

A revised and responsive Governance Regulation

**Respecting environmental democracy rights in
climate planning**



The need for a democratic Revision



The European Climate Energy Union and its Climate Action are struggling to reach its Paris Agreement targets and public demands. Its governance mechanism is in non-compliance with international law and national ministries are largely unresponsive to the input of the public and other stakeholders. This position paper addresses the procedural rights in the EU's climate governance architecture and sets out concrete recommendations on how to transform the Governance Regulation in respect of the Aarhus Convention obligations.

The Governance Regulation's currently ongoing evaluation (as required by its Article 45) should conclude that a partial revision is required to address procedural issues. A revision was already demanded by the European Commission and the European Committee of the Regions, and hinted at by the Commission in its decision VII/8f progress report on the ongoing non-compliance case of the EU with the Aarhus Convention. The European Scientific Advisory Board on Climate Change also underlined many gaps in the implementation of environmental democracy aspects of the Governance Regulation.

Legal grounds calling for review

The need for a review of the environmental democracy elements of the Governance Regulation is supported by the following legal grounds:

- A case is currently pending before the Aarhus Convention Compliance Committee, in which the EU is charged for non-compliance of the Governance Regulation with the Aarhus Convention (decision VII/8f)
- The obligations stemming from the Aarhus Convention three pillars, Article 12 of the Paris Agreement, and Article 9 of the EU Climate Law.

Impact of a Revised Governance Regulation

A legislative revision of the Governance Regulation would likely not be endorsed by the deadline for revision of the current NECPs (June 2024), LTSs (January 2025) and submission of the next NECPs progress reports (March 2025). A revised Governance Regulation with improved environmental democracy aspects would however be beneficial for the following processes:

- The submission of NECPs progress reports in March 2027.
- The preparation of the draft NECPs for the period 2030-2040, to be submitted by Member States by 1 January 2028.
- The preparation of the LTSs for the period 2030-2060, to be submitted by Member States by 1 January 2029.

Planning with respect for public opinion

The benefits of public participation are manifold but are most often grouped into three categories. Firstly, public participation improves the quality of the decisions taken. Secondly, it fulfills a fundamental democratic right. Thirdly, it fosters public trust and buy-in.

Overall, public participation can lead to innovative solutions coming from the ground up rather than top down. Looking for solutions to their own environmental challenges also empowers citizens and local communities and thus reconnects them with policy-making. Public participation in the National Energy and Climate Plans (NECPs) and national Long Term Strategies (LTSs) is particularly important because these plans are tools which must survive changes in governments over time.

The benefits of increased transparency and improved access to judicial remedies are equally well documented. Transparency is a necessary enabling condition for any public discourse. Access to justice is an essential part of the rule of law, accountability, and a safety net for other rights.

Arguably, the current standards of the Governance Regulation are already weakly applied by many national ministries drafting the plans and strategies. On the public participation side, countries which did carry out consultation exercises before submitting their draft updated NECPs did so with varying quality and without complying with their consultation obligations, while other countries simply did not carry out any public participation whatsoever. While implementation of existing EU laws is crucial, the improvement of the EU laws themselves is equally important. Well formulated, consistent, and clear EU laws raise the bar for minimum standards and aid in their proper application nationally. The Governance Regulation by its nature is directly applicable which puts additional emphasis on the need for it to be of high quality.

There are numerous climate and energy relevant planning obligations under European law which are arguably independent of the NECPs. However, they all have to be in line with the NECPs and LTSs of the Governance Regulation. Procedural climate governance is found in several pieces of international, EU and domestic law but most of its paths either lead to or through the Governance Regulation.



The public's ability to influence the plans and strategies

When looking at the original NECPs and the submitted draft NECP updates, it becomes clear that public participation in the consultation processes has been rare. In the draft NECP updates several countries recorded less than 50 responses as part of the public consultation process, and some even less than 20. That may be an indicator that these technical plans are not presented in a way that is easily understandable to non technicians and that an effort in this sense should therefore be made so as to better integrate citizens in these decisions. A need for improvement was also underlined by the European Commission in its country specific recommendations on draft revised NECPs issued in December 2023 and February 2024: 22 out of the 24 countries assessed received specific recommendations to improve public participation processes.

Timing: Draft vs draft of the draft

There is considerable ambiguity in the Regulation's text as well as significant differences in approach by ministries regarding at what stage a text should be open to public input. The Aarhus Convention prescribes an opportunity to participate when all options are still open.

The Governance Regulation Articles 9 and 14 demand the submission of a **draft** to the European Commission at a certain point in time. Article 9(4) demands that in the process of the public consultation (art 10) a **draft** must be made available publicly. However, if that later draft was to be the same draft which was submitted to the Commission, then at that stage the public consultation would come too late (as it currently is in several member states) for all options to still be open. There must, therefore, be different iterations of **drafts** available publicly at some point to fulfill both the public participation and the submission to the Commission obligations. Clarification in this area is needed.

Structured ongoing public dialogue

Under Article 11 of the Governance Regulation, Member States are required to set up Multilevel Energy and Climate Dialogues (MCED). These structures aim to gather local authorities, civil society organisations, business communities, investors and the general public to discuss the different scenarios envisaged for climate and energy policies. Here again, the implementation of the Governance Regulation has proven to be problematic. In most countries, MCED have not been adequately set up. Provisions on MCED should be improved in order to ensure that these dialogues actually take place, and are effective at avoiding barriers in implementation. Article 11 of the Governance Regulation should be made more precise and the reporting requirements on the dialogues should be improved. Accordingly, the suggestion in Article 11 itself that the MCED are utilised as a vehicle for conducting public participation in the NECPs and LTSs should be formalised.

Compliance with international law



To aid any substantive improvements of the EU climate governance, procedural improvements must go hand in hand.

Participation framework

As found by the Aarhus Convention Compliance Committee (ACCC) in its Decision VII/8f, the Governance Regulation does not currently provide a “proper regulatory framework” in line with the Aarhus Convention.

The aim of making the EU regulatory framework more responsive to people must consider varying national circumstances and pre-existing consultation and planning structures. The goal is not to artificially harmonize and replace existing consultative structures but rather to provide minimum level guarantees in European law. To achieve this objective, the Governance Regulation needs to address the below points.

Proper regulatory framework adopted

The Regulation should mandate the applicability of the Strategic Environmental Assessment directive including its obligations on public participation. There is an overwhelming need to clarify the application of the SEA Directive to the NECP and LTSs rules. The governance framework would benefit from a systematic application of the SEA Directive, which could be ensured via a mention of this



application in Articles 10, 12 and in Recital 28 of the Governance Regulation.

Applying the SEA Directive to all NECP and LTSs drafting processes would render several of the following points of revision unnecessary.

Transparent and fair framework

In its Recital 29, the Governance Regulation provides that “When carrying out public consultations, Member States should aim to ensure equal participation”. The recital also includes mentions of the need for accessible information, public notices. The contents of this recital should be made binding via an operational article.

This was one ground upon which the European Union was found in non-compliance with the Aarhus Convention requirements by the Meeting of the Parties both in 2014 and again in 2021.

Reasonable time frames for public participation procedures

Member State practice in 2019-2020 and for the updates in 2023-2024 show that reasonable time frames were not respected despite an obligation to provide “sufficient time” in Article 10 of the Governance Regulation.

This can be avoided by providing a clear minimum time-frame of weeks in the Regulation.

Early public participation

As alluded to above in the discussion about different drafts, the Governance Regulation fails to specify that public participation needs to take place when all options are still open. However, it is clear from the ACCC's words, that compliance with international law will only be achieved by revising article 10 to include the requirement for public participation to occur when all options are still open, well before the submission of the NECP to the Commission to give the consulting entity/ministry a reasonable opportunity to incorporate any views raised.

Due account of the public participation outcome

Incorporating or assessing the opinions voiced by the public is the most difficult aspect to ensure in practice. At the bare minimum, however, the ACCC states that a written and reasoned decision on what was done with the opinions voiced must be given. The number of submissions to NECP public consultations have been low.

Taking them into due consideration and publishing decisions on how they were addressed (even if in agglomerated form) would not be overly burdensome for the national administrations.

While the Governance Regulation should not demand too much detail in this area, some minimum standards must, nevertheless, be included. Therefore, the text of art 3(2)(a) demanding a “description of the public consultation and involvement of stakeholders and their results” is not sufficient. First and foremost, it is clear that a simple summary of opinions voiced does not equal a justification.

To address this point, the templates on drafting and reporting of NECPs (Annex I of the Governance Regulation and Commission Implementing Regulation (EU) 2022/2299) should be adjusted to demand more detail on how the public's views were taken into account. For the drafting, this was also suggested Fit for Future Platform Opinion. For the reporting you can find a more detailed analysis and suggestion here.



Identifying the participating public while taking into account the objectives of the Aarhus Convention

The Governance Regulation needs to either define which members of the public are to be included in the scope of the public consultation or require that the Member States do so. The list of stakeholders given for the MCEDs in Article 11 is not in and of itself a substitute for the identification of the target public.

MCEDs

Article 17(2)(b) of the Governance Regulation obliges Member States to report on the progress made in establishing MCEDs “where applicable”. This weak obligation should be transformed into a clear obligation to report on the iterations of the national dialogue and on how the opinions voiced, in the dialogues, were taken into account in energy and climate related decision-making. Carrying out a public dialogue is not a democratic exercise in and of itself. A public dialogue derives its democratic purpose from how it interacts with decision-making on policy.

Policy consistency

Article 10 on public consultations and Article 11 on the MCEDs of the Governance Regulation are currently not linked. One details the public participation requirements in drafting NECPs and the other gives a vague obligation to hold public dialogues where NECPs “may be discussed”. A more coherent link between these two forms of public participation obligations should be

created so that it is clear that the public must be involved both in formulating and in implementing the plans. In that regard, the optional discussion on NECPs’ establishment in the MCEDs from Article 11 of the Governance Regulation should become mandatory.

Transparency

Information necessary for the Public Participation requirements

The information necessary for an informed participation should be identified in the form of a public notice. See for guidance the [Maastricht Recommendations](#). Such a notice should be explicitly demanded by the Governance Regulation and include at the least:

- A draft of the plan (before the submission of the official draft to the Commission)
- Information about the public participation procedure
- Cost-benefit analysis
- Information on the possible effect of the plan

The Article 9(4) requirement of making a draft available to the public should be explicitly extended to the updates through an incorporation into Article 14(6).

General information

NECP progress reports clearly classify as environmental information in both EU law and the Aarhus Convention and should be made available in accordance with the formatting and procedural safeguards of the Convention.

As things stand, NECPs progress reports are submitted by Member States through two online platforms: Reportnet3 and ReportENER. The Commission makes progress reports available on the Reportnet3 platform after running a quality control on the national submissions. Direct access to the ReportENER platform, which provides raw data, is restricted. Public accessibility to those platforms should be improved by the European Commission, in accordance with Article 28 of the Governance Regulation.

The timing of the progress reports is problematic as well. While mostly an implementation issue, more precise wording in the Regulation could help. For the currently running NECPs updates, the progress reports come out at the same time or after the submission of draft updates for most countries. This needs to be remedied in the future, as those progress reports are key environmental information that should be made available to the public during the public consultations for the preparation or update of NECPs.

Finally, the outcome of the reporting is a compilation of excel sheets that are hardly intelligible. While technical data is necessary, such a publication is not satisfactory both for transparency and public participation purposes, nor for understanding the assessment of progress which will be made by the European Commission following the publication. Requiring Member

States to prepare a narrative report summarizing those technical data would benefit public understanding of the progress reports.

Access to judicial review

Firstly, the question arises whether members of the public can challenge NECPs and LTSs in front of the national courts. The current Governance Regulation does not have an access to justice provision nor is it covered by any other EU law ensuring access to judicial review. Secondly, acts from institutions of the European Union could also be disputed at the European level, which will for example entail challenging the assessment of the NECPs or of the LTSs issued by the European Commission according to Articles 13 and 15(9) of the Governance Regulation.

National legal challenge

The Aarhus Convention demands access to justice for plans such as NECPs either through its Article 9(2) (depending on the interpretation and voluntary application of the state party) or failing that through Article 9(3). NECPs and LTSs, if drafted wrongly, can contravene national environmental law and must therefore be open to legal challenge. In fact, there have been several national cases about NECPs where standing was obtained successfully by the applicants. However, the legal situation is less than clear across the EU and an access to justice provision in the Governance Regulation could both clarify the status of NECPs under national law and ensure

compliance with the Aarhus Convention. It would also ensure a level playing field among all EU Member States for access to justice on climate and energy planning, as the situation is very different among Member States.

If the SEA directive were to be applicable in all Member States when drafting NECPs and LTSs then the access to justice dilemma may be automatically solved. However, until then an additional provision granting access to justice will be necessary. In conclusion, there is no concrete and direct guaranteed right of access to justice to challenge the governance framework of the Energy Union in front of national courts across the EU. The right to access judicial remedy can be identified via indirect routes. That may barely save the whole framework from being found non-compliant but is so uncertain that it cannot be considered satisfactory from a litigant's perspective that wishes to enforce the rights guaranteed in the Aarhus Convention. The Commission itself, in the Effort Sharing Regulation and the LULUCF Regulation, committed to explore the issue of Member States to provide access to justice to members of the public. In a [statement](#) it announced that *"in its report pursuant to Article 45 of Regulation (EU) 2018/1999 on the Governance of the Energy Union and Climate Action, the Commission will also assess aspects related to access to justice in EU Member States, notably as regards Article 10 of that*

Regulation and take this assessment into account as appropriate in any possible subsequent legislative proposal."

EU legal challenge of Commission acts

According to Article 34 of the Governance Regulation, the Commission is required to assess draft and final plans and issue recommendations thereof. The CJEU has never had the chance to clarify whether these acts of the Commission would fulfill the relevant legal criteria to be open for review by individuals. It should be made clearer that the Commission's recommendations adopted under Article 34 of the Governance Regulation fulfill the conditions of the EU Aarhus Regulation.

As it stands, the EU Aarhus Regulation, in theory, may guarantee access to justice for Commission non-legislative acts with legal effects based on the Governance Regulation but it has yet to be adjudicated on which of those acts would meet the Aarhus Regulation criteria. Outside of the Aarhus Regulation's format of internal review requests, the only other option in theory is an action for annulment under article 263 TFEU, but it is unclear whether any of the Commission's acts would fulfill the Plaumann criteria (direct and individual concern).

For further information:
GreenDealNet paper. [Assessing environmental democracy rights in the Governance Regulation](#)

Recommendations

Governance Regulation

1. Clarify the link with the Strategic Environmental Assessment (SEA) Directive by ensuring its applicability to National Energy and Climate Plans (NECPs)

- Mandate the applicability of the SEA through amendments to Articles 10, 12 and Recital 28.

2. Clear mention of procedural public participation guarantees in Article 10 (in lieu of SEA Directive applicability)

- Transform the text of Recital 29 into operational text as regards ensuring equal participation opportunities.
- Clarify the timing of the obligation to consult. Specify that it should take place when all options are still open i.e. well before the submission of drafts to the Commission, to give the consulting entity/ministry a reasonable opportunity to incorporate any views raised.
- Specify a minimum time-frame for consultations.

3. Include an access to justice provision

- Include an access to justice provision modelled on other existing provisions in sectoral EU law (e.g. Commission Proposal for a Nature Restoration Law) which provides for a review of the plans as well as review of the Commission's assessments
- Make explicit that the Commission's recommendations adopted under Article 34 fulfil the conditions of the EU Aarhus Regulation and are subject to the internal review mechanism.

4. Differentiate between different drafts

- Differentiate between different drafts by making clear that Article 9(4) refers to a draft for the purpose of informing the public rather than the draft obligated to be submitted to the Commission as per Articles 9(1) and 14(1)

5. Specify which information must be proactively made available

- Provide a link in Article 10 to all necessary information obligations to the public including those in Articles 8(2)(b), 8(3) and 18(4).
- Include obligations to make information available in clear and accessible formats.

6. Create a link between the public consultation on the plans and the Multilevel Climate and Energy Dialogues (MCEDs)

- Turn the option of discussing the NECPs in the MCEDs from an option into an obligation under Article 11, including an obligation to regularly discuss the implementation of the NECP.

7. Ensure easy access to environmental information

- Correctly implement Article 28 of the Governance Regulation and ensure that the public has an easy and timely access to environmental information (e.g. NECPs progress reports)

NECP template - Annex I of the Governance Regulation

8. Improve reporting on public participation in the preparation of NECPs

- Annex I of the Governance Regulation should be adjusted to demand more detail on how the public's views were taken into account.

Implementing Regulation 2022/2299 and its Annex XXIII

9. Include an obligation for meaningful reporting in Article 18

10. Increase the level of detail required in the template of Annex XXIII

- Include section about which exact process is supposed to be the national MCED, the number of dialogues held in a given period, how the opinions voiced were taken into account in the decision-making. See for a revised template [here](#).

Commission Notice: Guidance to Member States

11. Include guidance on reasonable timeframes for public participation.

- If not directly included in Article 10 (demand 2 above), provide clear instructions on starting public consultations before a submission of a draft to the Commission and specify a minimum reasonable timeframe for submitting views.



Signatories

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