

## Legal obligations for public participation during the 2023 updating of National Energy and Climate Plans (NECPs)

By Alison Hough and Ciara Brennan

### Introduction

This explainer and checklist describes what international (the Aarhus Convention) and EU law (the Governance Regulation) requires Member States to do so to ensure effective public participation during the 2023 update of the 2021-2030 National Energy and Climate Plans (NECPs). A full description and legal analysis of these obligations is set out in this [detailed paper](#). A National Energy and Climate Plan is a ten-year plan outlining how a Member State will tackle climate change through emissions reductions, increase in renewables, interconnections and research and innovation. Member States are due to submit to the EU Commission draft revised NECPs by 30<sup>th</sup> June 2023. **Wide public participation in the preparation of the draft NECP is mandatory under the EU Governance Regulation and the Aarhus Convention, as well as other instruments.**

### Legal Framework

The legal framework governing public participation in the NECPs is made up of the requirements of the [EU Governance Regulation](#) as supplemented by the Strategic Environmental Assessment ([SEA Directive](#)), interpreted through the lens of the Aarhus Convention. These provisions are also supplemented by the broader EU law acquis, which includes the fundamental principles of EU law, e.g. the principle of effectiveness. According to the principle of effectiveness, the exercise of rights conferred by the EU legal order may not be rendered impossible in practice or excessively difficult (Case [C-280/18 Flausch](#)). [The Charter of Fundamental Rights](#) (Art 37) guarantees a high level of environmental protection and the CJEU has said that the provisions of the SEA Directive must be interpreted in light of this principle (Case [C-24/19 A and Others](#)). Where these rights are interfered with Art 47 of the Charter guarantees the right to an effective remedy (Case [C-243/15 LZ II](#)). Also relevant is Art 2(7) of the Espoo Directive and the Protocol on SEA to the Espoo Convention which require environmental assessment of plans programs and policies. The CJEU has ruled that the term “plans and policies” under the SEA Directive has to be interpreted in accordance with the provisions of the Espoo Convention Case [C-24/19 A and Others](#)).

It is important to note that additional obligations for transboundary consultation arise in the context of a plan likely to have an impact on the environment in a transboundary context. The Governance Regulation recognises the obvious potential transboundary impact of NECPs over their ten-year life span in Art 12(2), which requires Member States to identify opportunities for regional cooperation and consult with neighbouring States prior to submitting their National Energy and Climate Plan. Additional, more detailed obligations arise in the context of the SEA Directive/SEA Protocol to the Espoo Convention which are also applicable here and set out in more detail the procedure for carrying out the transboundary consultation. Therefore, Member States must invite any country likely to be so affected to identify themselves as a party to the procedure and initiate the transboundary SEA procedure as set out in the SEA Directive.

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One issue with the Governance Regulation is that it fails to make it explicit that the SEA Directive applies to the preparation of the NECPs. The SEA Directive is briefly referred to in Art 11 (public consultation), but the wording “In so far as Directive 2001/42/EC is applicable,” may create the misleading impression that the SEA Directive is not always or not completely applicable to the preparation of NECPs. However, an examination of the scope and wording of the relevant provisions of the SEA Directive shows that it captures any plan or program that sets the framework for future development which may have a significant effect on the environment. It goes on to capture energy plans with a high degree of specificity: (Art 3(2)(a) & (b)) energy plans which set the framework for development of projects listed in the Annex I & II of the EIA Directive or which would require assessment under the Habitats Directive. So it could not be clearer that NECPs are captured within its scope. The Aarhus Convention Compliance Committee (ACCC) has [found the EU in non-compliance with the Convention because the Governance Regulation](#) has not created a sufficiently clear and precise framework for public participation in the NECPs, and has not resulted in consistent well designed public participation processes being undertaken in all EU Member States.

In addition to the legal requirements, in December 2022 the EU Commission provided [guidance](#) on the NECP revision process. This guidance highlighted the key importance of the NECPs in responding to the current challenges of climate change and the energy/cost of living crisis, in order to ensure European social stability and success. The upshot of all of these interacting, complex requirements is that Member States should produce a draft NECP and draft Environmental Assessment Report on the draft NECP and then hold extensive public consultation on the draft NECP and Report in a manner that complies with the obligations of the Aarhus Convention and the SEA Directive. **Public participation in the drafting of the NECP is an opportunity for Member States to have difficult and necessary conversations about environmental-climate obligations and energy use, and how to achieve our climate targets in a fair and distributive manner.**




The Governance Regulation also provides for the holding of **Multilevel Climate and Energy Dialogues** (MCEDs) under Article 11. These are multi-stakeholder dialogues intended to discuss the different scenarios and options for energy and climate policies, including for the long term, and the achievement by the EU of the climate neutrality objective set out in Art 2. The Governance Regulation recommends but does not require that the NECPs are discussed in these MCEDs processes. The Governance Regulation identifies the participants in the dialogues as local authorities, civil society organisations, business community, investors and other relevant stakeholders and the general public. 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 through which compliance with Art 7 in relation to the NECPs is achieved. The Regulation is not detailed or prescriptive about how these dialogues are to be managed and carried out, and if Member States were to seek to use them as a vehicle for public consultation on the NECPs, they would need to construct them carefully and ensure they comply with the more details requirements of Art 7 of the Aarhus Convention, the SEA Protocol to the Espoo Convention and the SEA Directive.

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**Summary of the key issues arising from the framework of legal obligations and policies**

	<p><b>Provisions must be introduced to guarantee public participation</b></p> <p>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. This includes in the revision process and should involve consultations with stakeholders, including social partners, and engagement of civil society and the general public.</p>
	<p><b>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.</b></p> <p>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. This means clear rules should be set down regarding the conduct of the procedure and information on these provided in advance. The public must be able to use rules that are applied in a clear and consistent fashion. The Governance Regulation requires Member States to “limit administrative complexity”.</p>
	<p><b>Certain information should be provided to the public.</b></p> <p>The Governance Regulation contains binding provisions to the effect that the public should be informed. The recitals suggest this can be done by public notices or other appropriate means such as electronic media; and Member States should ensure that the public have access to all relevant documents early in the process. The</p>

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	<p>Governance Regulation also requires the draft revised NECP to be made available to the public. This 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.</p> <p>The Commission in its guidance document also states (3.2): "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"</p> <p>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:</p> <ul style="list-style-type: none"> <li>● a description of the scope of the NECP</li> <li>● how a decision on the NECP will be taken and which authority/authorities will take the decision</li> <li>● 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.</li> </ul> <p>Additionally, it seems that the information required by the SEA Directive 2001/42/EC should be provided to the public:</p> <ul style="list-style-type: none"> <li>- Outline of the plan/programme, its main and relationship with other plans/programmes</li> <li>- Environmental characteristics of the area.</li> <li>- Relevant environmental protection objectives under other legislation and instruments, and how they were taken into account in the preparation of the plan.</li> <li>- Contain information about the likely significant effects on the environment including on issues such as biodiversity, population, human health, fauna, flora, soil, water, air, climatic factors, material assets, cultural heritage including architectural and archaeological heritage, landscape and the interrelationship between the above factors;</li> <li>- Outline the reasonable alternatives, describe them and explain their likely significant effects on the environment, and the reasons they were not chosen.</li> <li>- The environmental effects described should include secondary, cumulative, synergistic, short, medium and long-term permanent and temporary, positive and negative effects.</li> </ul>
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	<ul style="list-style-type: none"> <li>- Mitigation measures (envisaged to prevent, reduce and as fully as possible compensate any significant adverse effects on the environment of implementing the plan or programme).</li> <li>- Monitoring measures post-implementation.</li> <li>- A non-technical summary in plain language so the public can understand the document.</li> </ul>
	<p><b>Reasonable time frames must be set.</b></p> <p>Timeframes must allow 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. In the development of Ireland’s previous NECP in 2018, according to the public consultation website, <a href="#">only 1 month was allowed</a> for public participation in the draft NECP. This is insufficient for a complex document that is hundreds of pages of technical information.</p> <p>EU Case law on the SEA Directive indicates that the period actually laid down, be sufficient to allow them an effective opportunity to express their opinions in good time on that draft plan or programme and on the environmental report upon it. (Seaport (NI) and Others, C-474/10, paragraphs 45 and 50).</p> <p>The ACCC has similarly been clear that timeframes must be adequate to the complexity of the document consulted on. In the case of an individual project, a <a href="#">six week timeframe</a> was considered sufficient, but this is unlikely to be considered sufficient for such a complex National level plan.</p>
	<p><b>Public participation must take place early, when all options are open and effective participation can take place.</b></p> <p>In particular, whilst authorities may take an initial position in their draft plan, public participation must take place when those authorities are still open to persuasion with respect to the contents of NECPs.</p>

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	<p>This means the public authority must be prepared to fundamentally revise the draft based on the feedback of the public consultation.</p>
	<p><b>Due account is to be taken of the outcome of the public participation</b></p> <p>The Governance Regulation doesn't explicitly state that account has to be taken of the outcome of public consultation (for which the framework has been <a href="#">criticised by the ACCC</a>). However, under the interlocking web of EU, International and domestic legal and policy provisions referred to above, this is required. The NECP is a plan relating to the environment and therefore is subject to the requirements in the applicable to plans in the SEA Directive (envisaged by the reference to this directive in Art 10 of the Governance Regulation), and in Art 7 and Art 6(8) of the Aarhus Convention. This is also required by Art 8 of the SEA Protocol to the Espoo Convention. This includes ensuring 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, and this is also a fundamental principle of administrative law. 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.</p> <p>Finally, Art 10 requires that when submitting the draft NECP to the EU Commission, it must provide a report on the outcomes of the public consultation carried out and Art 3(2) of the Governance Regulation requires that this information be included in the NECP itself. This would seem to imply that those responses were processed and taken account of, as otherwise this requirement would seem pointless.</p>
	<p><b>Identification of the public to participate: who may participate?</b></p> <p>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</p>

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	<p>public to be consulted. The EU Guidance is clear: “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”.</p> <p>Where sections of the public or stakeholders are to be selected for input, there should be clear and transparent criteria for this process. This should be done in a manner consistent with the objectives of the Aarhus Convention “to encourage widespread public awareness of, and participation in, decisions affecting the environment and sustainable development”.</p>
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### NECP Revision Public Participation Checklist

	Requirement	Legal/Policy basis	Present in national consultation plans?
1	<p><b>Prepare draft NECP &amp; explanatory</b> document setting out:</p> <p>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, Information on the analytical basis of NECP.</p>	<p>EU Governance Regulation Art 10</p> <p>SEA Directive 2001/42/EC Art 5</p> <p>Aarhus Convention, Art 7</p>	
	<p><b>Prepare draft Environmental Assessment Report.</b></p>	<p>SEA Directive 2001/42/EC, Art 5</p> <p>Aarhus Convention Art 7</p> <p>Espoo SEA Protocol Art 7</p>	
2	<p><b>Publish draft NECP.</b></p> <p>This should include or be accompanied by the explanatory document described above. Make available through a variety of media including electronic.</p>	<p>EU Governance Regulation 10/SEA Directive Art 6/Aarhus Convention Art 7/Espoo SEA Protocol Art 8</p>	

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	Carry out awareness raising and capacity building exercises. Consideration to a dedicated e-platform.		
	<b>Publish draft Environmental Assessment Report</b>	EU Governance Regulation Art 10 (implied)/SEA Directive Art 6/Aarhus Convention Art 7/Espoo SEA Protocol Art 8	
3	<b>Identify the public concerned.</b>  This should be done in a manner designed to ensure the input of key stakeholders/expert input is sought, but should not lead to closed consultations or exclusion of the general public, who should still have the opportunity to participate.	EU Governance Regulation 10/SEA Directive Art 6/ Aarhus Convention Art 7/Espoo SEA Protocol Art 8	
4	<b>Commence public consultation on the draft Report and draft Plan.</b>  This should provide an opportunity for deep engagement with the draft plan and its impacts, and an opportunity to comment on same.	EU Governance Regulation Art 10 & 11/SEA Directive Art 6/Aarhus Convention Art 7/Espoo SEA Protocol Art 8	
5	<b>Commence Transboundary Consultation process:</b>  Notification to the relevant Government department of the potentially affected State. Receive confirmation from affected country that they are an “Affected Party” and wish to be involved. Provide the draft NECP and draft Environmental Assessment Report. Opening the consultation procedure. Provide opportunity for commenting by the authorities and public in the relevant country. Consulting with the relevant environmental and health authorities in the other jurisdiction. Reporting on the results of public consultation.	Espoo SEA Protocol Art 8 & 10/SEA Directive Art 7  EU Governance Regulation Art 10 & 12 (implied).	
6	<b>Ensure:</b>  Fair and Transparent framework for participation, without excessive administrative complexity.	EU Governance Regulation Art 10/SEA Directive Art	

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	<p>Adequate timelines for participation in a complex policy (we recommend in excess of 3 months with holidays excluded).</p> <p>Adequate awareness raising and publications.</p> <p>Access to adequate information to enable participation.</p> <p>That the draft Plan is sufficiently detailed to allow meaningful consultation.</p>	<p>6/Aarhus Convention Art 7/Espoo Protocol Art 8</p>	
7	<p><b>The Environmental Assessment Report should:</b></p> <p>Be published and made available at the beginning of the consultation process. Any delay should lead to extension of the consultation period.</p> <p>Outline of the plan/programme, its main and relationship with other plans/programmes.</p> <p>Environmental characteristics of the area.</p> <p>Relevant environmental protection objectives under other legislation and instruments, and how they were taken into account in the preparation of the plan.</p> <p>Contain information about the likely significant effects on the environment including on issues such as biodiversity, population, human health, fauna, flora, soil, water, air, climatic factors, material assets, cultural heritage including architectural and archaeological heritage, landscape and the interrelationship between the above factors.</p> <p>Outline the reasonable alternatives, describe them and explain their likely significant effects on the environment, and the reasons they were not chosen.</p> <p>The environmental effects described should include secondary, cumulative, synergistic, short, medium and long-term permanent and temporary, positive and negative effects.</p> <p>Mitigation measures (envisaged to prevent, reduce and as fully as possible compensate any significant adverse effects on the environment of implementing the plan or programme).</p> <p>Monitoring measures post-implementation.</p> <p>Non-technical summary.</p>	<p>SEA Directive Art 5 &amp; Annex I/Aarhus Convention Art 7/Espoo SEA Protocol Art 7 &amp; Annex VI</p>	
8	<p><b>Engage in Multilevel Stakeholder Dialogues</b> using <a href="#">best practice examples</a> from other countries.</p> <p>Facilitate engagement with:</p>	<p>EU Governance Regulation Art 11</p>	

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	local authorities, civil society organisations, business community, investors, other relevant stakeholders, the general public.		
9	<b>Prepare a report on the results of Public Consultations</b> , and transboundary consultations, showing how they were taken into account.	EU Governance Regulation Art 10/SEA Directive Art2(b) & Art 8/Aarhus Convention Art 7/Espoo SEA Protocol Art 11	
10	<b>Publish the Environmental Assessment Report and draft Plan</b> , and a document showing how the public consultation and Environmental Assessment Report was taken into account in the preparation of the draft plan.	SEA Directive/Aarhus Convention/Espoo SEA Protocol	
11	<b>Communicate the finalised draft Plan to all participants</b> and stakeholders in a National and transboundary context.	SEA Directive Art 9/ Espoo SEA Protocol Art 11	
12	<b>Submit the draft Plan to the EU Commission</b> together with a report on the views of the public obtained from public consultation.	EU Governance Regulation Art 10	

### Further Resources:

EEB Briefing: [Legal-Briefing-Public-Participation-in-NECPs-v1.pdf \(eeb.org\)](https://eeb.org/wp-content/uploads/2023/03/Legal-Briefing-Public-Participation-in-NECPs-v1.pdf) <https://eeb.org/wp-content/uploads/2023/03/Legal-Briefing-Public-Participation-in-NECPs-v1.pdf>

Client Earth Memo: Not (yet) a missed opportunity. Influencing the 2021- 2030 NECPs through early Public Participation [Microsoft Word - Memo NECP - 7 Dec 2018 - Final BVRS \(clientearth.org\)](https://www.clientearth.org/media/deaipy4g/microsoft-word-memo-NECP-7-Dec-2018-final-BVRS) <https://www.clientearth.org/media/deaipy4g/influencing-necps-2021-to-2030-through-public-participation-ce-en.pdf>

The LIFE PlanUP (2019) Report on Good Practices in Energy and Climate Governance <https://energy-cities.eu/wp-content/uploads/2019/09/C7.4-Report-on-good-practices-in-energy-and-climate-governance-ENC.pdf>

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