

Memo



Not (yet) a missed opportunity. Influencing the 2021-2030 NECPs through early Public Participation

Executive Summary

1. On 5 December 2018, the European Council adopted a significant part of the Clean Energy package: the revised directive on energy efficiency, the revised directive on renewable energy and the Governance Regulation (“GR”). They will have to all enter into force on 24 December 2018. Under the GR, Member States (“MS”) shall prepare National Energy and Climate Plans (“NECP”) that set out how they plan to achieve the energy transition between 2021 and 2030 and deliver the objectives of the Paris Agreement. It is essential for each MS to deliver an ambitious and well-informed NECP as it will establish the foundations of its energy policy.
2. Under the GR, each MS shall first deliver a draft NECP to the European Commission before **31 December 2018**. It will then have to take into account the European Commission’s comments and deliver a final version before 31 December 2019. While the GR provides that “*each MS shall ensure that the public is given early and effective opportunities to participate in the preparation of the NECP*” (GR Article 10), the GR does not mandate MS to do so prior to the delivery of the first draft to the European Commission.
3. It is essential to safeguard meaningful public participation (“PP”) in the context of the preparation of the NECPs. This is so the interests and concerns of citizens, renewable energy developers, self-consumption communities and individual producers are heard by public authorities as early as possible. Otherwise, there is a risk that the initial version of the NECPs will only reflect the vested interests of established players, in particular fossil fuel operators.
4. ClientEarth notes that the Meetings of the Parties of the Aarhus Convention have previously found that the PP mechanism for the drafting and adoption of the National Renewable Energy Action Plans (NREAP), the predecessor of the NECP, did not comply with Article 7 of the Aarhus Convention. The Aarhus Compliance Committee also found that a previous draft of the above quoted article 10 of the GR did not comply with the Aarhus Convention. ClientEarth is concerned that Article 10 falls short of certain requirements set out by the Aarhus Convention.
5. The GR is indecisive regarding the applicability of the Strategic Environment Assessment Directive (“SEA Directive”) to the NECP adoption process. We believe that there are strong arguments that the SEA Directive will have to be applicable. If so, MSs will have to put into place PP mechanisms that are fully compatible with the SEA Directive.
6. We understand that certain MSs may either not put in place PP mechanisms prior to the submission of the draft to the European Commission, or have a particularly short timeframe for providing comments (for example Romania, where the Ministry of Energy only offers seven days to provide comments). In such cases, the public will not have the opportunity to provide meaningful input prior to the delivery of the first draft NECP. Such PP mechanisms may also be in breach of the Aarhus Convention and the SEA Directive.

ClientEarth invites all interested organisations to contact us as soon as possible about shortcomings in, or the absence of, PP mechanisms in their jurisdiction. In particular, you should consider contacting us if:

- You believe that your MS has delivered the NECP to the European Commission but you are not able to retrieve it;
- You believe that your country is not planning to open a meaningful public participation process before delivering the draft NECP to the European Commission;
- You would like to better understand the public participation process that your home country is obliged to put into place in accordance with European laws and your country’s laws; or
- You would like to provide input or comments regarding the NECP but have not been given an opportunity to do so.

Annex – Legal Analysis

1. What are the NECP and the LTS? Why is this an important topic?

The National Energy & Climate Plans (“**NECP**”) are part of the reformed governance of the Energy Union and aim to be a more effective, streamlined and cost-efficient method to plan, report and monitor in the climate and energy fields.¹ Specifically, NECPs are the successors of a number of plans to be prepared by each Member State (“**MS**”) such as the National Renewable Energy Action Plan (NREAP) and the National Energy Efficiency Action Plans (NEEAP).

A NECP must cover the 2021-2030 period and address the five chapters of the Energy Union:

1. Energy security;
2. Internal energy market;
3. Energy efficiency;
4. Decarbonisation; and
5. Research, innovation and competitiveness.

The Governance Regulation (“**GR**”)² provides for a binding outline and a description of the minimum content of the NECP. Section A (National plan) will have to address each of the five Energy Union chapters. Section B (Analytical basis) will have to describe in economic and technical terms the current energy situation, planned developments and projections.

Under Article 15 of the GR, the MS must prepare a long-term strategy (“**LTS**”) “with a perspective of at least 30 years” (i.e. until at least 2050). This document should be updated “if necessary” every five years. The NECP must be “consistent with the long-term strategies referred to in [Article 15].”³

In short, the NECP is the primary governance tool for the European Commission and MSs to plan and monitor the energy transition and ensure that the EU puts itself in a position to fully deliver the objectives of the Paris Agreement. It is essential for each MS to deliver an ambitious and well-informed NECP as it will make up the foundations of each MS’s energy policy.

2. What is the status of the Governance Regulation and the clean energy package? Is there a legal obligation for MSs to deliver draft NECPs to the European Commission?

The GR, which provides among other things, the obligation to prepare the NECPs, was proposed in 2016 by the European Commission as part of the 4th Energy Package (which is also known as the Clean Energy for All Europeans Package or the Winter Package⁴). In summer 2018, the European Parliament, the European Commission and the European Council aligned their positions on the GR; the European Parliament adopted it in plenary

¹ Recital 24 of the GR

² The GR is not adopted yet. As of 30 November, the latest version is available as a Position of the European Parliament adopted at first reading on 13 November 2018 with a view to the adoption of Regulation (EU) 2018/... of the European Parliament and of the Council on the Governance of the Energy Union and Climate Action.

³ Article 15 of the GR

⁴ See [webpage](#) of the European Commission

session on 13 November and the European Council adopted it on 4 December. It will be published in the Official Journal of the European Union on 21 December and enter into force on 24 December 2018.⁵

In short, despite the fact that the European Commission has urged the MS to prepare NECPs since the concept of NECP was refined in 2015, the legal obligation for the MS to prepare and send a draft NECP prior to 31 December 2018 will only exist as of 24 December.

3. Why is public participation important? What does the GR say about public participation? Why is access to information a prerequisite condition?

It is essential to safeguard public participation in the preparation of the NECPs. This is so the interests and concerns of citizens, renewable energy developers, self-consumption communities and individual producers are heard by public authorities as early as possible. If not, there is a risk that the initial version of the NECPs will only reflect the vested interests of established players, in particular fossil fuel operators.

Due in part to this legitimate concern, references to public participation were progressively inserted in the iterations of the regulation on the governance of the Energy Union.⁶

In particular, Recital 28 of the GR regulation provides that the NECP has an impact on the environment. Therefore, Member States should “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”. This is in accordance with 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 (“Aarhus Convention”) or, where applicable, with the provisions of the Directive 2001/42/EC on Strategic Environmental Assessment (SEA Directive). As explained immediately below, the reference to the Aarhus Convention is not reiterated in the relevant public consultation article.

Indeed, Article 10 (Public consultation) of the GR does provide for a public participation process but the timing may impede impactful public participation. Article 10 states that:

“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/EC 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.

⁵ See [press release](#) from the Council of 4 December (date?).

⁶ Prior to the publication of the GR’s proposal by the Commission in 2016, the Commission had not included any mechanism for public consultation. For instance, in an annex to the State of the Energy Union entitled “Guidance to Member States on National Energy and Climate Plans as part of the Energy Union Governance”, the Commission had envisioned that the NECPs would be finalised after taking account of Commission recommendations and other peer-review from other MS in 2018. Specifically, there was no process of public consultation built in in the original annex. See [Communication](#) from the Commission to the European Parliament, the Council, the European Economic and Social Committee, the Committee of the Regions and the European Investment bank - State of the Energy Union 2015, COM(2015) 572 final.

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

Article 11 of the GR (Multilevel climate and energy dialogue) provides that:

“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.”

The second paragraph of Article 10 providing that “*Each Member State shall ensure that the public is informed*” would have benefitted of stating with more clarity the precise standards of dissemination of the NECPs by the MS. Indeed, access to the documents (which is one of the subject matters of the Aarhus Convention)⁷ is a preliminary condition for an effective and meaningful public participation.

As explained in section 4 below, we consider that such a public consultation mechanism is insufficient and may result in the MS carrying out public participation activities that are not fully compatible with the standards set out by the Aarhus Convention.

We consider that MSs will have to consult the public on the draft plans *before* their submission to the European Commission, when all options are open and with a reasonable timeframe of at least two months. This complements Articles 10 and 11’s public participation procedures that MSs will have to conduct throughout 2019 and until submission of the final NECP to the European Commission.

We also consider that MSs have to make publicly available the information/documentation, on the basis of which the NECP is produced.

4. Is the GR compatible with the Aarhus Convention?

Article 7 specifically obliges its Parties, including the EU and all its MSs, to enforce certain public participation provisions of Article 6 in relation to “*plans, programmes and policies relating to the environment*”. In particular, Article 6(4) provides that authorities must conduct early public participation activities “***when all options are open and effective public participation can take place***”.

As a reminder, the Meeting of the Parties determined in 2014 that the public participation mechanism for the drafting and adoption of the National Renewable Energy Action Plan (NREAP) under Directive 2009/28 EU was not compliant with Article 7 of the Aarhus Convention.⁸ Upon monitoring the outcome of this decision, the Compliance Committee of the Aarhus Convention found on 7 June 2017 that: (i) the draft GR proposed by the European Commission in 2016 was not compliant with Article 7 of the Aarhus Convention; and that (ii) the EU had so far inadequately implemented its recommendation on public participation in the

⁷ See Article 5 of the Aarhus Convention.

⁸ See Decision V/9g on compliance by the European Union adopted by the Meeting of the Parties to the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters - Fifth session, 30 June and 1 July 2014, Excerpt from the addendum to the report of the fifth session of the Meeting of the Parties (ECE/MP.PP/2014/2/Add.1). The process was initiated by a communication from an individual alleging that the EU had failed to properly monitor the implementation of EU law related to the Aarhus Convention by Ireland with respect to Ireland’s NREAP.

NREAPs (the Committee considers that the NECPs are the successors to the NREAPs and will continue to assess compliance with the recommendation concerning the NECPs).

The final version of Article 10 incorporates new wording on information of the public and the requirement for MSs to put in place a reasonable timeframe for public participation. A new Article 11 providing for a mandatory multilevel dialogue structure was also inserted. However, the underlying concept embodied in Article 10 of seeking the public's participation *after* the adoption of the first draft NECP is unchanged. As stated above, authorities must conduct public participation activities "*when all options are open and effective public participation can take place*". ClientEarth is concerned that such public participation procedure falls short of the requirements set out by the Aarhus Convention. ClientEarth believes that there is a substantial risk that MSs may implement Articles 10 and 11 in a way that is not compliant with Articles 6 and 7 of the Aarhus Convention.⁹

5. Is the GR compatible with the SEA Directive?

The drafters of the GR have been indecisive regarding the applicability of Directive 2001/42/EC of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment ("**SEA Directive**") to the preparation of the NECPs. The last sentence of Article 10 of the GR provides that "**In so far as Directive 2001/42/EC 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.**" (Emphasis added).

The SEA Directive mandates the MS to undertake an environmental assessment prior to the preparation of any plan or programme that is likely to have a significant effect on the environment. The relevant authorities must conduct a public participation process simultaneously to the environmental assessment.

This note does not aim to provide an in-depth analysis of the applicability of the SEA Directive in the preparation of the NECPs. Such analysis should be conducted on a country-by-country basis as it is necessary to assess both the provisions of each MS's implementing legislation and the content of each NECP. Nonetheless, we find that there are strong, common arguments that the SEA Directive shall be applicable. For instance, the language used in recital 28 GR¹⁰, as well as specific references in the GR that the NECP must provide the "*key electricity and gas transmission infrastructure projects, and where relevant, modernisation projects, that are necessary for the achievement of objectives and targets under the five dimensions of the Energy Union*" leaves little doubt on the NECP content matching the SEA directive requirements.¹¹ Furthermore, with regards to the level of electricity interconnection, we understand that each MS is mandated to list new proposed interconnections. Therefore,

⁹ For instance, on 3 December 2018, the Ministry of Energy of Romania released a draft NECP and opened it for public participation until 10 December 2018 (that is a total of seven days of public participation). While ClientEarth encourages MSs to open public participation prior to delivery of the draft NECP to the Commission, we are concerned that such a short timeframe does not allow civil society to make any meaningful contribution. If Romania were to deliver its NECP a few weeks past the 31 December 2018, it would not risk derailing the 2019 deadline for finalising its NECP.

¹⁰ The first sentence of recital 28 states that "*The implementation of policies and measures in the areas of energy and climate has an impact on the environment*".

¹¹ Article 23(1)(b) of the GR. See also para. 2.4.2 of Annex I of the GR.

any NECP is arguably setting “the framework for future development consent of projects listed in Annexes I and II to Directive 85/337/EEC [EIA Directive]”.¹²

6. My country does not have any plan to open public participation prior to the delivery of the first draft NECP to the Commission, what can I do?

Based on the information we obtained from our partner Climate Action Network-Europe (“CAN-E”), we understand that the MSs have diverging attitudes regarding the level and timeframe of public participation. For instance, some MS such as Greece have prepared a public consultation prior to the delivery of the draft NECP to the European Commission but have put a very tight deadline for the public to provide comments. Ireland has released a list of 30 questions prior to releasing any draft NECP. Some other MSs, such as Sweden, are only opening public participation simultaneously to delivering the draft NECP to the European Commission. Finally, we understand that a number of MSs, such as Germany, Italy or Bulgaria are planning to wait for the recommendations of the European Commission on their draft NECP (expected in June 2019) before opening up the draft NECP to public consultation.

Opening public participation and access to information at such a late stage creates a significant risk that national authorities will refuse to meaningfully amend the draft NECP to take into account the participation from civil society and renewable companies.

Pushing through advocacy or litigation for at least an eight week public participation period prior to the delivery of the first draft to the European Commission, would not derail the timeline set by the GR. The MSs would still be in a position to adopt NECP and LTS prior to 31 December 2019 deadline.

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¹² Article 3(2) of the SEA Directive

ClientEarth is a non-profit environmental law organisation based in London, Brussels, Berlin and Warsaw. We are activist lawyers working at the interface of law, science and policy. Using the power of the law, we develop legal strategies and tools to address major environmental issues.

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