



LEGAL BRIEFING:

Legal obligations for public participation during the updating of the National Energy and Climate Plans



Legal obligations for public participation during the updating of the National Energy and Climate Plans

We are Europe's largest network of environmental citizens' organisations. We bring together over 160 civil society organisations from more than 35 European countries. Together, we work for a better future where people and nature thrive together.

The EEB is an International non-profit association /
Association internationale sans but lucratif (AISBL).
EC register for interest representatives:
Identification number 06798511314-27
BCE identification number: 0415.814.848
RPM Tribunal de l'entreprise francophone de Bruxelles

Published February 2023
Author: Alistair McGlone



With the support of the LIFE Programme of the European Union

This publication reflects the authors' views and does not commit the donors.



Contents

Executive Summary	4
Introduction	8
Relevant provisions relating to public participation concerning the update of NECPs... 9	
The requirements of Article 7 of the Aarhus Convention.....	9
Partial implementation of Article 7 of the Aarhus Convention by the Governance Regulation.....	10
Failure of the Governance Regulation to implement Article 7 of the Aarhus Convention.....	11
Commission Notice on the Guidance to Member States for the update of the 2021-2030 national energy and climate plans (the EU Guidance) and public participation.....	13
Description of the level of public participation that should be expected with respect to the updating of NECPs	16
Public participation under Article 10 of the Governance Regulation and in line with the Aarhus Convention	16
Introduction.....	16
Appropriate practical and/or other provisions.....	17
Transparent and fair framework.....	17
Provide the necessary information to the public.....	18
Within this framework, article 6, paragraphs 3, 4 and 8, shall be applied....	18
Identification of the public.....	24
Multilevel climate and energy dialogues (MCEDs) under Article 11.....	25
What is a multilevel climate and energy dialogue?.....	25
What is discussed during MCEDs?.....	26
Are Member States required to establish MCEDs?.....	27
Who is to participate in MCEDs?.....	27
Description of MCED in draft NECP.....	27



Executive Summary

This paper describes what international and EU law requires Member States do so to ensure effective public participation during the NECP revision process. It covers legal duties -

- under Article 10 of the Governance Regulation and in line with the Aarhus Convention; and
- with respect to multilevel climate and energy dialogues (MCEDs) under Article 11 of the Governance Regulation,

concerning the update of the 2021-2030 national energy and climate plans (NECPs).

The following is a summary description of those legal duties concerning public participation.

Public participation under Article 10 of the Governance Regulation and in line with the Aarhus Convention

Provisions for public participation

- Member States are obliged to introduce provisions, which may, but do not have to, include legislation, to guarantee public participation during the preparation of NECPs (which includes the revision process).
- NECPs should address consultations with stakeholders, including social partners, and engagement of civil society and the general public.

Transparent and fair framework

- There must be arrangements for the public to participate within a transparent and fair framework, with rules and procedures applied in a clear and consistent fashion.
- Equal participation should be ensured, and practical arrangements for public participation should be in place.
- The transparent framework should be both for the decision-making itself and should allow members of the public the possibility to challenge procedures and decisions.
- The Governance Regulation requires Member States to “limit administrative complexity”.

Information to be provided to the public

- The Governance Regulation contains (non-legally binding) provisions to the effect that-



- the public should be informed by public notices or other appropriate means such as electronic media; and
 - the public should have access to all relevant documents.
- The Governance Regulation requires the draft revised NECP to be made available to the public
- The draft NECP should include an overview of the process followed for establishing the revision of the NECP, including a description of the public consultation and involvement of stakeholders.
- If using Article 6(2) of the Aarhus Convention as a model it is arguable that during public participation with respect to NECPs the following information should be provided:
 - a description of the scope of the NECP
 - how a decision on the NECP will be taken and which authority/authorities will take the decision
 - the envisaged procedure including, as and when this information can be provided:
 - the commencement of the procedure;
 - the opportunities for the public to participate;
 - the time and venue of any envisaged public hearing(s);
 - an indication of the public authority/authorities from which relevant information can be obtained;
 - an indication of where the relevant information has been deposited for examination by the public;
 - an indication of how and to whom comments or questions may be submitted and a time frame for the transmittal of comments or questions; and
 - an indication of what relevant environmental information is available.
- For the purposes of consultations on the updating of NECPs, the public may also resort to the following information-
 - information on the analytical basis of NECPs, made available pursuant to Article 28 of the Governance Regulation;
 - information requested under national laws implementing Article 3 of the environmental information Directive; and
 - information disseminated under Article 7 of the environmental information Directive.

Reasonable time frames

- Reasonable time frames must be set, allowing sufficient time for the public



- to be informed of the specific information required under the public participation procedure
- to participate in the public participation procedure, including
- adequate time for preparation; and
- to formulate and express its views.

Early public participation, when all options are open and effective public participation can take place

- Public participation must take place early, when all options are open and effective participation can take place.
- In particular, whilst authorities may take an initial position, public participation must take place when those authorities are still open to persuasion with respect to the contents of NECPs.

Due account is to be taken of the outcome of the public participation

- Whilst the Governance Regulation does not require Member States to ensure that due account is taken of the outcomes of the public participation, in most EU Member States administrative law already requires decisions to be reasoned and given in writing.
- Taking due account does not require the relevant authority to accept the substance of all comments received and to change the decision according to every comment; but authorities should
 - base their decisions on NECPs taking into account all the relevant information available them, including all comments received, and
 - be able to show why comments were rejected on substantive grounds in a reasoned decision.

Identification of the public to participate: who may participate?

- A very broad section of the public should be consulted, in accordance with the Aarhus Convention.
- There must be consultations with stakeholders, including social partners, civil society and the general public.
- NECPs themselves may identify the public to be consulted.



Multilevel climate and energy dialogues (MCEDs) under Article 11

What is a multilevel climate and energy dialogue?

- MCEDs are principally required under EU law, namely Article 11 of the Governance Regulation. The Aarhus Convention does not mention MCEDs, although such dialogues may become a vehicle for the implementation of provisions of the Convention, particularly Article 7.
- The Governance Regulation fails adequately to clarify what multilevel climate and energy dialogues are
- There are, however, a number of examples of good practice which are easily available and which may indicate how dialogues may be conducted
- It may be difficult to determine where there is non-compliance with Article 11, and even more difficult to take remedial action with respect to any such non-compliance.

What is discussed during MCEDs?

- It is possible, but not required, that MCEDs may discuss the updating of NECPs
- Multilevel climate and energy dialogues must enable participants to engage and discuss the different scenarios envisaged for energy and climate policies, including for the long term, and review progress.

Are Member States required to establish MCEDs?

- Each Member State must establish a MCED, unless it already has a structure which serves the same purpose.

Who is to participate in MCEDs?

- Article 11 of the Governance Regulation provides, in very broad terms, for the participation of local authorities, civil society organisations, business community, investors and other relevant stakeholders and the general public.

Description of MCED in draft NECP

- The draft NECP should include a description of any MCED established.



Introduction

This paper describes what is to be expected with respect to public participation with concerning the update of the 2021-2030 national energy and climate plans (NECPs).

The main obligations with respect to such public participation are imposed by international law under a multilateral environmental treaty, namely the Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (the Aarhus Convention). The EU's failure fully to implement the requirements of the Aarhus Convention with respect to public participation in NECPs complicates matters, because some of the Convention's requirements are transposed into EU law, and some of them are not.

Nevertheless, and regardless of this complexity, all EU Member States are Parties to the Aarhus Convention and bound by its obligations; and in particular the failure of the EU fully to apply Article 7 with respect to the preparation of NECPs in no way exempts Member States from their international obligations in this regard. Member States must implement, with respect to NECPs, all their obligations arising under Article 7 of Aarhus; indeed, as we shall see, the draft Guidance to Member States for the update of the 2021-2030 national energy and climate plans expressly envisages that Member States must provide for public participation under the Governance Regulation and Article 7 of the Aarhus Convention.



Relevant provisions relating to public participation concerning the update of NECPs

The requirements of Article 7 of the Aarhus Convention

Article 7 of the Aarhus Convention applies to the updating of NECPs because such updating is included in the phrase “the preparation of plans and programmes relating to the environment” within the meaning of Article 7.

Article 7 provides as follows:

Each Party shall make appropriate practical and/or other provisions for the public to participate during the preparation of plans and programmes relating to the environment, within a transparent and fair framework, having provided the necessary information to the public. Within this framework, article 6, paragraphs 3, 4 and 8, shall be applied. The public which may participate shall be identified by the relevant public authority, taking into account the objectives of this Convention...

These are the paragraphs from Article 6 of the Convention that are referred to in Article 7:

3. The public participation procedures shall include reasonable time-frames for the different phases, allowing sufficient time for informing the public in accordance with paragraph 2 above and for the public to prepare and participate effectively during the environmental decision-making.

4. Each Party shall provide for early public participation, when all options are open and effective public participation can take place.

...

8. Each Party shall ensure that in the decision due account is taken of the outcome of the public participation.



Partial implementation of Article 7 of the Aarhus Convention by the Governance Regulation

Article 7 of the Aarhus Convention is partially implemented, with respect to NECPs, by Article 10 (public consultation) of Regulation (EU) 2018/1999 of the European Parliament and of the Council of 11 December 2018 on the Governance of the Energy Union and Climate Action (the Governance Regulation), which provides as follows -

Without prejudice to any other Union law requirements, each Member State shall ensure that the public is given early and effective opportunities to participate in the preparation of the draft integrated national energy and climate plan — as regards the plans for the 2021 to 2030 period, in the preparation of the final plan well before its adoption — as well as of the long-term strategies referred to in Article 15. Each Member State shall attach to the submission of such documents to the Commission a summary of the public's views or provisional views. In so far as Directive 2001/42/EC¹ is applicable, consultations undertaken on the draft in accordance with that Directive shall be deemed to satisfy the obligations to consult the public under this Regulation.

Each Member State shall ensure that the public is informed. Each Member State shall set reasonable timeframes allowing sufficient time for the public to be informed, to participate and express its views.

Each Member State shall limit administrative complexity when implementing this Article.

Recitals (28) and (29) of the Governance Regulation relate to Article 10;² the recitals show the relationship between the Convention and provide for the implementation of, inter alia, elements of Article 7 of the Convention. The recitals, however, do not impose legal obligations. As such, they do not require implementation of Article 7.

¹ Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment, commonly known as the SEA Directive; as that Directive does not expressly relate to NECPs and in any event is considerably narrower in scope than the Governance Regulation, the SEA Directive is not considered either in this paper or in the Commission's Draft Guidance on the update of NECPs.

² Recitals (28) and (29) of the Regulation provide as follows:

(28) The implementation of policies and measures in the areas of energy and climate has an impact on the environment. Member States should therefore ensure that the public is given early and effective opportunities to participate in and to be consulted on the preparation of the integrated national energy and climate plans in accordance, where applicable, with the provisions of Directive 2001/42/EC of the European Parliament and of the Council (14) and the United Nations Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters of 25 June 1998 (the 'Aarhus convention'). Member States should also ensure involvement of social partners in the preparation of the integrated national energy and climate plans, and aim to limit administrative complexity when fulfilling their obligations with regard to public consultation.

(29) When carrying out public consultations, and in line with the Aarhus Convention, Member States should aim to ensure equal participation, that the public is informed by public notices or other appropriate means such as electronic media, that the public is able to access all relevant documents, and that practical arrangements related to the public's participation are put in place.



Annex I³ of the Governance Regulation, which establishes the general framework for national plans, provides that section A.1.3 of each plan is to address “consultations with stakeholders, including social partners, and engagement of civil society and the general public”.

Article 11 of the Governance Regulation requires each Member State to establish a multilevel climate and energy dialogue. Article 11 provides as follows-

Each Member State shall establish a multilevel climate and energy dialogue pursuant to national rules, in which local authorities, civil society organisations, business community, investors and other relevant stakeholders and the general public are able actively to engage and discuss the different scenarios envisaged for energy and climate policies, including for the long term, and review progress, unless it already has a structure which serves the same purpose. Integrated national energy and climate plans may be discussed within the framework of such a dialogue.

Article 11 is supplemented by recital (30) to the Regulation⁴.

Failure of the Governance Regulation to implement Article 7 of the Aarhus Convention

Whilst Article 1 of the Governance Regulation states that “...The governance mechanism ensures effective opportunities for the public to participate in the preparation of [NECPs] and ... long-term strategies...”, the Aarhus Compliance Committee⁵ (ACCC) disagrees, and there is a longstanding and unresolved case relating to the failure of the EU to implement Article 7 of the Aarhus Convention with respect to NECPs. This is not the place to discuss the detail of that case, suffice it to say here the ACCC has found that Article 10 of the Governance Regulation is inadequate for the purposes of implementing Article 7 and that the EU is under an obligation to improve public participation in this regard.

³ By virtue of Article 3(2) of the Regulation, NECPs “shall contain the elements set out in paragraph 2 of this Article and in Annex I”.

⁴ Recital (30) to the Regulation provides as follows:

(30) Each Member State should establish a permanent multi-level energy dialogue, bringing together local authorities, civil society organisations, the business community, investors and other relevant stakeholders to discuss the different options envisaged for energy and climate policies. It should be possible for the Member State's integrated national energy and climate plan as well as its long-term strategy to be discussed within the framework of that dialogue. The dialogue may take place by means of any national structure, such as a website, public consultation platform or another interactive communication tool.

⁵ Article 15 of the Aarhus Convention required the Meeting of the Parties of the Convention, which is in effect its governing body, to establish arrangements for reviewing compliance with the Convention. Acting in accordance with Article 15, the MOP established the ACCC for the review of compliance by the Parties with their obligations under Convention. The functions of the ACCC include considering communications from the public relating to the compliance of Parties to the Convention. In the event that the Committee finds a Party in breach of the Convention, those findings, upon endorsement by the Meeting of the Parties, become legally binding.



The Aarhus Convention Meeting of the Parties (MOP) endorsed these findings in *Decision VII/8f concerning compliance by the European Union with its obligations under the Convention*⁶. Paragraphs 1 and 2 of the decision say that the MOP

1. *Endorses the findings of the Committee in its report on the implementation of request ACCC/M/2017/3 that, with respect to decision V/9g:*

- a) *The Party concerned has put in place a regulatory framework that meets the requirements of article 6 (3) of the Convention with respect to National Energy and Climate Plans but has not yet demonstrated that it has adopted either a proper regulatory framework or clear instructions to ensure that the other requirements of article 7 are met in the adoption of National Energy and Climate Plans, as required by the first three sentences of paragraph 3 of decision V/9g;*
- b) *While welcoming the fact that the Party concerned has carried out an assessment of public participation on each member State's National Energy and Climate Plan, albeit in brief, the Party concerned has not yet met the requirements of the final sentence of paragraph 3 of decision V/9g;*

2. *Reaffirms its decision V/9g and, in particular, requests the Party concerned [the EU], as a matter of urgency:*

(a) To provide the Committee with evidence that it has adopted a proper regulatory framework and/or clear instructions for implementing article 7 of the Convention with respect to the adoption of National Energy and Climate Plans, and, in particular, to take the necessary legislative, regulatory or practical measures to:

- (i) Ensure that the arrangements for public participation in its member States are transparent and fair and that, within those arrangements, the necessary information is provided to the public;*
- (ii) Ensure that the adopted regulatory framework and/or clear instructions ensure that the requirements of article 6 (4) and (8) of the Convention are met, including allowing for early public participation when all options are open, and ensuring that due account is taken of the outcome of the public participation;*

(b) To adapt the manner in which it evaluates National Energy and Climate Plans accordingly;

These paragraphs of Decision VII/8f are based on the 2021 ACCC Report on compliance by the European Union⁷: see in particular paragraphs 50-102. To list key findings in that report -

- the EU⁸, has **no proper regulatory framework or clear instructions** in place to ensure that Member States implement the requirements of Article 7 regarding the adoption of NECPs, and in particular;
- the EU has not shown that it clearly requires arrangements for public participation in the preparation of member States' NECPs that are **transparent and fair** and that, within the

⁶ https://unece.org/sites/default/files/2021-12/Decision_VII.8f_eng.pdf

⁷ https://unece.org/sites/default/files/2022-01/ECE_MP.PP_2021_51_E.pdf

⁸ The EU is obliged to implement Article 7 of the Aarhus Convention.



arrangements, **the necessary information is provided to the public** (both requirements of Article 7 of the Aarhus Convention) ;

- the requirement in Article 10 of the Governance Regulation that “each Member State shall set **reasonable time-frames allowing sufficient time for the public to be informed, to participate and to express its views**” meets the requirements of Article 6(3) of the Aarhus Convention;
- Article 10 of the Governance Regulation meets the requirement in Article 6(4) of the Convention to “**ensure that the public is given early and effective opportunities to participate**” in the preparation of the draft plans; but
- Article 10 fails to include an express requirement for the public to have opportunities to participate “**when all options are open**” as required by Article 6 (4) of the Convention; what is more, with respect to the 2021–2030 NECPs, Article 10 only requires public participation at a time **when all options would most likely no longer be open**, not least because the draft plans would have already been provided to the Commission for comment.
- Article 10 of the Governance Regulation does not oblige Member States to ensure that **due account** is taken of the outcomes of the public participation.

The EU participated in the endorsement of those findings by the MOP, which means they have legal effect.

Commission Notice on the Guidance to Member States for the update of the 2021-2030 national energy and climate plans (the EU Guidance) and public participation

Draft Guidance⁹ (the Guidance) on the update of NECPs has recently been prepared; when adopted it will offer guidance to Member States on the process and the scope of preparing the draft and final updated NECPs, notably by identifying good practices and outlining the implications of recent policy and geo-political developments. The Guidance says relatively little about public participation; what it does say about public participation is almost entirely in part 3.2:

3.2 An early and inclusive public participation in line with the Aarhus Convention

As was the case for the initial plans, Member States must develop the update of the NECPs in a dialogue with local authorities, civil society organisations, social partners, the sectoral business community, investors and other stakeholders. Article 10 of the Governance Regulation requires

⁹ At the time of writing, the Commission Notice on the Guidance to Member States for the update of the 2021-2030 national energy and climate plans is in draft it can be found at https://energy.ec.europa.eu/communication-and-annex-guidance-ms-updated-necps-2021-2030_en



Member States to give the public early and effective opportunities to participate in the elaboration of the NECPs. Member States are parties to the Aarhus Convention and so, they are obliged to ensure that the public is given early and effective opportunities to participate in preparing the draft updated national plans in a transparent and fair framework¹⁰. In particular, the public must be given reasonable time to participate in the different phases and must be consulted when all options are still open.¹¹ Sound consultation implies that the public should have access to all relevant documents, reports and assumptions at the start of the consultation period. Member States are invited to reflect on best practices, such as setting up the consultation through a dedicated NECP website, which contains all the information.

Under Article 11 of the Governance Regulation, Member States must establish a multilevel energy and climate dialogue. They must provide a platform to discuss with stakeholders the different scenarios envisaged for energy and climate policies and achieving the EU's climate-neutrality objective set out in the Climate Law.¹² Member States will report on the progress in establishing this dialogue in the NECPRs. For public consultations, Member States are encouraged to strengthen the multilevel dialogue and work with regional and local individuals and groups who can bring forward concrete measures. They should also explore synergies with existing forums, such as the EU Covenant of Mayors. Member States also need to ensure full and timely consultation and involvement of social partners, in accordance with the relevant national rules and practices. Social dialogue and a whole-of-society approach are key for developing and implementing effective energy and climate policies in line with the principles of the European Pillar of Social Rights.

In the updated NECPs, Member States are required to include a summary of the consultations and of the public's view or provisional views. Member States should explain how the views of the public were considered ahead of submitting the draft and final national plans. Member States are also expected to describe how the process allowed the public to participate transparently and fairly.

The Guidance clearly indicates that it is necessary to implement both the Convention and the Regulation to enable adequate public participation: public participation is governed by a patchwork of legal obligations and exhortations. In particular, in view of the failures of the Governance Regulation to implement Article 7 of the Aarhus Convention¹³, mere compliance with Article 10 of the Regulation will be inadequate to secure sufficient public participation, which will be based on requirements arising

¹⁰ Article 6 of the Aarhus Convention.

¹¹ Article 7 of the Aarhus Convention.

¹² The NECPlatform project funded under the LIFE Program aims at supporting six EU Member States (Bulgaria, Croatia, France, Italy, Portugal and Romania) in setting-up and managing permanent multi-level Climate and Energy Dialogue (CED) Platforms, helping them comply with Article 11 of the Governance Regulation by fostering vertical and horizontal integration of energy and climate policies., more info: <https://ec.europa.eu/info/funding-tenders/opportunities/portal/screen/how-to-participate/org-details/999999999/project/101076359/program/43252405/details>

¹³ Although recitals (28) and (29) of the Governance Regulation provide for implementation of Article 7 of the Aarhus Convention, they do not impose legal obligations and as such do not constitute a proper legal framework except insofar as they are supplemented by legal obligations imposed by Member States by the Regulation.



- under both the Aarhus Convention and EU law;
- principally under EU law; and
- principally under the Aarhus Convention,
- and these requirements are supplemented by non-binding exhortations, recommendations etc.¹⁴

¹⁴ Much of the language in part 3.2 shows that the Guidance is merely *recommending* particular practices, rather than drawing attention to *legal obligations*. See the following examples, with the non-legally binding language bolded out -

*Member States **are invited** to reflect on best practices...*

*For public consultations, Member States **are encouraged** to strengthen the multilevel dialogue...*

*They **should also explore** synergies with existing forums...*

*Social dialogue and a whole-of- society approach **are key** for developing and implementing effective energy and climate policies...*

*Member States **should explain**...*

In contrast, where the Guidance is describing legally binding obligations it uses language such as “must” and “are required”.



Description of the level of public participation that should be expected with respect to the updating of NECPs

Public participation under Article 10 of the Governance Regulation and in line with the Aarhus Convention

Introduction

There follows an analysis and summary of provisions relating to public participation with respect to the updating of NECPs.

Although the requirements that are enshrined in binding EU law should be the most readily enforceable, it has been necessary extensively to discuss requirements under the Aarhus Convention. For the purposes of that discussion, extensive use has been made of *The Aarhus Convention: An Implementation Guide*¹⁵, which is a non-legally binding and user-friendly reference tool to assist policymakers, legislators and public authorities in implementing the Convention, and is commended to readers of this paper.

For the sake of brevity, this paper has not discussed the Aarhus Convention requirements in the same detail as the Implementation Guide, which should be consulted if more depth is required.

¹⁵ https://unece.org/DAM/env/pp/Publications/Aarhus_Implementation_Guide_interactive_eng.pdf



Appropriate practical and/or other provisions

Article 7 of the Convention requires Parties to make appropriate practical provisions, as a minimum, for public participation in the update of NECPs, plans and programmes relating to the environment.

The Convention also provides that Parties may make “other provisions” for public participation which may include legislation of some kind, although this is not strictly required.

The obligation should be construed in the light of the objectives of the Convention, which include guaranteeing public participation in order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being.

Article 10 of the Governance Regulation enlarges the Aarhus requirement to make appropriate provision by requiring Member States to limit administrative complexity.

The obligation to make appropriate practical provisions is fleshed out in Annex I of the Governance Regulation, which, as we have seen provides that section A.1.3 of each plan should address “consultations with stakeholders, including social partners, and engagement of civil society and the general public”.

To summarise –

- **Member States are obliged to introduce provisions, which may, but do not have to, include legislation, to guarantee public participation during the preparation of NECPs**
- **NECPs should address consultations with stakeholders, including social partners, and engagement of civil society and the general public**

Transparent and fair framework

Article 7 requires that there must be arrangements for the public to participate within a transparent and fair framework.

This framework must give the public the opportunities to participate effectively; so there must be rules and procedures which are applied in a clear and consistent fashion, which in turn requires the implementation of a transparent and fair framework.

This requirements is to be read in the light of Article 1 of the Convention, which provides that the objective of the Convention includes guaranteeing rights in respect of public participation in decision-making. For rights to be guaranteed, a transparent and fair framework must be in place, both for decision-making itself and to afford affected members of the public the possibility to uphold the standards of decision-making processes by challenging procedures and decisions.

Moreover, Recital (29) of the Governance Regulation provides -

(29) When carrying out public consultations, and in line with the Aarhus Convention, Member States should aim to ensure equal participation...and that practical arrangements related to the public's participation are put in place.

Whilst the recital does not create legal binding obligations it nevertheless has moral force.



As far as transparency is concerned, there is a supplementary requirement in Article 10 of the Governance Regulation for an absence of complexity: Article 10 requires that “each Member State shall limit administrative complexity when implementing this Article”. But that does not implement Article 7 and the ACCC has found that the EU has not shown that it clearly requires arrangements for public participation in the preparation of member States’ NECPs that are transparent and fair.

Summary –

- **There must be arrangements for the public to participate within a transparent and fair framework, with rules and procedures applied in a clear and consistent fashion.**
- **Equal participation should be ensured, and practical arrangements for public participation should be in place.**
- **The transparent framework should be both for the decision-making itself and should allow members of the public the possibility to challenge procedures and decisions.**
- **The Governance Regulation requires Member States to “limit administrative complexity”.**

Provide the necessary information to the public

Under Article 7 of the Convention, provision of the necessary information to the public is a precondition for public participation. A public participation procedure will be ineffective if it fails to inform the public about the process and how the public may participate.

Provision of information must be proactive, that is to say the information must be provided without members of the public having to ask for it first, and there must be appropriate access to information relevant to the NECPs.

As the Guidance points out, “*Sound consultation implies that the public should have access to all relevant documents, reports and assumptions at the start of the consultation period. Member States are invited to reflect on best practices, such as setting up the consultation through a dedicated NECP website, which contains all the information.*”

Within this framework, article 6, paragraphs 3, 4 and 8, shall be applied

The words “within this framework” refer back to the transparent and fair framework for public participation required to be established by the first sentence of Article 7.

Article 6 of the Aarhus Convention provides for public participation in decisions on specific activities. Article 7 is drafted on the premise that the plans and programmes that fall within its scope require a different public participation regime than decisions on specific activities. So only parts of Article 6 are expressly applied to plans and programmes: paragraphs (3), (4) and (8). But paragraph (2) is also indirectly referred to, because it is named in paragraph (3).¹⁶

¹⁶ Article 6(3) provides as follows-

The public participation procedures shall include reasonable time-frames for the different phases, allowing sufficient time for informing the public in accordance with paragraph 2 above and for the public to prepare and participate effectively during the environmental decision-making.



Information to be provided to the public

Recital (29) of the Governance Regulation provides -

(29) When carrying out public consultations, and in line with the Aarhus Convention, Member States should aim to ensure...that the public is informed by public notices or other appropriate means such as electronic media, that the public is able to access all relevant documents”.

This is morally, but not legally, binding.

Summary: The Governance Regulation contains (non-legally binding) provisions to the effect that-

- **the public should be informed by public notices or other appropriate means such as electronic media; and**
- **the public should have access to all relevant documents.**

The draft NECP

Article 9(4) of the Governance Regulation provides -

In the context of the public consultation as referred to in Article 10, each Member State shall make available to the public its draft integrated national energy and climate plan.

The Governance Regulation requires the draft NECP to be made available to the public.

Description of public consultation and involvement of stakeholders

Article 3(2) of the Governance Regulation provides -

The integrated national energy and climate plans shall consist of the following main sections:

- (a) an overview of the process followed for establishing the integrated national energy and climate plan consisting of an executive summary, a description of the public consultation and involvement of stakeholders and their results...as established in Articles 10 [and] 11....and in point 1 of Section A of Part I of Annex I*

It seems probable that most of the information listed in Article 3(2)(a) would be found in the draft NECP as well. Whilst it would be impossible for the draft NECP to include the results of public consultation and involvement with stakeholders, there is no reason why a draft NECP could not include a description of consultation and involvement, and the draft NECP would arguably be incomplete if such information were excluded.

The draft NECP should include an overview of the process followed for establishing the NECP, including a description of the public consultation and involvement of stakeholders.



Information listed in Article 6(2) of the Aarhus Convention

Article 6(2)¹⁷ lists the information to which the public should have access in order to participate effectively. Not all that information is necessary for the purposes of Article 7, and some of it is not relevant to Article 7. But both provisions – Article 6 and 7 – relate to similar forms of environmental decision-making, and it is at least arguable, therefore, that Article 6(2) provides a model for information that should be provided to the public with respect to public participation for the updating of NECPs, not least because of the cross reference in paragraph (3) of that Article.

Using Article 6(2) of the Aarhus Convention as a model it is arguable that during public participation with respect to NECPs the following information should be provided:

- **a description of the scope of the NECP**
- **how a decision on the NECP will be taken and which authority/authorities will take the decision**
- **the envisaged procedure including, as and when this information can be provided:**
 - **the commencement of the procedure;**
 - **the opportunities for the public to participate;**
 - **the time and venue of any envisaged public hearing(s);**
 - **an indication of the public authority/authorities from which relevant information can be obtained;**
 - **an indication of where the relevant information has been deposited for examination by the public;**

¹⁷ Article 6(2) provides as follows-

The public concerned shall be informed, either by public notice or individually as appropriate, early in an environmental decision-making procedure, and in an adequate, timely and effective manner, inter alia, of:

- (a) The proposed activity and the application on which a decision will be taken;*
- (b) The nature of possible decisions or the draft decision;*
- (c) The public authority responsible for making the decision;*
- (d) The envisaged procedure, including, as and when this information can be provided:*
 - (i) The commencement of the procedure;*
 - (ii) The opportunities for the public to participate;*
 - (iii) The time and venue of any envisaged public hearing;*
 - (iv) An indication of the public authority from which relevant information can be obtained and where the relevant information has been deposited for examination by the public;*
 - (v) An indication of the relevant public authority or any other official body to which comments or questions can be submitted and of the time schedule for transmittal of comments or questions; and*
 - (vi) An indication of what environmental information relevant to the proposed activity is available; and*
- (e) The fact that the activity is subject to a national or transboundary environmental impact assessment procedure.*



- **an indication of how and to whom comments or questions may be submitted and a time frame for the transmittal of comments or questions; and**
- **an indication of what relevant environmental information is available.**

Further information that should be available to the public for the purposes of consultations on draft NECPs

Article 8(3) (analytical basis of the integrated national energy and climate plans) of the Governance Regulation provides as follows-

Member States shall make available to the public comprehensive information concerning the assumptions, parameters and methodologies used for the final scenarios and projections, taking into account statistical restrictions, commercially sensitive data, and compliance with the data protection rules.

More generally, Directive 2003/4/EC of 28 January 2003 on public access to environmental information implements Articles 4 and 5 of the Aarhus Convention (which respectively relate to access to environmental information, and collection and dissemination of environmental information). The public may request environmental information under national laws implementing Article 3 of the 2003 Directive (access to environmental information upon request). And Member States must take the necessary measures to ensure dissemination of environmental information under Article 7 of the Directive; much of that environmental information will be relevant to the updating of NECPs.

For the purposes of consultations on the updating of NECPs, the public may also resort to the following information-

- **information on the analytical basis of NECPs, made available pursuant to Article 28 of the Governance Regulation;**
- **information requested under national laws implementing Article 3 of the environmental information Directive; and**
- **information disseminated under Article 7 of the environmental information Directive.**

Reasonable time frames

Article 6(3) requires reasonable time frames for the different phases of public participation procedures, allowing enough time for informing the public about the process and for the public to prepare and participate during that particular decision making process.

This is one of the few requirements of Articles 6 and 7 that is expressly implemented by the Governance Regulation, which provides that “each Member State shall set reasonable time-frames allowing sufficient time for the public to be informed, to participate and to express its views”; that meets the requirements of Article 6(3) of the Aarhus Convention.

Article 10 of the Governance Regulation therefore, reflects the requirements of Article 6(3) with respect to three phases. **Reasonable time frames must be set, allowing sufficient time for the public**



- **to be informed of the specific information required under the public participation procedure**
- **to participate in the public participation procedure, including**
 - o **adequate time for preparation; and**
 - o **to formulate and express its views.**

Early public participation, when all options are open and effective public participation can take place

Article 6(4) of the Aarhus Convention requires “early” public participation; means when all options are open and effective public participation can take place. Whilst this does not prevent a Member State’s authorities from taking an initial position on a NECP, those authorities must still be in the information gathering and processing stage and must be open to persuasion by members of the public to change its position or opinion. Taking steps that might have the effect of decreasing the range of available options may breach the requirements of Article 6(4), even though no decision has been formally been made.

Thus, whilst Article 10 of the Governance Regulation expressly implements the requirement in Article 6(4) of the Convention to “ensure that the public is given early and effective opportunities to participate” in the preparation of the updating of NECPs, it fails to include an express requirement for the public to have opportunities to participate “when all options are open”. And as the ACCC has found, with respect to the 2021–2030 NECPs, Article 10 only requires public participation at a time when all options would most likely no longer be open, not least because the draft plans would have already been provided to the Commission for comment.

Summary:

- **Public participation must take place early, when all options are open and effective participation can take place.**
- **In particular, whilst authorities may take an initial position, public participation must take place when those authorities are still open to persuasion with respect to the contents of NECPs.**

Due account is to be taken of the outcome of the public participation

Article 6(8) of the Convention contains the following requirement: “Each Party shall ensure that in the decision due account is taken of the outcome of the public participation.”



The ACCC has found that Article 10 of the Governance Regulation lacks any requirement that Member States ensure that due account is taken of the outcomes of the public participation.¹⁸

Nevertheless, in most EU Member States administrative law already requires decisions to be reasoned and given in writing: such requirements might be interpreted to require a written reasoned decision to include a discussion of how the public participation was taken into account.

Taking due account does not require the relevant authority to accept the substance of all comments received and to change the decision according to every comment.¹⁹

But of course, authorities should base their decisions on NECPs taking into account all the relevant information available them, including all comments received, and should be able to show why comments were rejected on substantive grounds in a reasoned decision.²⁰

¹⁸ "Article 10 of the Governance Regulation as adopted lacks any requirement that the member State ensure that due account is taken of the outcomes of the public participation. Neither the requirement in article 10 to provide with the NECPs "a summary of the public's views or provisional views," nor point 1.3 of Section A of Part I of Annex I of the Governance Regulation establish any obligation on the member States to actually take due account of the outcomes of public participation. Nor has the Party concerned pointed the Committee to any other provision of the Regulation imposing such an obligation."

¹⁹ In connection with its discussion of communication with respect to Poland in case ACCC/C/2008/29 (ECE/MP.PP/C.1/2009/4, para 29), the Compliance Committee said:

The requirement of article 6, paragraph 8, that public authorities take due account of the outcome of public participation, does not amount to the right of the public to veto the decision. In particular, this provision should not be read as requiring that the final say about the fate and design of the project rests with the local community living near the project, or that their acceptance is always needed.

²⁰ In its findings on a communication with respect to Spain in ACCC/C/2008/24 (ECE/MP.PP/C.1/2009/8/Add.1, paras. 99-100.), the ACCC stated:

It is quite clear to the Committee that the obligation to take due account in the decision of the outcome of the public participation cannot be considered as a requirement to accept all comments, reservations or opinions submitted. However, while it is impossible to accept in substance all the comments submitted, which may often be conflicting, the relevant authority must still seriously consider all the comments received. The Committee recalls that the obligation to take "due account" under article 6, paragraph 8, should be seen in the light of the obligation of article 6, paragraph 9, to "make accessible to the public the text of the decision along with the reasons and considerations on which the decision is based". Therefore the obligation to take due account of the outcome of the public participation should be interpreted as the obligation that the written reasoned decision includes a discussion of how the public participation was taken into account. ... The Committee notes that a system where, as a routine, comments of the public were disregarded or not accepted on their merits, without any explanation, would not comply with the Convention.



Summary:

- **Whilst the Governance Regulation does not require Member States to ensure that due account is taken of the outcomes of the public participation, in most EU member States administrative law already requires decisions to be reasoned and given in writing.**
- **Taking due account does not require the relevant authority to accept the substance of all comments received and to change the decision according to every comment; but authorities should**
 - **base their decisions on NECPs taking into account all the relevant information available them, including all comments received, and**
 - **be able to show why comments were rejected on substantive grounds in a reasoned decision.**

Identification of the public

Article 7 of the Convention requires the identification of public that may participate, taking into account the objectives of the Convention. The Governance Regulation does not define “the public” but it does, of course, provide in a preambular paragraph that opportunities are to be given to the public to participate in accordance with the Aarhus Convention, which defines “the public” in Article 2(4) as: “one or more natural or legal persons, and, in accordance with national legislation or practice, their associations, organizations or groups”.

And whilst the Regulation itself does not define the public, the Guidance is written on the assumption that there is a legal obligation to develop the update of NECPs “*in a dialogue with local authorities, civil society organisations, social partners, the sectoral business community, investors and other stakeholders*”.

The objectives of the Convention, which are expressly referred to in the Article 7 obligation to identify the public, includes the fourteenth preambular paragraph: “to encourage widespread public awareness of, and participation in, decisions affecting the environment and sustainable development”. It seems that, in view of the scope of NECPs, a very broad section of the public should be consulted: indeed the Guidance is consistent with this: “*Social dialogue and a whole-of- society approach are key for developing and implementing effective energy and climate policies in line with the principles of the European Pillar of Social Rights*”.

The means for identify the public should be transparent and fair. Parties may wish to establish standards to be applied to determine the scope of the public that the public authority should attempt to reach, and procedures to allow members of the public to express their interest; the NECPs themselves may well give an indication of the public to be consulted because, as we have seen, Annex I of the Governance Regulation provides that each plan is to address “consultations with stakeholders, including social partners, and engagement of civil society and the general public”.

Summary

- **A very broad section of the public should be consulted, in accordance with the Aarhus Convention.**



- There must be consultations with stakeholders, including social partners, civil society and the general public.
- NECPs themselves may identify the public to be consulted.

Multilevel climate and energy dialogues (MCEDs) under Article 11

MCEDs are principally required under EU law, namely Article 11 of the Governance Regulation. The Aarhus Convention does not mention MCEDs, although such dialogues may become a vehicle for the implementation of provisions of the Convention, particularly Article 7.

To revisit Article 11 of the Governance Regulation, it provides -

Each Member State shall establish a multilevel climate and energy dialogue pursuant to national rules, in which local authorities, civil society organisations, business community, investors and other relevant stakeholders and the general public are able actively to engage and discuss the different scenarios envisaged for energy and climate policies, including for the long term, and review progress, unless it already has a structure which serves the same purpose. Integrated national energy and climate plans may be discussed within the framework of such a dialogue.

Article 11 is supplemented by recital (30) to the Regulation²¹.

What is a multilevel climate and energy dialogue?

The Governance Regulation is not helpful in so far as it fails to define “multilevel climate and energy dialogue”. So at first glance, the concept is difficult to pin down. But in practice, there are models to follow. For example, the European Committee of the Regions, in partnership with the Czech Presidency, organised a Multilevel Climate and Energy Dialogue at COP 27²²; and before that the World Bank’s Communication for Governance and Accountability Program (CommGAP) has described Multistakeholder dialogue.²³

The LIFE PlanUP (2019) Report on Good Practices in Energy and Climate Governance²⁴ acknowledged that the MCEDs provided for in Article 11 of the Governance Regulation may seem

²¹ Recital (30) to the Regulation provides as follows:

(30) Each Member State should establish a permanent multi-level energy dialogue, bringing together local authorities, civil society organisations, the business community, investors and other relevant stakeholders to discuss the different options envisaged for energy and climate policies. It should be possible for the Member State's integrated national energy and climate plan as well as its long-term strategy to be discussed within the framework of that dialogue. The dialogue may take place by means of any national structure, such as a website, public consultation platform or another interactive communication tool.

²² <https://cor.europa.eu/el/events/Pages/Multilevel-Climate-Energy-Dialogue.aspx>

²³ <https://assets.publishing.service.gov.uk/media/57a08b45ed915d3cfd000c26/MultiStakeholderweb.pdf>

²⁴ https://energy-cities.eu/wp-content/uploads/2019/09/C7.4_Report-on-good-practices-in-energy-and-climate-governance_ENC.pdf



like a novel idea, but energy and climate governance frameworks, which involve stakeholders and the public in effective participation processes, have already been established in different ways within and outside the EU; the report described good practice in energy and climate governance in the form of case studies.

What is more – as the Guidance points out, the NECPlatform project funded under the LIFE Program is intended to provide support to six EU Member States in setting-up and managing permanent MCED platforms, helping them to comply with Article 11 of the Regulation.²⁵

Whilst it is initially frustrating to discover the lack of clarity in the Governance Regulation as to what MCEDs are, the establishment and organisation of dialogues may benefit from the inherent flexibility in the Regulation, leaving a margin of discretion to organisers and participants to improvise and to take into account local and national circumstances.

That said, the lack of granular legal requirements as to MCEDs may make it difficult to determine where there is non-compliance with Article 11, and even more difficult to take remedial action with respect to any such non-compliance.

Summary

- **MCEDs are principally required under EU law, namely Article 11 of the Governance Regulation. The Aarhus Convention does not mention MCEDs, although such dialogues may become a vehicle for the implementation of provisions of the Convention, particularly Article 7.**
- **The Governance Regulation fails adequately to clarify what multilevel climate and energy dialogues are**
- **There are, however, a number of examples of good practice which are easily available and which may indicate how dialogues may be conducted**
- **It may be difficult to determine where there is non-compliance with Article 11, and even more difficult to take remedial action with respect to any such non-compliance.**

What is discussed during MCEDs?

For the purposes of our discussion, it is important to note that NECPs may be discussed within the framework of MCEDs but Article 11 does not require them to be.

Perhaps it will be natural for MCEDs to consider NECPs, given the subject matter on which the dialogues will focus, and it seems possible that discussion of the updating of NECPs during dialogues may fulfil some of the requirements of Article 10 of the Governance Regulation; but none of that is certain.

MCEDs have a very broad remit: the participants must be able to “to engage and discuss the different scenarios envisaged for energy and climate policies, including for the long term, and review progress”.

²⁵ <https://ec.europa.eu/info/funding-tenders/opportunities/portal/screen/how-to-participate/org-details/999999999/project/101076359/program/43252405/details>



Summary:

- It is possible, but not required, that MCEDs may discuss the updating of NECPs
- Multilevel climate and energy dialogues must enable participants to engage and discuss the different scenarios envisaged for energy and climate policies, including for the long term, and review progress.

Are Member States required to establish MCEDs?

As we have seen, the Guidance is written on the premise that Member States must establish MCEDs; and in this respect the Guidance is at odds with the text of Article 11 itself, which clearly requires the following: “Each Member State shall establish a multilevel climate and energy dialogue pursuant to national rules, ... unless **it already has a structure which serves the same purpose**.*[emphasis added]*”

The requirement to establish a MCED will not apply where a structure with the same purpose already exists.

Summary: each Member State must establish a MCED, unless it already has a structure which serves the same purpose

Who is to participate in MCEDs?

Article 11 of the Governance Regulation provides, in very broad terms, for the participation of local authorities, civil society organisations, business community, investors and other relevant stakeholders and the general public.

As we have seen, the Guidance also provides for wide participation, without adding any clarity on the requirements with respect to participation.²⁶

Description of MCED in draft NECP

As we have seen, Article 3(2) of the Governance Regulation requires, inter alia, the NECP to include an overview of the process followed for establishing the NECP including a description of the involvement of stakeholders as provided for in Article 11; and there is no reason why the draft NECP could not include a description of the MCED, indeed it would arguably be incomplete if such information were excluded.

The draft NECP should include a description of any MCED established.

²⁶ See also the Guidance

Member States are encouraged to strengthen the multilevel dialogue and work with regional and local individuals and groups who can bring forward concrete measures. They should also explore synergies with existing forums, such as the EU Covenant of Mayors. Member States also need to ensure full and timely consultation and involvement of social partners, in accordance with the relevant national rules and practices. Social dialogue and a whole-of- society approach are key for developing and implementing effective energy and climate policies in line with the principles of the European Pillar of Social Rights.



EEB
European
Environmental
Bureau

eeb.org



A better future where people and nature thrive together