

15 May 2019



Influencing the 2050 long-term strategy through public participation

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1 Executive Summary

Before 1 January 2020, each EU Member States must prepare a long-term strategy ("*LTS*") and deliver it to the European Commission. A *LTS* will establish how Member States plan to achieve long-term greenhouse gas emission reductions and enhance removals by sinks in all sectors until at least 2050, in line with the objective of the Paris Agreement.

The preparation of *LTS*s falls within the scope of the Aarhus Convention as they are plans that concern the environment.

Under the Aarhus Convention, each Member State has an obligation to ensure effective public participation is part of the preparation of their *LTS*. It must do so as early as possible so that all options can be considered. Public participation carried out for former versions of national *LTS*s (or their predecessors) is very unlikely to meet the requirements of the Aarhus Convention.

In 2019, the Aarhus Convention Compliance Committee found that the Governance Regulation did not fully comply with the Aarhus Convention as it fails to incorporate all the mandatory steps that Member States should take to guarantee early and effective public participation when preparing their National Energy and Climate Plans (NECP).

Similarly, the Governance Regulation states that Member States must allow for public participation when preparing their *LTS* but does not clarify the method to do so. The public authorities of each Member State must ensure that public participation is compliant with the below:

1. It must be open to all interested individuals and organisations. The consultation of a selected stakeholder group is insufficient.
2. The authorities will actively disseminate all the necessary information to the public, including the draft *LTS* itself, and any other information relevant to the decision-making on the *LTS*. This includes main reports and advice issued to public authorities, any information regarding environmental consequences and cost-benefit and other economic analyses held by the responsible authorities and an outline of the main alternatives studied.
3. Ideally, the public will have an initial 6-week period to consider the information disseminated by the authorities. This should be followed by another 6-week period to allow for public participation. Reasonably shorter periods may be acceptable.
4. Authorities must take the outcome of public participation into due account.
5. The authorities must prepare and issue a document that sets out concretely how the public's comments have been considered.
6. We consider that public participation should start no later than September 2019.

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ClientEarth invites all interested organisations to contact us regarding shortcomings in, or the absence of, public participation mechanisms in their jurisdiction. In particular, you should consider contacting us if:

- 1. You believe that your country is not planning to open a meaningful public participation process before delivering the LTS to the European Commission.**
- 2. 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.**
- 3. You would like to provide input or comments regarding the LTS but have not been given an opportunity to do so.**

2 Introduction

This memorandum addresses the process of public participation as part of preparing the Long-Term Strategy (“LTS”) that each Member State must deliver in accordance with the Governance Regulation (the “GR”)¹ to the European Commission by 1 January 2020. By this date, all Member States should have delivered their LTSs to the European Commission addressing how they intend to meet their emission reduction targets between 2030 and 2050, in accordance with the Paris Agreement.

This document builds on the memorandum “Not (yet) a missed opportunity. Influencing the 2021-2030 NECPs through early Public Participation” released in December 2018 by ClientEarth,² and provides an updated analysis of how Member States have so far ensured that public participation is carried out when preparing their National Energy and Climate Plans (“NECP”).

The GR does not state the specific steps that Member States have to take to comply with their international obligations under the Aarhus Convention. This approach has been criticised by the Aarhus Compliance Committee, the body in charge of monitoring the enforcement of the Aarhus Convention.

Section 6 summarises the factors that Member States must consider when preparing the LTS to ensure that public participation fully complies with the Aarhus Convention.

¹ 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, amending Regulations (EC) No 663/2009 and (EC) No 715/2009 of the European Parliament and of the Council, Directives 94/22/EC, 98/70/EC, 2009/31/EC, 2009/73/EC, 2010/31/EU, 2012/27/EU and 2013/30/EU of the European Parliament and of the Council, Council Directives 2009/119/EC and (EU) 2015/652 and repealing Regulation (EU) No 525/2013 of the European Parliament and of the Council

² See memorandum Influencing 2021-2030 NECP's through public participation, available at <https://www.documents.clientearth.org/library/download-info/influencing-2021-2030-necps-through-public-participation/>

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3 Public participation: the status of NECPs so far

In the above-mentioned December 2019 memorandum, ClientEarth emphasised that the GR failed to embody a number of provisions relating to public participation and that the GR was consequently unlikely to fully comply with the Aarhus Convention.³

These concerns have now been confirmed, as the Aarhus Convention Compliance Committee assessed in February 2019 that the GR does not fully comply with the Aarhus Convention. Specifically, it found that the GR fails to “*includ[e] reasonable time frames, allo[w] sufficient time for informing the public and for the public to prepare and participate effectively, allo[w] for early public participation when all options are open, and ensur[e] that due account is taken of the outcome of the public participation.*”⁴

While the Aarhus Convention Compliance Committee raises specific concerns about the preparation of the draft NECPs, ClientEarth is worried that Member States may fail to carry out meaningful public consultations for the LTSs.

This concern is heightened, as a number of Member States have not undertaken adequate public participation processes before submitting their draft NECPs to the European Commission. Under the Aarhus Convention, authorities must conduct early public participation activities “*when all options are open and effective public participation can take place*”.⁵ It is highly doubtful that this criterion will be fulfilled by Member States that have not conducted any public participation activities on their draft NECPs in 2018 (such as Bulgaria, France, Germany, or Italy) and which will only consult the public once they have incorporated the comments from the European Commission into their final NECPs.⁶

As the GR does not require Member States to prepare their LTS in two phases (as it does for NECPs, i.e. a draft and a final document), it is even more important to safeguard the process of meaningful public participation while preparing the LTS. The GR also does not clarify *when* a public consultation should take place.

Effective public participation is essential so that public authorities hear the interests and concerns of citizens, renewable energy developers, citizen energy communities and individual producers as early as possible. National and European NGOs have a role to play in assisting these groups to influence the LTS before it is submitted by each Member State to the European Commission.

³ 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”)

⁴ See para. 61 of first progress review of developments relating to request ACCC/M/2017/3, available at [https://www.unece.org/fileadmin/DAM/env/pp/compliance/Requests_from_the_MOP/ACCC-M-2017-](https://www.unece.org/fileadmin/DAM/env/pp/compliance/Requests_from_the_MOP/ACCC-M-2017-3_European_Union/Correspondence_with_the_Party_concerned/First_progress_review_on_M3_EU_adopted_22.02.2019.pdf)

[3_European_Union/Correspondence_with_the_Party_concerned/First_progress_review_on_M3_EU_adopted_22.02.2019.pdf](https://www.unece.org/fileadmin/DAM/env/pp/mop5/Documents/Post_session_docs/Decision_excerpts_in_English/Decision_V_9g_on_compliance_by_the_European_Union.pdf), itself quoting decision v/9g, available here:

https://www.unece.org/fileadmin/DAM/env/pp/mop5/Documents/Post_session_docs/Decision_excerpts_in_English/Decision_V_9g_on_compliance_by_the_European_Union.pdf

⁵ See Article 6(4) of the Aarhus Convention

⁶ Please refer to Influencing 2021-2030 NECP’s through public participation, section 6 available at <https://www.documents.clientearth.org/library/download-info/influencing-2021-2030-necps-through-public-participation/>

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4 Content of national and European long-term strategies

Under article 4.19 of the Paris Agreement, signatories have to “*formulate and communicate long-term low greenhouse gas emission development strategies, mindful of Article 2 taking into account their common but differentiated responsibilities and respective capabilities, in the light of different national circumstances.*” It is important to note that all Member States as well as the European Union are parties to the Paris Agreement.

The European Union has implemented and expanded on this obligation under the Paris Agreement by stipulating in the GR that the European Commission was to prepare a Union LTS by 1 April 2019 and that each Member State will prepare a national LTS by 1 January 2020.⁷

According to the GR, the scope of the Union LTS is not as broad as the national LTS. For instance, the Union LTS will only address reductions of greenhouse gas emissions, while national LTSs will also address renewable energy, energy efficiency, financing, an impact assessment of the socio-economic aspects. National LTSs will also include specific content related to emission reductions for the energy, industry, transport, and agriculture sectors.⁸ It is clear that neither the Paris Agreement, nor any of its additional instruments, state a list of topics or specific items that have to be included in the LTS before it is submitted to the United Nations Framework Convention on Climate Change Secretariat (“**UNFCCC Secretariat**”).⁹

The Union LTS should be drafted while considering the draft NECPs that Member States have submitted to the European Commission. We note that as the vast majority of Member States submitted their draft NECPs to the European Commission after November 2018, the Union LTS published on 28 November 2018 by the Commission therefore cannot conform to the requirement of Article 15(2) of the GR.

5 Public participation when drafting national long-term strategies in 2019

The GR is insufficiently clear on the obligation of Member States to consult the public on their national LTSs in 2019. Public participation activities conducted for previous versions of a national LTS (or a predecessor) are insufficient to meet the requirements of the GR and the Aarhus Convention.

There are a number of arguments supporting this view:

1. Governance Regulation's provisions

Article 10 of the GR mandates Member States to ensure public participation takes place. It provides, among other things, that “*each Member State shall ensure that the public is*

⁷ See Article 15 of the GR

⁸ In practice, the 25 pages long-term strategy released by the European Commission in November 2018 address the topics of renewable energy, energy efficiency, financing and socio-economic aspects. Available at: https://ec.europa.eu/clima/sites/clima/files/docs/pages/com_2018_733_en.pdf

⁹ For an explanation as to why there is no mandatory outline for the Paris Agreement long-term strategies, see “Planning to Succeed, How to build strong 2050 climate and energy development strategies”, WWF Report, January 2018, p. 14 et seq., available at <http://www.maximiser.eu/publications>

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given early and effective opportunities to participate in the preparation of (...) the long-term strategies”.

2. National LTS are distinct new plans

While we understand that most of the Members States would base their national LTS on previous plans, which may or may not have been subject to public participation procedures, the National LTS are new and distinct plans for the following reasons:

- National LTSs are distinct from the LTSs prepared in accordance with the Paris Agreement.
- Since the signature of the Paris Agreement, four EU Member States have prepared long-term strategies in line with Article 4 paragraph 19 of the Paris Agreement and submitted them to the UNFCCC Secretariat.¹⁰ By chronological order these countries are Germany,¹¹ France,¹² the Czech Republic¹³ and the United Kingdom.¹⁴ We also understand that other Member States, such as Poland,¹⁵ have developed 2050 strategies, but have yet to submit them to the UNFCCC Secretariat. These long-term strategies were prepared with reference to the Paris Agreement and not to the GR. As explained in section 2, neither the Paris Agreement, nor any additional instrument states specific elements that have to be included in the long-term strategy. By contrast, National LTSs have to be prepared specifically in accordance with the GR and therefore need to comply with the outline of Annex IV and the drafting directions of Article 15.
- Article 15(6) of the GR states that the NECPs must be consistent with LTSs. In practice, this means that the LTS and the NECP must be mutually coherent with each other. National LTSs must therefore be adjusted to the content of its post-public participation NECP and will consequently be materially different from long-term strategies that may have been prepared previously prepared in line with the Paris Agreement.
- The outline included in Annex IV of the GR is different from any plan that Member States have prepared under previous regulations or national laws, such as the Monitoring Sharing Regulation.¹⁶
- Assumptions in each Member State have evolved over the last few years (and will continue to evolve in 2019).

¹⁰ See <https://unfccc.int/process/the-paris-agreement/long-term-strategies>

¹¹ Climate Action Plan 2050, originally submitted in November 2016 and resubmitted twice in April and May 2017

¹² National low-carbon strategy, originally submitted in December 2016 and resubmitted in April 2017

¹³ Climate Protection Policy Summary, submitted in January 2018

¹⁴ Clean Growth Strategy, submitted in April 2018

¹⁵ Polish Energy Policy to 2050

¹⁶ Regulation No 525/2013 of 21 May 2013 on a mechanism for monitoring and reporting greenhouse gas emissions and for reporting other information at national and Union level relevant to climate change and repealing Decision No 280/2004/EC

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6 Timing and characteristics of public participation

As explained above, there is a legal obligation for each Member State to organise public participation activities during the preparation of their LTS. The process of public participation must comply with both the GR and the Aarhus Convention.¹⁷

While each Member State has a different legal regime for undertaking public participation, it cannot provide for fewer opportunities for the public to participate than under the GR and the Aarhus Convention.

As the GR does not always fully incorporate the requirements of the Aarhus Convention, we suggest below a consolidated procedure of how public authorities could organise public participation activities, which are fully compliant with the GR and the Aarhus Convention:

1. the GR indicates that “*the Member States should aim (...) to ensure equal participation, that the public is informed by public notice or other appropriate means such as electronic media*”.¹⁸ To fully comply with the Aarhus Convention, this must be interpreted to mean that public participation is open to all interested individuals and organisations (members of the public). The consultation of a selected stakeholder group is insufficient;¹⁹
2. the GR indicates that “*the Member States should aim (...) that the public is able to access all relevant documents*”²⁰ and states that “*Each Member States shall ensure that the public is informed.*”²¹ In practice, this means that the authorities must actively disseminate all the necessary information to the public, including the draft LTS, and any other information relevant to the decision-making of the LTS. This includes main reports and advice issued to the public authorities, any information regarding environmental consequences and cost-benefit and other economic analyses held by the responsible authorities and an outline of the main alternatives studied;²²
3. the GR says that “*each Member State shall set reasonable timeframes*” for the public participation process²³ but does not indicate timings. The Aarhus Convention Compliance Committee previously found that authorities offering the public a 6-week period to consider the information disseminated by the authorities and another period of 6 weeks for the public participation phase is appropriate;²⁴
4. authorities must ensure that the outcome of the public participation process is taken into account;²⁵

¹⁷ The National LTSs falls in the ambit of Article 7 of the Aarhus Convention as they are “*plans and programmes relating to the environment*”. Indeed, section 2.4 of the outline mandated by Annex IV of the GR contains a number of sector-specific policy measures that Member States are envisaging to use in order to reach their emission reduction targets, such content typically being found in a plan relating to the environment.

¹⁸ Recital 29 of the GR

¹⁹ See communication ACCC/C/2010/51 (Romania), ECE/MP.PP/C.1/2014/12, para. 109

²⁰ Recital 29 of the GR

²¹ See Article 10 para. 2 of the GR

²² In accordance with article 7 in conjunction with article 6(6) of the Aarhus Convention

²³ See Article 10 para. 2 of the GR

²⁴ See ECE/MP.PP/C.1/2009/4/Add.1, para. 44

²⁵ In accordance with Article 7 in conjunction with article 6(8) of the Aarhus Convention

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5. Annex IV of the GR simply says that authorities must include a section in the LTS addressing public participation in the context of the “*overview and process for developing the [LTS]*.”²⁶ To be fully Aarhus Convention compliant, authorities must prepare and issue a document that concretely sets out how the public's comments have been taken into account.²⁷

As each National LTS has to be submitted by 1 January 2020 at the latest, and as there is no obligation on Member States to submit or publish a draft, it is essential to ensure public participation occurs as early as possible and when all options are open. From a practical point of view, we consider that the process of public participation should start no later than September 2019 in order to conform to the GR²⁸ and the Aarhus Convention.²⁹

In Member States where no public participation has been announced, where a public participation process is planned but will take place unreasonably late in 2019, or which will not satisfy the essential characteristics of a meaningful public participation process, we advise to put pressure on authorities so that they take all necessary measures to comply with their Aarhus Convention obligations. Pressure could be applied through campaigning, advocacy, and/or litigation.

ClientEarth invites all interested organisations to contact us regarding shortcomings in, or the absence of, public participation mechanisms in their jurisdiction. In particular, you should consider contacting us if:

- **You believe that your country is not planning to open a meaningful public participation process before delivering the LTS 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 LTS but have not been given an opportunity to do so.**

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²⁶ See Section 1.3 of Annex IV to the GR

²⁷ See communication ACCC/C/2012/70 (Czechia), ECE/MP.PP/C.1/2014/9, para. 62.

²⁸ Under which the public shall have “early and effective opportunity to participate” (See Article 10 of the GR)

²⁹ Which mandates to conduct public participation “when all options are open” (see article 7 of the Aarhus Convention)

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ClientEarth is funded by the generous support of philanthropic foundations, institutional donors and engaged individuals.

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