Energy Community of 16 October 2015 made Regulation (EU) 347/2013 part of the legal framework of the Energy Community (Adapted EC Regulation 347). Adapted EC Regulation 347 pertains to the application of measures for the implementation of “Projects of Energy Community Interest” (PECI). Given that Bosnia and Herzegovina is a signatory of the Energy Community Treaty, it is therefore obliged to ensure adequate transposition of Adapted EC Regulation 347 into its legislation and thus enable the construction of PECI projects in the territory of BiH. Among other things, Article 7 of the Adapted EC Regulation 347 states: “Where such status exists in national law, projects of Energy Community interest shall be allocated the status of the highest national significance possible and be treated as such in permit granting processes . . .”

1.2. Regional context

Republic of Slovenia

The Republic of Slovenia has a special “Act Regarding the Siting of Spatial Arrangements of National Significance in Physical Space.” This Act regulates the procedure for selecting projects of national interest and locations of such projects with a view to spatial planning. The Ministry of Economic Development and Technology of Slovenia proposes projects of national significance

based on the National Energy Program. At the proposal of the Ministry, the Government of Slovenia prepares a detailed plan and list of projects of “national importance.” For these projects, the Act Regarding the Siting of Spatial Arrangements of National Significance in Physical Space stipulates the type and content of documents to be submitted in order to obtain permits, and specifies spatial planning requirements.
Republic of Croatia

The Republic of Croatia has adopted a special law for large infrastructure projects – the “Act on Strategic Investment Projects of the Republic of Croatia.” This Act regulates all matters of importance for the authorization and construction of large investment projects, starting from the criteria used to identify strategic projects and including the permitting procedure, spatial planning issues, deadlines for issuing individual permits and approvals, competences for issuing permits, disposal of state-owned properties for the construction of strategic projects, and granting concessions for large strategic projects. The Act stipulates that projects designated as “strategic projects” must be considered urgent and determines the deadline for issuing all required opinions and administrative documents to be within 15 days, with the exception of environmental protection administrative documents that are issued in line with applicable environmental regulations.

2. THE LEGAL FRAMEWORK FOR GRANTING THE STATUS OF PUBLIC (COMMON) INTEREST IN THE FEDERATION OF BOSNIA AND HERZEGOVINA (FBiH)

Designating a project, including energy infrastructure projects, as being of public interest in order to facilitate the implementation of said project is part of the legal tradition of Bosnia and Herzegovina. In the previous legal system (the period of the Socialist Republic of Bosnia and Herzegovina - SRBiH), this status could be granted at the level of the municipality if the project was of local significance, or at the level of the Republic of BiH if the project was of interest for the wider community. In line with the definition of “public interest,” the assessment and determination of public interest were conducted by competent municipal/Republic authorities, and the status was granted by the relevant municipal assembly or the Assembly of the Republic of BiH, depending on the size and importance of the project. In practice this status meant that the permitting procedure would be accelerated on account of the status of public interest or the strategic commitment of the country for the speedy and efficient implementation of the project. Projects designated as being of public interest by the competent assemblies did not need to be additionally justified, and the decision to grant the status of public interest itself constituted the legal basis for securing land for construction, i.e., resolving property ownership relations at the relevant location.

In post-Dayton BiH, the issuing of permits for the construction of energy infrastructure falls mostly within the competences of the entities, so the legal framework and practice of granting this status at the entity level, i.e., in FBiH, will be the primary focus of this analysis. However, the construction of energy infrastructure projects is often planned in the territory of both entities and may also extend to that of neighboring countries. Therefore, consideration of the legal framework.

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4The Government of the Republic of Croatia appoints a special Commission to select strategic projects.
and practice of determining and granting the status of public interest at the level of BiH will also be included in this analysis.

2.1. Level of Bosnia and Herzegovina (BiH)

The Adapted EC Regulation 347 that would provide for the implementation of PECI projects in the territory of BiH in line with Regulation 347, including the matter of granting the status of public interest for this type of energy infrastructure projects, has not been transposed into the legal framework in BiH.

For other energy infrastructure projects that are not PECI projects, the status of public interest can be granted at the BiH level as part of the concession award procedure based on an unsolicited proposal.

Article 25 of the BiH Law on Concessions\(^5\) reads:

“In the event that a bidder submits to the competent Ministry (hereinafter: Ministry) a proposal for concession for which there was no public invitation, the Ministry shall evaluate whether there is public interest for such a concession.”

It follows from the above provision that the relevant ministry is authorized to assess whether there is a public interest or not. However, neither the BiH Law on Concessions nor other laws and regulations at the BiH level have defined the concept of public interest, or who is responsible for deciding whether there is a public interest for BiH, or the procedure and competent authorities in the procedure. Given the administrative organization of the country and the permitting procedure being conducted at the level of the entities and of the cantons in FBiH, it is important to point out that no piece of legislation defines the manner in which competent authorities at the various levels of government – BiH, the entities, the cantons, the municipalities – should coordinate the granting of the status of public interest, i.e., what the effects of this status are at the BiH level when it is granted. The concept of public interest has not been defined at the BiH level either.

Finally, it should be noted that the effects of granting the status of public interest at the BiH level are limited only to the concession award procedure. This means that granting this status does not ensure or expedite the issuing of other permits as required, for example, by the Adapted EC Regulation 347.

2.2. Federation of Bosnia and Herzegovina

In line with FBiH-level legislation, energy infrastructure projects may be designated with the status of public interest within the concession award procedure pursuant to the FBiH Law on Concessions\(^6\) and within the expropriation procedure pursuant to the FBiH Law on Expropriation.

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\(^5\) “Official Gazette of BiH,” Nos. 32/02 and 56/04.

\(^6\) “Official Gazette of FBiH,” Nos. 40/02 and 61/06.
Apart from that, in FBiH public interest is also determined as part of the procedure to adopt spatial planning documentation.
a) **Concession Award**

Just like the BiH Law on Concessions, the FBiH Law on Concessions stipulates that public interest is to be determined only in the concession award procedure when an unsolicited proposal has been submitted by an interested bidder.

Article 28 of the FBiH Law on Concessions reads:

> If a bidder submits a proposal to the ministry for a concession for which a public tender has not been published, the ministry shall assess whether there is a public interest for that concession.

The FBiH Law on Concessions does not define the concept of public interest and does not stipulate the procedure or the competent authorities at the FBiH level for designating this status.

The regulation prepared by the FBiH Concessions Commission and adopted by the FBiH Government – Rules on the Procedure for Awarding Concessions\(^7\) defines the public interest as follows:

**Article 2**

> Public interest means the common interest of all or some of the local communities in relation to natural goods, goods in general use and activities of common interest, and is protected and ensured by legal acts of the sociopolitical community responsible for awarding each individual concession.

The other regulation prepared by the FBIH Concessions Commission and adopted by the FBIH Government – the FBIH Concessions Policy Document\(^8\) also contains a chapter titled “Public Interest” with provisions pertaining to the procedure to determine the public interest. In this chapter, it says, “determining the public interest is directly related to the quality of the preliminary study, i.e., the economic viability study.” The document also notes that “[. . .] by approving the economic viability study, the FBIH Concessions Commission assesses the existence of public interest.”

Furthermore, the Concessions Policy Document points out that “assessing and determining public interest should indicate the economic, political, social and general justification for the concession, define the short-term and long-term objectives achieved by the concession, and determine the impact of the concession activity on the environment, the existing infrastructure and other economic areas and systems.”

However, these regulations do not stipulate the procedure and authorities responsible for granting the status of public interest to a project. In practice, once the FBIH Concessions Commission and

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\(^7\) “Official Gazette of FBiH,” Nos. 68/06 and 87/11.

\(^8\) “Official Gazette of FBiH,” No. 64/05.
the competent ministry conduct an assessment and determine that there is a public interest to award the concession, the FBiH Government grants the status of public interest if the concession award falls within the competences of FBiH.

Just like at the BiH level, granting the status of public interest to an energy infrastructure project at the FBiH level does not mean that the process to obtain other permits will be expedited in practice or be unencumbered, which should be the point of granting this status. One illustrative example of how limited the effect of granting the status of public interest to an energy project can be seen in the case of HE Vranduk: in the period from 2006 to 2012, as part of the procedure for constructing the Vranduk hydropower plant, the FBiH Government adopted a number of decisions determining the public interest for the construction of this facility and designating it a priority electricity facility in FBiH. However, none of these decisions resulted in any concrete expedition of the permitting process. The public interest status was of benefit to the investor in that it served as the basis for resolving property ownership relations and facilitated obtaining a concession, but all of the subsequent permits were issued in regular administrative procedures.

b) Expropriation procedure

Apart from the concession award procedure, the public interest may be determined at the FBiH level through the expropriation procedure for “construction in the public interest for the purpose of expropriation.” The expropriation procedure at the FBiH level is regulated by the FBiH Law on Expropriation.10

The procedure for determining the public interest in the expropriation procedure is set out in Articles 14 through 16 of the FBiH Law on Expropriation. According to this Law, the status of public interest for the construction of facilities or implementation of works may be granted by all levels of government in FBiH – FBiH, cantons, and municipalities. At the FBiH level, the decision to determine the public interest is adopted by the FBiH Government if a future facility will be located in the territory of two or more cantons. Cantonal governments are responsible for determining the public interest if the construction of the facility extends across the territories of two or more municipalities, while municipalities are responsible for decisions on the public interest for facilities located in their territory.11 The expropriation procedure itself is conducted by the municipality on whose territory the facility is to be constructed.


10 “Official Gazette of FBiH,” Nos. 70/07, 36/10, 25/12 and 34/16.

11 FBiH Law on Expropriation, Article 14.
If implementing spatial planning regulations have been adopted (urban regulatory plan or urban zoning plan), then the public interest for the purpose of expropriation may be drawn from them. Thus, Article 15 of the FBiH Law on Expropriation states: “The public interest for the construction of a facility or other works in an area for which an urban regulatory or zoning plan has been adopted shall be considered as determined by that plan.”

The urban regulatory plan and the zoning plan are implementing spatial planning regulations that concretely implement strategic commitments from higher-level spatial planning documents – municipal, cantonal or entity spatial plans. This means that when implementing spatial planning regulations are being adopted, the interests of various users of the space are being taken into account and the public interest for implementing a specific project is drawn from this.

c) An example of comprehensive application of the “public (common) interest” status to an entire procedure in the case of the construction of the Corridor Vc motorway

Given the above limitations of the public interest status under existing general laws, i.e., only for the purpose of concession and expropriation procedures, the FBiH Parliament adopted a special law for the construction of the motorway on Corridor Vc so as to facilitate and expedite the permitting procedure for this investment. As part of the Pan-European transport network, the motorway on Corridor Vc is a capital, strategic project of importance for the entire territory of FBiH and BiH. One of the main reasons for adopting this special law was cited as “the duration of certain procedures conditioning either the start or the course of implementation of the investment.”

The Law on the Corridor Vc Motorway determined, among other things, the area of common interest for FBiH for the purpose of the motorway construction, as well as the public interest for all real estate within the Corridor Vc motorway construction area, resolving property-legal issues within the motorway area, environmental protection measures and procedures, and the authorities responsible for issuing permits and the shortened deadlines for issuing permits. In addition, it explicitly stipulated that the provision of the Law had primacy in the event of conflict with provisions of other laws. This enabled a more expedited and efficient implementation of a capital, strategic project such as the Corridor Vc motorway.

Even though the construction of the Corridor Vc motorway is not progressing at a desirable rate, the implementation of this project would have been even slower if FBiH had not adopted this special law.

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12 The Corridors of the Pan-European transport network were determined at the Crete Conference in March 1994.
13 From the Reasoning for the adoption of the Law on the Corridor Vc Motorway.
2.3. Cantons and municipalities in the Federation of Bosnia and Herzegovina

This section presents the legal framework and practice for granting the status of public interest in four selected cantons in FBiH: Tuzla Canton (TC), Zenica-Doboj Canton (ZDC), Central Bosnia Canton (CBC), and Herzegovina-Neretva Canton (HNC).

Just like at the FBiH level, the status of public interest at cantonal and municipal level can also be granted within the concession and expropriation procedures.

In all of the analyzed cantonal laws on concessions, public interest is assessed in the concession award procedure based on an unsolicited proposal. Only in the HNC Law on Concessions, the wording of Article 28 on unsolicited proposals leaves out the word “public” in front of the word “interest.” Article 28 of the HNC Law on Concessions reads “the conceding party [Government] assesses the existence of interest for the concession based on the opinion of the competent ministry.” The above legal provision may be interpreted as to mean that public interest is not assessed in HNC; only interest for awarding a concession is assessed. The HNC Law on Concessions and relevant regulations do not stipulate a procedure for assessing this interest or the criteria to be taken into account when deciding on whether there is an interest for the award of the concession.

None of the cantonal laws and regulations on concessions define the public interest, the procedure for determining and granting the status, or the authorities responsible for deciding on the granting of this status.

The cantons do not have their own laws on expropriation; instead, the expropriation procedure at the cantonal level adheres to the FBiH Law on Expropriation. According to the provisions of this Law, the cantonal government is responsible for determining and granting the status of public interest if the construction of the facility extends across the territory of one or more municipalities in the canon, and the municipalities are responsible for determining the public interest for the purpose of expropriation in their territories.

3. **CONCLUSIONS:**

- The Adapted Regulation EC 347 has not been transposed to the legal framework in BiH. In the context of the requirements under the Adapted EC Regulation 347, including the granting of the status of public interest for this category of energy infrastructure projects, the laws and regulations at the BiH, FBiH and RS level do not contain relevant provisions that would enable the efficient, transparent and coordinated implementation of PECI projects in the territory of BiH. Another significant shortcoming of the system in general is its lack of a basis to establish an efficient coordination mechanism at the BiH level for the purposes of the permitting procedure for PECIs at various levels of government, which is one of the key requirements under the Adapted EC Regulation 347. The same holds true for the implementation of non-PECI projects.
• The BiH Law on Concessions contains only one provision stipulating that the competent ministry must assess the public interest for unsolicited proposals seeking the award of a concession. However, neither this Law nor any other laws and regulations at the BiH level stipulate the procedure or the competent authorities for granting the status of public interest. It is also unclear what the legal effects of the public interest status are at the BiH level, i.e., whether such a status should also be granted at the entity/cantonal/municipal level, given that these levels of government issue almost all of the necessary permits and resolve property-legal relations.

• The existing legal framework regarding concessions at the BiH and FBiH levels implies certain legal effects of the status of public interest only for the concession award procedure, but not for other permitting procedures, as illustrated by numerous examples in practice, such as the construction of HE Vranduk.

• The concept of public interest has not been defined at the BiH level, and FBiH lacks a unique definition of the concept of public interest.

• The procedure for granting the status of public interest and its actors or competent authorities in the procedure have not been defined by the laws and regulations at the level of FBiH or the cantons included in this analysis. Only the FBiH Law on Expropriation specifies the competent authorities when it comes to granting this status as part of the expropriation procedure.

4. RECOMMENDATIONS

• Large electricity infrastructure projects, constructed on the territory of both entities in BiH and/or the territory of BiH and neighboring countries, irrespective of whether they have been designated as PECIs or not, require a coordinated approach from all competent institutions at all levels of government in the country. These projects require large financial investments, affect the overall stability of the energy system and security of supply of electricity for BiH and the wider region. It is, therefore, important to facilitate their implementation in an efficient, coordinated and transparent manner. Granting the status of public interest to such projects at the level of BiH and the entities would have multiple benefits for their implementation, in the context of the implications issuing from the provisions of the Adapted EC Regulation 347. The Adapted EC Regulation 347 should, therefore, be transposed to the legal framework in BiH (BiH and entity level) so as to enable the granting of this status and expedited treatment for PECIs and other energy infrastructure projects constructed in BiH.

• A BiH-level regulation should define the concept of public interest that would then be identically defined in entity-level regulations. This piece of legislation should also define
the procedure for granting this status and the competent authorities for that procedure. Finally, this regulation should define how the procedure for granting the status of public interest is to be coordinated with the entities and other levels of government in BiH.

- An FBiH-level regulation should define the concept of public interest in the same way as it is defined at the BiH level. This regulation should also define the procedure and competent authorities for granting the status of public (common) interest at the level of FBiH and of the cantons in a uniform way.

- Finally, a general law should provide that the status of public interest entitles a project to different, expedited treatment throughout the permitting procedure, not just in relation to concession and expropriation procedures.