BRUSSELS SCHOOL OF GOVERNANCE

THE EU'S CLIMATE AND ENERGY FRAMEWORK IN LIGHT OF THE AARHUS CONVENTION

Assessing environmental democracy rights in the Governance Regulation

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Policy Report

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Glossary

AC	Aarhus Convention
ACCC	Aarhus Convention Compliance Committee
CJEU	Court of Justice of the European Union
ECE	Economic Commission for Europe
EIA	Environmental Impact Assessment
EU	European Union
IED	Industrial Emissions Directive
IPPC	Integrated Pollution Prevention and Control Directive
LTS	Long-Term Strategy
MCED	Multilevel Climate and Energy Dialogue
NECP	National Energy and Climate Plan
NGO	Non-Governmental Organisation
NREAP	National Renewable Energy Action Plan
SEA	Strategic Environmental Assessment
TFEU	Treaty on the Functioning of the European Union
UNECE	United Nations Economic Commission for Europe

Introduction

As part of the European Green Deal, the architecture of the European Union's (hereafter EU) climate and energy framework was overhauled. This review included a European Climate Law and the Fit for 55 package. However, one essential piece of the puzzle has, as of yet, been left untouched. The Governance Regulation, which administers the long-term climate objectives and energy targets of the European Union, remains in its initial 2018 version. The discourse surrounding a potential adaptation of the governance framework focusses on substantive matters of law related to energy efficiency targets and the Paris Agreement commitments. But the procedural aspects of governance cannot be ignored. Amongst the measures for monitoring, compliance, and planning, are also the requirements to involve the stakeholders and to listen to the public. These procedural aspects of environmental democracy are governed by the Aarhus Convention to which the EU and all its Member States are party to. An eventual revision of the EU's energy and climate governance mechanism should respect the democratic rights of EU citizens and reap the benefits of involving the public early on in policy making.

This paper addresses the missing piece of the puzzle by assessing the compliance of the Regulation EU 2018/1999[1] on the Governance of the Energy Union and Climate Action (hereafter Governance Regulation) with the environmental democracy requirements under the Aarhus Convention (hereinafter AC).

It argues that the climate governance framework of the Energy Union[2] is not compliant with the requirements of the Convention. While compliance with environmental democracy rights can be achieved through several pieces of EU legislation and even via direct application of the Aarhus Convention, the Governance Regulation is the main instrument of the EU's climate and energy governance framework.

The Governance Regulation contains the legislative framework (a) setting out how Member States should plan for the policy action required to achieve their share of the EU's climate and energy targets spanning five dimensions of the 'Energy Union' and report on national implementation progress, and (b) empowering the EU Commission to monitor compliance. Those five dimensions

[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] The Energy Union is a policy strategy presented by the European Commission in 2015 in its communication "A Framework Strategy for a Resilient Energy Union with a Forward-Looking Climate Change Policy", available here, aimed at coordinating the transformation of the energy system of the EU.

are: energy security, internal energy market, energy efficiency, decarbonisation and research, innovation and competitiveness. The main requirement for Member States is the elaboration and submission of a National Energy and Climate Plan (hereafter NECP) every ten years, to be updated mid-way of the ten-year period. Along with the NECPs, Member States are required to prepare and submit Long-Term Strategies (hereafter LTS) every ten years with a perspective of at least 30 years. 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 national targets set in the NECPs. While these plans all must meet Aarhus Convention requirements, this paper focusses exclusively on the overall planning process in the Governance Regulation. NECPs and LTS are the most impactful plans of the Energy Union and the EU's climate action.

The Aarhus Convention is an international binding instrument signed in 1998 under the UNECE that entered into force in 2004. It is a mixed agreement, which makes it an international treaty whose subject matter does not fall under the exclusive external competence of the EU and must thusly be ratified by each Member State. It follows that both the European Union and all its Member States are Parties to the Aarhus Convention. The Convention comprises three pillars: access to information, public participation and access to justice in environmental matters.

This paper assesses the Governance Regulation through the lens of these three pillars. Each chapter discusses the applicable requirements under the Aarhus Convention and assesses the EU's governance framework in light of those requirements. Ultimately, the Governance Regulation will have to be revised to allow the EU to come into compliance with environmental democracy standards. At the time of writing, a revision is already on the horizon. A formal evaluation report of the functioning of the Regulation is required under its article 45 linked to the Paris Agreement "global stocktake" process.[3] That this report could serve as the stepping stone to a revision is supported by the Fit For Future Platform's 2022 assessment which proposed to update the Regulation.[4]

[3] The review process has started with a call of evidence opened on July 7, 2023, available here. The report should be finalised in the first quarter of 2024.
[4] Fit for Future Platform, Opinion adopted on 5 December 2022, 2022/SBGR1/03, available here.

Note on Methodology

The methodology used in this paper is analytical legal research based on a doctrinal approach of the state of the law. The approach chosen is to provide a systematic description of the Aarhus Convention requirements, followed by an analysis of the compatibility of the text of the Governance Regulation with this regulatory framework. In doing so, the paper contextualises the Governance Regulation in its wider EU law framework and then contrasts it comparatively with the Aarhus Convention and the state of the art in environmental democracy. The purpose of this paper is not to formulate best-case scenario policy recommendations but to identify existing gaps in de minimis compliance of the current text of the Governance Regulation with the requirements under the Aarhus Convention.

Limitations of the method applied include the lack of availability of comparable governance models which could be juxtaposed to the Governance Regulation in its compliance with the Aarhus Convention, the lack of a statistically relevant amount of case law in this area which would allow more nuanced approaches to be applied, and the difficulty in designing empirical methods of addressing the research question.

Future research in this area should take into account an array of related national case law, which is not yet available due to the relative novelty of the governance framework and should take into account the application of the requirements already contained in the Governance Regulation in the implementation at national level.

Part 1 - Public Participation: A technocrat's paradise

Public participation lies at the heart of the democratic nature of the European Union. While a representative democracy at its core, elements of direct public participation are woven into the EU's environmental policy-making process. The benefits of public participation are manifold but are most often grouped into three categories[5]. Firstly, public participation improves the quality of the decisions taken. Secondly, it fulfils a fundamental democratic right. Thirdly, it fosters public trust and buy-in.

The Aarhus Convention text differentiates between public participation in decisions on whether to permit proposed specific activities,[6] and public participation concerning plans, programmes and policies relating to the environment.[7] Public participation rights are also guaranteed in relation to the preparation of executive regulations and/or generally applicable legally binding normative instruments.[8] NECPs and LTS are not normative instruments as such, as will be explained hereafter. They could however fall under one of the other two categories aforementioned.

With regards to the Governance Regulation, the compliance assessment will shortly consider the relevant requirements under the Aarhus Convention before diving into the compliance assessment. In that assessment a digression will be made into the applicability of the SEA Directive which is, however, a necessity to discuss the different aspects of article 7 of the Aarhus Convention.

1.1. Relevant requirements under the Aarhus Convention[9]

Article 6 AC applies to "proposed activities" listed in Annex I of the Convention. Each party can also decide that this provision will apply to any other decisions on "proposed activities" that have a significant effect on the environment. The expression "proposed activities" is not defined in the Aarhus Convention. The term is defined in the Espoo Convention as "*any activity or any major change to an activity subject to a decision of a competent authority in accordance with an*

[5] Stirling Andrew, Analysis, participation and power: justification and closure in participatory multi-criteria analysis, *Land Use Policy Journal,* volume 23 Issue 1, January 2006.
[6] Article 6 AC applies to decisions related to specific activities listed in Annex I of the Convention as well as to other decisions which may have a significant effect on the environment and are determined by Parties themselves.
[7] Aarhus Convention, article 7.
[8] Aarhus Convention, article 8.
[9] The requirements of the Espoo Convention on Environmental Impact Assessment in a Transboundary Context and its Protocol on Strategic Environmental Assessment, to which the European Union is a Party will not be further discussed in this study, for their provisions are mirrored in the Strategic Environmental Assessment Directive (hereafter SEA Directive).

applicable national procedure".[10] This definition is in itself not enlightening to assess whether NECPs or LTS fall under this category.

From the Annex I of the Convention, we can see that the activities listed relate to industrial projects such as refineries, metal foundries, chemical installations etc. The Aarhus Convention Implementation Guide indeed specifies that this expression is broad enough to cover both the terms "project" as meant in the Environmental Impact Assessment Directive (hereafter EIA Directive) and "installation" in the Industrial Emissions Directive (hereafter IED).[11] Applying a teleological and systematic interpretation, it clearly appears, however, that both NECPs as well as LTS cannot be considered as activities, for they cover several policies and measures which in turn span numerous projects or installations. Article 6 AC, therefore, cannot be applicable.

"Plans and programmes", as referred to in article 7 AC, are also not defined in the Aarhus Convention. The Aarhus Convention Implementation Guide however refers to the common-sense and uniform legal meaning of these terms throughout the ECE region as understood for example in the SEA Protocol.[12] The Aarhus Convention Compliance Committee (hereafter the Compliance Committee) itself confirmed that NECPs fall under article 7 AC. In its findings regarding communication ACCC/C/2010/54 concerning the European Union, the Compliance Committee recognised that National Renewable Energy Action Plans (hereafter NREAPs) constitute plans or programmes relating to the environment, because "[they set] *the framework for activities by which Ireland aims to enhance the use of renewable energy in order to reduce greenhouse gas emissions, based on Directive 2009/28/EC.*".[13] NREAPs were prescribed by the Renewable Energy Directive,[14] and are the predecessors of the NECPs. In the first progress review of the compliance of the European Union in a subsequent communication,[15] the Compliance Committee[16] accepted to shift its analysis from the NREAPs to the NECPs, recalling that the European Union itself had

[10] Espoo Convention, article 1 (v).
[11] Aarhus Convention Implementation Guide, p. 131.
[12] SEA Protocol, article 2 §5 : "*Plans and programmes and any modifications to them that are:*
(a) Required by legislative, regulatory or administrative provisions; and
(b) Subject to preparation and/or adoption by an authority or prepared by an authority for adoption, through a formal procedure, by a parliament or a government".
[13] ACCC, Findings and recommendations with regard to communication ACCC/C/2010/54 concerning compliance by the European Union.
[14] Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC, repealed in 2018.
[15] Communication ACCC/M/2017/3 (available here) alleged the lack of progress following the endorsement of findings of the ACCC by the Meeting of the Parties in decision V/9g (available here).
[16] ACCC, First progress review of developments relating to request ACCC/M/2017/3 on compliance by the European Union with its obligations under the Convention, p. 4.

explained that the NECPS required under the Governance Regulation, at the time still in writing stage, will replace the NREAPs.[17] The provisions of article 7 AC should then apply to the NECPs.

NECPs must further be updated every 5 years after the submission of the initial plan,[18] by June 30 2024 for the first round of plans. So an important question arises about whether these updates also fall under the scope of article 7 AC. As pointed out by the Aarhus Convention Implementation Guide, the answer remains unclear, for article 7 AC is silent on the matter, while article 6 AC on the contrary provides that when a public authority reconsiders or updates the operating conditions for an activity, the provisions on public participation shall apply *mutatis mutandis*.[19] According to a literal interpretation of article 7 AC, it shall apply "during the preparation of plans and programmes",[20] meaning only the initial drafting process of the plan or programme and not its subsequent revision. However, one could also argue that a modification of such a plan amounts to a new plan itself.

An "update" is differentiated from a simple modification, which is not a holistic review but can be limited to contained changes. According to the Governance Regulation, the NECPs span over ten years to ensure stability, transparency and predictability of national measures and policies.[21] Their holistic update halfway through this ten-year period is necessary to adapt the plans to significant changing circumstances.[22] Member States shall then "*modify [their] national objective, target or contribution with regard to any of the quantified Union objectives, targets or contributions*".[23] These targeted updates will trigger a series of changes in subsequent policies and measures and modify substantially core elements of the NECPs.[24] Another worthwhile consideration of the applicability of article 7 AC to the NECPs' updates is that the EU legislators anticipated that the public participation requirements will apply to the updates and provided for the application of public participation obligations to the updating process.[25] Indeed, the European Commission itself does not contest that article 7 AC applies and refers to these public participation in its Guidance on the updating of NECPs issued in December 2022.[26]

[17] European Union, First progress report, case ACCC/C/M/2017/3, p. 2.
[18] Governance Regulation, article 14 §1.
[19] Aarhus Convention, article 6 paragraph 10.
[20] Aarhus Convention Implementation Guide, 2014, p. 176.
[21] Governance Regulation, recital 34.
[22] Governance Regulation, recital 34.
[23] Governance Regulation, article 14 §.
[24] The 2023-2024 update will for example address how the Member States will contribute to the achievement of the new collective targets set in the revised Renewable Energy Directive, Energy Efficiency Directive.
[25] Governance Regulation, article 14 paragraph 6.
[26] European Commission, Commission Notice on the Guidance to Member States for the update of the 2021-2030 national energy and climate plans, 29 December 2022, 2022/C 495/02, par. 3.2.

As for the LTS, the case for applicability of article 7 AC is one yet to be made, for the Compliance Committee has never had to assess the nature of those strategies and whether they fall under the scope of article 7 AC. The Aarhus Convention Implementation Guide recalls that the scope of article 7 AC is broader than the scope of the SEA Directive, for example, which prescribes that a plan or programme must be subjected to a SEA only if it is likely to have significant environmental effect[27] and sets the framework for future development consent of projects listed in the EIA Directive.[28] The literature also leans towards the application of article 7 AC.[29]

1.2. Compliance of the Governance Regulation

Article 7 AC reiterates the need to "*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*".[30] It also refers to requirements laid out in article 6 AC and adds that "*the public which may participate shall be identified by the relevant public authority, taking into account the objectives of this Convention*".[31]

Six different requirements can be identified in article 7 AC as follows:

- Proper regulatory framework adopted (1.2.1)
- Transparent and fair framework providing the necessary information to participate (1.2.2.)
- Reasonable time frames for public participation procedures (1.2.3.)
- Early public participation (1.2.4.)
- Due account of the public participation outcome (1.2.5.)
- Identifying the participating public while taking into account the objectives of the Convention (1.2.6.)

Finally, the case will be made that to comply with the Aarhus Convention, the Governance Regulation should lay out more detailed requirements for the Member States to provide for, and describe, public participation procedures in the implementation of their NECPs (1.2.7.).

[27] SEA Directive, article 3 §1.
[28] SEA Directive, article 3 §2 (a), §4.
[29] Stockhaus Heidi, *Stakeholder exclusion likely? Public Participation under the Governance Regulation, An Assessment of Article 10 in the light of the Aarhus Convention*, Ecologic Institute, 24 April 2018, p. 6-7.
[30] Aarhus Convention, article 7 sentence 1.
[31] Aarhus Convention, article 7, sentence 3.

1.2.1. Proper regulatory framework adopted

The first requirement to be assessed is whether the NECPs and LTS benefit from a proper regulatory framework that ensures the public participation process can meet all the other requirements. This first requirement is by far the most intricate one to assess and takes up a lion's share of the analysis of compliance question. At the outset, the mere existence of the Governance Regulation might make the assessment of this first criterion seem redundant. However, this particular condition relates to the status rather than the content of the framework. Hence, this section will examine the legislative structure the Governance Regulation sits in and consider its interlinkages with other EU legislation. It ultimately concludes with the finding that the Governance Regulation does not in fact in and of itself fulfil this first requirement.

The meaning of this condition is not explicit either in the text of article 7 or 6 AC. However, the Aarhus Convention Implementation Guide recalls that it is implicit in the Convention that the law must allow environmental considerations to be one of the factors in decision-making.[32] This can only happen if there is an established legal framework allowing for public participation and mandatory guidelines on how to translate the outcome of those processes into the decision-making. A legal basis for the consideration of the environmental aspects of plans, programmes and policies is therefore a prerequisite for the implementation of article 7 AC.[33]

Before assessing whether the framework set by the Governance Regulation itself is sufficient to meet this criteria, other main legal instruments which set a framework for public participation in environmental matters must be analysed along with their applicability with regards to the governance framework. Indeed, the Governance Regulation itself does not exclude supplementary applicability of other European legislation. Its article 10 provides indeed that the specific requirements regarding participation laid out in this article apply "*without prejudice to any other Union law requirements*".[34]

With regards to public participation, the framework laid out in the Public Participation Directive comes to mind.[35] This Directive could be applicable by listing NECPs and LTS in its Annex I.[36]

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[32] Aarhus Convention Implementation Guide, 2014, p. 128.

[33] Aarhus Convention Implementation Guide, 2014, p. 174.

[34] Governance Regulation, article 10.

[35] Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC, available here (cited as "Public Participation Directive).

[36] Public Participation Directive, article 2 §2.

However, in this annex, no mention of NECPs nor LTSs was added. Thus, the Public Participation Directive's requirements do not apply in the Governance Regulation context.

The other main legal instruments that could be applicable are the SEA Directive[37] and the EIA Directive.[38] These two directives follow somewhat the differentiation between projects and plans explained with regards to articles 6 and 7 AC. In that regard, the EIA Directive applies only to projects[39] and cannot find application in the context of the Governance Regulation.

The Aarhus Convention Implementation Guide recognises that public participation procedures in the context of SEAs are valuable tools to assist in the implementation of article 7 but cannot be considered as fully implementing its requirements.[40] Should the SEA Directive be applicable, this will not exempt the Governance Regulation from requiring subsequent safeguards for public participation procedures. That is to say that the systematic application of the SEA Directive to the establishment of NECPs and LTS will not automatically make the governance framework compliant with the Aarhus Convention requirements. It would however provide an additional and complementary framework within which Aarhus Convention rights can be ensured.

The applicability of the framework provided by the SEA Directive

The Governance Regulation provides for a self-standing framework of public participation which is analysed below but since the applicability of the SEA Directive is determining for the first condition of article 7 AC (existence of a proper regulatory framework), this paper allows itself a brief digression in this section on SEAs. The SEA Directive provides for a comprehensive set of obligations with regards to the preparation of the plans and public participation. It is not clear whether the SEA Directive applies to NECPs and LTS. The text of the Governance Regulation itself does not offer clarity on that question. Article 10 of the Regulation provides that "*In so far as Directive 2001/42/EC is applicable consultations undertaken on the draft [NECP] in accordance with that Directive shall be deemed to satisfy the obligations to consult the public under this Regulation*".[41] This seems to imply that the SEA Directive might not be always applicable. This is also confirmed by recital 28 which mentions that the requirements laid out in article 10 must be implemented "*in accordance, where applicable, with the provisions of Directive 2001/42/EC of the*

[37] Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment, available here (cited as "SEA Directive").
[38] Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment (codification), available here (cited as "EIA Directive").
[39] EIA Directive, article 1 §1.
[40] Aarhus Convention Implementation Guide, p. 174.
[41] Governance Regulation, article 10.

European Parliament and of the Council".[42]

The SEA requirement applies to plans and programs under the following four conditions:

1. They are subject to preparation and/or adoption by an authority at national, regional or local level. [43]
2. They are required by legislative, regulatory or administrative provisions.[44]
3. They are likely to have significant environmental effects.[45]
4. They set the framework for future development consent of projects as understood in the annexes I and II of the EIA Directive.[46]

The first and second condition are easily fulfilled for NECPs and LTS, as they are prepared by public authorities at national level and are required by the Governance Regulation which is generally applicable in all Member States according to the EU treaties.[47] This conclusion is furthermore supported by the fact that the Court of Justice of the European Union (hereafter CJEU) has ruled that the general nature of the instrument does not preclude it from being classified as a plan or program within the meaning of the SEA Directive.[48] The CJEU has for example clarified that policies or general legislation must not be *de facto* excluded from the scope of the SEA Directive because of their particular nature. It stated that the SEA Directive differs from the Aarhus Convention and the Kiev Protocol "*inasmuch as [it] does not contain any special provisions in relation to policies or general legislation that would call for them to be distinguished from plans and programmes*".[49]

As regards meeting the third condition, usually an evaluation of the likely significant environmental effects is undertaken through a screening process laid out in paragraph 5 of article 3 of the SEA Directive. However, several sectors fulfil the third condition by default without the need for a screening process (agriculture, forestry, fisheries, energy, industry, transport, waste management, water management, telecommunications, tourism, town and country planning or

[42] Governance Regulation, recital 28.
[43] SEA Directive, article 2 (a).
[44] SEA Directive, article 2 (a).
[45] SEA Directive, article 3 §1.
[46] SEA Directive, article 3 §2 (a).
[47] Article 288 paragraph 1. For an application of the SEA Directive to the Nitrate Action Programmes required by EU law, see CJEU, 4 March 2010, *Terre wallonne and others*, C-105/09, opinion of the Advocate General Kokott.
[48] CJEU, 25 June 2020, *A and others*, C-24/19, par. 61.
[49] CJEU, 27 October 2016, *Patrice d'Oultremont and others*, C-290/15, par. 53.

land use.).[50] The NECPs contribute to the five dimensions of the Energy Union[51]. As they are plans specifically relating to the energy sector, NECPs must be understood as likely to have significant environmental effects.

The fourth condition for application of the requirements stemming from the SEA Directive to plans and programs is that they must set the framework for future development consent of projects as understood in the annexes I and II of the EIA Directive. NECPs list off policy and measures related to the five dimensions of the Energy Union. These policies and measures will imply for the national and subnational authorities to give consent to projects listed in the annexes I and II of the EIA Directive. The determining and remaining question is whether the NECPs, by listing off policies and measures, set a framework for these future projects.

The phrase "*which sets the framework for future development consent of projects*", as understood in the EIA Directive, has been considered to be an autonomous concept of European Union law which must be interpreted uniformly throughout the territory thereof.[52] This entails that the applicability of the SEA Directive cannot be left to the discretion of the Member States as regards this particular condition. The CJEU defines this notion as "*any measure that establishes by defining rules and procedures for scrutiny applicable to the sector concerned, a significant body of criteria and detailed rules for the grant and implementation of one or more projects that are likely to have significant effects on the environment*".[53] This criteria must be assessed in the light of the objective of the directive which is to make decisions likely to have significant environment effects subject to an environmental assessment.[54] The CJEU indeed favours the effectiveness of the SEA Directive, even if it means extending its scope beyond the strict interpretation of the wording of the Directive.[55] Such a broad interpretation has been adopted by the CJEU to ensure consistency with article 37 of the Charter of Fundamental Rights of the European Union, according to which a high level of environmental protection and the improvement of the quality of the environment must be

[50] SEA Directive, article 3 paragraph 2 (a).

[51] Governance Regulation, article 3 §2. The five dimensions are: energy security, internal energy market, energy efficiency, decarbonisation, research, innovation and competitiveness.

[52] CJEU, 25 June 2020, *A and others*, C-24/19, par. 75.

[53] CJEU, 27 October 2016, *Patrice d'Oultremont and others*, C-290/15, par. 49.

[54] CJEU, 27 October 2016, *Patrice d'Oultremont and others*, C-290/15, par. 47.

[55] Porzeżyńska Magdalena, *Case C-24/19(A and others): How to ensure effet utile of the Strategic Environmental Assessment Directive?,* RECIEL 2022, 31, p. 144.

integrated into the policies of the European Union[56] and with the Espoo Convention.[57] This is why the concept of a "*significant body of criteria and detailed rules*" must be construed qualitatively and not quantitatively.[58]

On one side of the spectrum, when assessing whether a plan or program sets the framework for future development consent of projects, the CJEU takes into account the normativity of the measures prescribed in the instrument. The Court has for example ruled that conservation objectives in a Natura 2000 site that have not a statutory but indicative value do not fall into that category.[59] On the other side of the spectrum, it ruled differently in the case of Nitrate Action Programmes. Indeed, in the words of the Advocate General, it is unclear how strongly the requirements laid out in plans and programmes must influence individual projects in order for those requirements to set a framework.[60] However, in this particular case, the Nitrate Action Programme contains mandatory measures for installations covered by the EIA Directive. Those requirements ensure the reduction of environmental impacts of these installations and should therefore be taken into account in the environmental impact assessment of the individual project.[61] It seems to be the level of prescriptive detail on the individual pertaining project which is decisive in the question whether a certain plan or programme fulfils the condition of being a framework and therefore requires a strategic environmental assessment.

As regards NECPs, the CJEU has not yet had the opportunity to adjudicate on the application of the SEA Directive for these particular plans. From the case law presented above, it can be inferred that the NECPs must lay out mandatory requirements for future projects in order to have a framework-setting effect. In that regard, NECPs do not lay out specific requirements though they set national objectives. They have a programmatic function and give the general orientation and policies each Member State will adopt to meet the set objectives. Their degree of normativity is also unclear and left to the Member States' discretion.[62] This does not speak in favour of an application of the SEA Directive.

[56] CJEU, 25 June 2020, *A and others*, C-24/19, par. 44.
[57] CJEU, 25 June 2020, *A and others*, C-24/19, par. 49. Article 2 paragraph 7 of the Espoo Convention provides that:" *Environmental impact assessments as required by this Convention shall, as a minimum requirement, be undertaken at the project level of the proposed activity. To the extent appropriate, the Parties shall endeavour to apply the principles of environmental impact assessment to policies, plans and programmes*."
[58] CJEU, 7 June 2018, *Inter-Environnement Bruxelles*, C-671/1, par. 55.
[59] CJEU, 12 June 2019, *Terre wallone*, C-321/18, par. 42.
[60] CJEU, 4 March 2010, *Terre wallonne and others*, C-105/09, opinion of the Advocate General Kokott, par. 61.
[61] CJEU, 4 March 2010, *Terre wallonne and others*, C-105/09, par. 43 to 54.
[62] As explained below in the section on Access to Justice.

Nonetheless, another argument could be that the SEA Directive must be interpreted as broadly as possible in order to ensure that any decision likely to have an impact on the environment is being assessed. In that regard, the Governance Regulation, even if elusive on the application of the SEA Directive, provides that "*the implementation of policies and measures in the areas of energy and climate has an impact on the environment.*".[63] NECPs set a path for the energy and climate policy of each Member State that, even if not legally binding within the country itself, will have extensive implications on the environment. A teleological interpretation of both the Governance Regulation and the SEA Directive speaks therefore in favour of the application of the SEA Directive.

The question of the applicability of the SEA Directive to the NECPs is therefore far from being resolved, even with the help of the Court of Justice of the European Union case-law and the text of the Governance Regulation. To formulate concrete recommendations, it is useful to look at the practice of Member States while drafting their NECPs and how they interpreted the ambiguous wording of the Governance Regulation in order to see if and how a clarification of the text is needed. The Governance Regulation itself leaves the choice to Member States to apply the SEA Directive or not.

Research into Member States' practice shows that a small number of Member States did in fact conduct a SEA in the preparation of the NECPs submitted in 2019. Amongst those Member States we can cite: Bulgaria,[64] France,[65] Hungary,[66] Italy,[67] Luxemburg,[68] Malta,[69] Spain[70] and Portugal.[71]

Other Member States conducted an assessment of the applicability of the Directive.[72] It is interesting to note that Denmark, for example, gave as a reason for not submitting its NECP to a strategic environmental assessment, that "*the Danish NECP is a generic and strategic plan,*

[63] Governance Regulation, recital 28.
[64] SEA still ongoing in April 2022 according to Justice and Environment, Options to challenge NECPs and SEA decisions in different EU Member States, Statement delivered during the Aarhus Convention 14th Task Force on Access to Justice, 27-28 April 2022, available here.
[65] France conducted SEAs on both plans that make up its NECP, the two assessments are available here for the SNCB and here for the PPE (in French).
[66] Hungary final NECP, available here, par. 5.4.
[67] Italy final NECP, available here, par. 1.3 iii.
[68] Luxemburg final NECP, available here, par. 5.2.2.
[69] Malta final NECP, available here, par. 5.2.v.
[70] Spain final NECP, available here, p. 377.
[71] Portugal final NECP, available here, par. 1.3.3.
[72] e.g. Ireland conducted a screening for the final NECP, see Irish final NECP, available here.

for which the criteria of the SEA directive does not comply"[73] and therefore "*does […] not set the framework for future development, as these are set in other agreements, plans and programmes*".[74]

While many NGOs[75] are calling for the SEA Directive to be applied to NECPs to increase the opportunities for public participation avenues and to take better account of biodiversity and climate impacts, neither the text of the Governance Regulation, nor the CJEU, nor Member States' practice provide a concrete response. The public participation requirements in the SEA Directive can therefore not be seen as contributing to the regulatory framework needed to comply with article 7 AC. There is an overwhelming need to clarify the application of the SEA Directive to the NECP and LTS 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 article 10, 12 and in recital 28 of the Governance Regulation.

The scope of the public participation requirements in the Governance Regulation

Apart from the reference to the SEA Directive, the Governance Regulation provides a legal framework to implement article 7 AC in its article 10 entitled "public consultation". It also obliges Member States to put in place a Multilevel Climate and Energy Dialogue (hereafter MCED) according to its article 11.

These articles implement the participative objective of the governance framework which is to ensure "*effective opportunities for the public to participate in the preparation of those national plans and those long-term strategies*"[76] within a "*structured, transparent, iterative process between the Commission and Member States for the purpose of the finalisation of the integrated national energy and climate plans and their subsequent implementation*".[77]

Scope of the public participation requirements under article 10 of the Governance Regulation

The first question to answer before delving into the different requirements laid out in article 10 is the question of when this framework should actually apply. Article 10 provides that "*each Member State shall ensure that the public is given early and effective opportunities to participate in the preparation of the draft integrated national and energy and climate plan – as regards the*

[73] Denmark final NECP, available here, par. 1.3 iii.
[74] Denmark final NECP, available here, par. 1.3 iii.
[75] For example EJNI, *Legal obligations for public participation during the 2023 updating of National Energy and Climate Plans (NECPs)*, March 2023, p. 2, available here.
[76] Governance Regulation, article 1 paragraph 1 subparagraph 2.
[77] Governance Regulation, article 1 paragraph 1 subparagraph 2.

plans for 2021 to 2030 period, in the preparation of the final plan well before its adoption – as well as of the long-term strategies".[78] It is worth noting at the outset that the scope of article 10 is wider than that originally proposed in the initial Commission's proposal for the legislation.[79] The inclusion of LTS was added in the amendments adopted by the European Parliament and adopted during trilogue negotiations.

This provision creates confusion on the scope of application of the public participation process which requires the following clarifications.

- **Application of the public consultation requirement for the draft NECP:**

The temporal extension of the public participation requirements past the submission of the NECPs drafts for the first period 2021 to 2030 was not included in the Commission's proposal either.[80] The Council, in its general approach, proposed to ensure public participation in the preparation of the draft plan or "*well before its adoption of the final plan*".[81] Their position was motivated by the tight deadline between the adoption of the Governance Regulation in December 2018 and the deadline for submitting the first draft NECP set for 31 December 2018.[82] As a result of the interinstitutional negotiations, the possibility was given to Member States to only organise public participation procedures after the submission of the draft for review by the Commission, but in any case, "*well before its [the plans'] adoption*", and only as regards the plans for the 2021 to 2030 period. However necessary this derogation from public participation in the drafting stage might have been for the first period, a revision of the Governance Regulation should foresee the deletion of this derogation. This will avoid any confusion and misinterpretation of the clear public participation requirements for the subsequent periods.

It should also be mentioned that the requirements of article 10 apply to the NECPs' updates, since article 14 paragraph 6 of the Governance Regulation provides that "*The procedures laid down in Article 9(2) and Articles 10 and 12 shall apply to the preparation and assessment of the updated integrated national energy and climate plans*". It is, however, unclear if the possible exclusion of public participation in the drafting stage foreseen for the first period 2021-2030 should also apply to the updates of those same plans. Indeed, the updating process follows the same structure as for the initial plan: a submission of a draft plan which the Commission

[78] Governance Regulation, article 10. See also Governance Regulation, recital 36: "*Member States should develop their strategies in an open and transparent manner and should ensure effective opportunities for the public to participate in their preparation*".

[79] Commission's proposal, article 10, available here.

[80] Commission's proposal, article 10, available here.

[81] Council General approach, article 10, available here.

[82] Governance Regulation, article 9 paragraph 1.

assesses and on which it issues recommendations and, one year later, the submission of the final plans. Following a strict interpretation of article 10 in conjunction with article 14, one might think that this derogation from public consultation in the drafting stage also applies to the updated NECPs. Fortunately, the Commission Guidance gives some clarity on this point when mentioning that "[*Member States*] *are obliged to ensure that the public is given early and effective opportunities to participate in preparing the draft updated national plans*".[83] Consistent with the CJEU's approach to legislative interpretation, a purposive approach to the meaning of article 10 in relation with article 14 must therefore be adopted, and public consultations must be carried out before the submission of the draft update of the 2021-2030 plan. However, in the interests of transparency and legal certainty, the Governance Regulation text should, in any event, be clarified on this point, as the Commission Guidance is not in itself binding.

- **Application of the public consultation requirement for the final NECP:**

Article 10 provides further that the public shall be given opportunities to participate in the preparation of the draft NECP. Public participation in the preparation of the final plan – i.e. consultation on any revisions made in response to EU Commission feedback – is, however, not explicitly required. The exclusion of public participation in the subsequent stages of establishing the NECP, after the submission of the draft to the Commission, would however not be in accordance with the spirit of the Regulation. According to article 10, Member States "*shall attach to the submission of such documents a summary of the public's views or provisional views*".[84] These documents refer to the draft NECPs, the final plans for the 2021-2030 period and the long-term strategies. The question that arises is whether this requirement applies in particular to the final plans for the period after 2021-2030.

On the one hand, applying a strict textual or systematic interpretation, there is no ground to extrapolate from this article that the final plans beyond the 2021-2030 period should also be submitted with a summary of relevant views of the public. On the other hand, the assessment of the draft NECPs issued by the European Commission in June 2019 recalls that "*Member States need to ensure that the public has early and effective opportunities to participate in preparing the final plans, which should then include a summary of the public's views*".[85] This assessment should

[83] European Commission, Commission Notice on the Guidance to Member States for the update of the 2021-2030 national energy and climate plans, 29 December 2022, 2022/C 495/02, par. 3.2.
[84] Governance Regulation, article 10.
[85] European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, "*United in delivering tbhe Energy Union and Climate Action – Setting the foundations for a successful clean energy transition*", 18 June 2019, COM(2019)285 final.

be put in the context of the submission of the NECP drafts for the first period, when most Member States did not have time to organise public consultations. Thus, the Commission encouraged them to ensure public participation in the final plans, interpreting the Governance Regulation text in a broad and constructive manner.

This interpretation is also supported by the Commission Guidance issued in December 2022, which specifies that "*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*".[86] The final plan must then include a summary of the public's views and how they were taken into consideration in the final plan. It would not make sense if the final plan, which is different from the draft one because it must *inter alia* take into account the recommendations of the Commission,[87] considers views of the public given on previous outdated measures from the draft plan.

Following the above course of teleological interpretations allows the conclusion that article 10 demands broad public participation and, ultimately, compliance with the Aarhus Convention requirements. However, this exercise would not be needed if the Governance Regulation were clearer and more systematically coherent.

Multilevel Climate and Energy Dialogue in article 11 of the Governance Regulation:

Multilevel Climate and Energy Dialogues are established by article 11 of the Governance Regulation, which may contribute to the general framework put in place by the Governance Regulation to implement article 7 AC with regards to the long-term strategies and the NECPs. These dialogues are structures that Member States must create to engage with relevant stakeholders and "*discuss the different scenarios envisaged for energy and climate policies, including for the long term, and review progress*".[88] These dialogues are not mandatory to fulfil the public consultation requirement from article 10 but they can be a forum to discuss the NECPs.[89]

[86] European Commission, Commission Notice on the Guidance to Member States for the update of the 2021-2030 national energy and climate plans, 29 December 2022, 2022/C 495/02, par. 3.2.
[87] As provided in article 9 paragraph 2 of the Governance Regulation.
[88] Governance Regulation, article 11.
[89] Governance Regulation, article 11: "*Integrated national energy and climate plans may be discussed within the framework of such a dialogue.*" and Governance Regulation, recital 30.

It is worth noting that the Governance Regulation relies heavily on this "*permanent multi-level*" dialogue.[90] Two projects were funded under the Life Programme[91] to help Member States build multi-stakeholder platforms with the aim of strengthening consultation processes, develop and implement effective NECPs.[92]

The Commission dedicated a whole paragraph to these dialogues in its Guidance from December 2022.[93] The language used seems to indicate that the Commission views the multi-level dialogues as vital tools for public participation and even public consultations. For example, they state that "*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*.".[94] This blurs the difference between public consultation and stakeholder consultation and gives the impression that conducting dialogues amongst stakeholders will be sufficient as a public participation process. The European Commission also seems to consider it a foregone conclusion that MCEDs will engage in the drafting of the updated NECPs, although their involvement in the drafting of the NECPs is not rendered mandatory by the wording of the Regulation.

In this regard, the Spanish Supreme Court recently ruled on a complaint filed by environmental NGOs alleging failure of the Spanish government to take adequate action on climate change consistent with the Paris Agreement.[95] The plaintiffs challenged the Spanish NECP on substantive grounds but also procedural grounds, alleging, *inter alia*, that since no MCED had been carried out prior to the adoption of the Spanish NECP, this formal defect rendered the plan irregular. The Supreme Court found that article 11 of the Governance Regulation, interpreted in the broader context of the governance framework, provided for a mandatory intervention of these dialogues in the establishment of the NECPs. The Court acknowledged[96] the confusion this interpretation creates with the discretionary wording of article 11, which provides that the NECPs "*may*" be discussed in the framework of the MCEDs. It asserted however that the logical purpose of these

90 Governance Regulation, recital 30.

91 The LIFE Programme is a funding instrument of the European Commission created to contribute to the environmental and climate action, see more details here.

92 "LIFE PlanUp: : A multi-stakeholder platform for inclusive and ambitious 2030 climate plans" from 2018 to 2021, website here and "National Energy and Climate Platforms to deliver on the EU 2030 targets" from 202 to 2025, website here.

93 European Commission, Commission Notice on the Guidance to Member States for the update of the 2021-2030 national energy and climate plans, 29 December 2022, 2022/C 495/02, par. 3.2.

94 European Commission, Commission Notice on the Guidance to Member States for the update of the 2021-2030 national energy and climate plans, 29 December 2022, 2022/C 495/02, par. 3.2.

95 For an overview of the case, timeline and challenging grounds, see the Climate chase chart webpage, available here.

96 Spanish Supreme Court, 24 July 2023, judgment no 1079/2023, available in Spanish here. In the context of this paper, the decision of the Spanish Court is limited to the aspects related to MCEDs.

dialogues was to be mandatory involved in the preparation of the NECPs.Nevertheless, the court concluded that the omission of these dialogues prior to the adoption the NECP by the Spanish government does not entail the nullity of the NECP, due to the haste in establishing and approving the plan as well as the complexity of the structured dialogues imposed by the Regulation.

This case demonstrates the confusion created by the wording of articles 10 and 11 of the Regulation regarding the interaction and timely intervention of each public participation process - i.e. in the drafting or implementation phase. It may also indicate that national courts are not willing to strike down the legality of NECPs for failing to comply with participatory rights.

All the limitations outlined above inevitably lead to the conclusion that the Governance Regulation does not constitute a proper regulatory framework as required by article 7 AC.

1.2.2. Transparent and fair framework within which the necessary information to participate

This requirement is provided in the first sentence of article 7 AC. The Aarhus Convention Implementation Guide specifies that the fairness of the framework is to be interpreted with the help of article 1 AC which provides that one objective of the Convention is to guarantee rights in respect of public participation in decision-making, for which a transparent and fair framework is conditional. This implies that the public must be able to use rules that are applied in a clear and consistent fashion.[97]

The Compliance Committee explained that the "*"transparent and fair framework" covers both the transparency and fairness of the general framework and also the transparency and fairness of the public participation procedure carried out on a particular plan or programme*".[98] In the context of the Governance Regulation, this relates to the transparency of the governance framework, which will be assessed in the below section on access to information. As for the different national public participation procedures, their transparency and fairness can only be ensured at national level with the help of a clear, binding and unified framework set out at the European level in the Governance Regulation text combined with effective monitoring and support from the European institutions.

[97] Aarhus Convention Implementation Guide, p. 178.
[98] ACCC, Findings and recommendations with regard to communication ACCC/C/2014/100 concerning compliance by the United Kingdom of Great Britain and Northern Ireland, available here, par. 105.

In its recital 29, the Governance Regulation provides that "*When carrying out public consultations, and in line with the Aarhus Convention, Member States should aim to ensure equal participation, […].*".[99] The Compliance Committee pointed out that this language is only aspirational and does not make this provision binding.[100] Despite having alerted the European Commission before the adoption of the final legal text, this absence of a binding requirement was not fixed in the latter stage of negotiations around the text.[101] This was one ground upon which the European Union was found not compliant with the Aarhus Convention requirements by the Meeting of the Parties both in 2014[102] and again in 2021.[103]

In this latter decision, the Meeting of the Parties urged the European Union to adopt a "*proper regulatory framework and/or clear instructions to ensure that the arrangements for public participation in the Member States are transparent and fair and that the necessary information is provided to the public*".[104] The Commission, in its latest action plan regarding the implementation of these recommendations, laid out the steps it had taken in order to ensure a transparent and fair framework. It intends on engaging with Member States assisting them in the preparation of their updated NECPs and notably accompanying them in providing a description in the NECPs on how they ensured that public participation was transparent and fair.[105] The Commission refers here to the NECP template in Annex I of the Governance Regulation, which provides that Member States must include a section on "*Consultations of stakeholders, including the social partners, and engagement of civil society and the general public*".[106] The Commission maintains that in this section the transparency and fairness of the public participation procedure must be reflected and that it will assess the extent to which it is in their assessment pursuant to article 9 paragraph 2 of the Governance Regulation.[107] The 2022 Commission Guidance adopts the same interpretation

[99] Governance Regulation, recital 29.
[100] ACCC, First progress review of developments relating to request ACCC/M/2017/3 on compliance by the European Union with its obligations under the Convention, 26 Feb. 2019, available here, par 36.
[101] ACCC, Report of the Compliance Committee on compliance by the European Union, 31 Aug. 2021, available here, par. 65.
[102] Decision V/9g of the Meeting of the Parties on compliance by the European Union with its obligations under the Convention (ECE/MP.PP/2014/2/Add.1), available here.
[103] Decision VII/8f concerning compliance by the European Union with its obligations under the Convention, (ECE/MP.PP/2021/2/Add.1), available here.
[104] Decision VII/8f concerning compliance by the European Union with its obligations under the Convention, (ECE/MP.PP/2021/2/Add.1), available here, par. 2 (a) (i).
[105] European Union, Plan of action for decision VII/8f (European Union), 31 July 2022, p. 4.
[106] Governance Regulation, Annex I Section A, 1.3 iii.
[107] European Union, Plan of action for decision VII/8f (European Union), 31 July 2022, p. 4.

of the Governance Regulation text and encourages Member States to describe "*how the process allowed the public to participate transparently and fairly*".[108] Such an interpretation is welcome but still does not resolve the issue of the missing legal basis in the Governance Regulation text, as explained above, and is not, in any case, binding for Member States.[109]

The second part of this requirement relates to the provision of the information necessary for the public to participate. This requirement will be assessed in the below section on access to information.

1.2.3. Reasonable timeframes for public participation procedures

This third requirement is laid out in article 6 paragraph 3 AC, applicable though cross-reference in article 7 AC: "*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.*" These phases correspond to the various timeframes required to, among others, provide the information necessary to participate, prepare for and get acquainted with the information, and finally effectively participate.[110] The respective timeframes must also be adapted to the nature, complexity and size of the plan or programme.[111]

This requirement is explicitly addressed in article 10 paragraph 2 of 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*". The Compliance Committee considered that this sentence in article 10 met the requirements of article 6 paragraph 3 AC.[112] It is worth noting that this obligation, made binding by the non-aspirational language but obligational verb "shall" was added to the lacking European Commission's proposal in the negotiation mandate of the European Parliament and was taken on during interinstitutional negotiations.

[108] European Commission, Guidance Notice, par. 3.2.
[109] See below developments and criticism from the Aarhus Convention Compliance Committee.
[110] Aarhus Convention Implementation Guide, p. 142.
[111] For an application to projects: ACCC, Findings and recommendations of the Compliance Committee with regard to communication ACCC/C/2006/16 concerning Compliance by Lithuania, April 2008, par. 69.
[112] ACCC, Report of the Compliance Committee on compliance by the European Union, 31 Aug. 2021, available here, par. 66.

However, Member States' practice during the first submission round in 2019-2020 showed that this requirement was across the board not complied with across the board. Reasonable timeframes were not respected either in the preparation of the public participation or for the participation procedure itself. For example, Romania opened a public participation procedure for 10 days on the draft NECP, which was released on the day of commencement of the public participation.[113] This trend was found in many Member States for example in Croatia,[114] or in Ireland.[115] The Governance Regulation can remedy these shortcomings by introducing a minimum time-limit for the preparation and the public participation procedure.

In addition, members of the public should be provided with an accessible and clear timeline ahead of each submission deadline to allow them sufficient time to get acquainted with the information, prepare for the public participation procedure and effectively participate. The European Commission could issue guidance to Member States with clear instructions on how to establish this timeline in line with the requirements of the Governance Regulation and hence with the Aarhus Convention. Member States could be then required to publish such a timeline, tailored to their country.[116]

1.2.4. Early public participation

Article 6 paragraph 4 AC requires that Parties provide for early public participation in the process, when all options are open and effective public participation can take place. The Aarhus Convention Implementation Guide recalls however that this does not prevent an authority from taking a position or determining a preliminary opinion as to a possible decision in the context of article 6,[117] which means that the Party can prepare a draft plan or programme ahead of the public participation procedures.

This requirement is also explicitly mentioned in article 10 paragraph 1 of the Governance Regulation, which provides that "*each Member State shall ensure that the public is given early and*

[113] ClientEarth, *Not (yet) a missed opportunity. Influencing the 20212030 NECPs through early Public Participation*, 7 December 2018, p. 6.
[114] LIFE Unify, *Taking Stock & Planning Ahead: National Energy and Climate Plans as a tool to achieve climate safety and energy security*, July 2022, p. 9.
[115] EJNI Ireland, *Legal obligations for public participation during the 2023 updating of National Energy and Climate Plans (NECPs)*, March 2023, p. 5.
[116] As recommended in LIFE PlanUp, *Fit for Flop/55: Lessons from the National Energy and Climate Plans to achieve a climate-neutral Europe*, May 2021, p. 10.
[117] Aarhus Convention Implementation Guide, p. 144.

effective opportunities to participate in the preparation of the draft integrated national energy and climate plan". However, it fails to require that this early participation should mean that the public must be able to express its views when all options are open. Therefore, the Compliance Committee found the European Union not compliant for not mentioning this important requirement.[118]

The addendum, "*when all options are open*", or any equivalent formulation, is considered a fundamental component of the legal obligation in article 6 paragraph 4 AC. It ensures that the environmental decision-making is shaped by the public's views and that public participation does not become a 'box-ticking' exercise rubberstamping an already foregone conclusion. Consulting when all options are open avoids "citizenwashing",[119] a form of reputation laundering, namely the appearance of involving the public in decision-making without taking their views in account. In this regard, the range of available options may be decreased before notifying public participation procedures but cannot be reduced to the one proposed by the authority. It is questionable whether this is the case when consulting on NECPs only after having narrowed down options to the extent that they already constitute a draft plan. This very same criticism was issued by civil society observers which deemed the public participation as in many cases "*only notional*".[120]

This lack of early participation requirements, when all options are open, can also be linked to the fact that draft plans for the first 2021-2030 period were to be submitted directly after the adoption of the Regulation. Member States had to submit their draft plans with exceptional expediency. However, there is no evidence of why such an absence of early participation requirement is justified for the subsequent updates and plans. The European Commission, called upon by the Meeting of the Parties in its decision VII/8f, recalled to the Member States that they are obliged, according to the Aarhus Convention and despite a lack of clear expression of this obligation in the Governance Regulation, to consult the public when all options are open.[121] The Compliance Committee considered however that a recollection from the Commission to the Member States' obligations does not amount to a clear instruction of a legal framework, which equals a direction or order that must be followed by the Member States.[122] Compliance will only be achieved by revising article 10 to include the requirement for public participation to occur when all options are still open.

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[118] ACCC, Report of the Compliance Committee on compliance by the European Union, 31 Aug. 2021, available here, par. 67.
[119] European Environmental Bureau, "Citizenwashing: what it is and how to spot it", 13 July 2022, available here.
[120] LIFE Unify, *Taking Stock & Planning Ahead: National Energy and Climate Plans as a tool to achieve climate safety and energy security*, July 2022, p. 9.
[121] European Commission, Guidance Notice, par. 3.2
[122] ACCC, Email to party concerned providing brief summary of the Committee's concerns on plan of action, 8 Dec. 2022, available here.

1.2.5. Due account of public participation

Related to the effectiveness of public participation processes and ensuring that they have an influence on the decision-making process, article 6 paragraph 8 further requires that due account is taken of the outcome of public participation. With regards to public participation in project decision-making, the Compliance Committee observed that: "*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.*".[123] This obligation should be interpreted, at the bare minimum, as the obligation to give a written reasoned decision which includes a discussion of how the public participation outcome was incorporated or not.[124] For example a zoning plan may concretely address specific views expressed in its preface or a legislative proposal may give an overview of a corresponding public consultation carried out and how its main outcomes were considered in the proposal.

Taking account of the public participation outcome can take many forms. The authority can respond to comments made directly by the public, justify the decision taken in light of the views expressed by the public, or answer specific questions as to why it has taken this decision and not some other substantially different one. This can also be attained through an assessment of the public's views and the possible repercussions on the decision. The European Commission should provide Member States with clear best examples on how NECPs can take these outcomes into account.

This requirement can only be met if procedural safeguards are put in place to ensure that the outcome of the public participation is not only a "box-ticking" exercise[125] and its disregard can amount to a procedural violation that may invalidate the decision.[126]

Notwithstanding, article 10 of the Governance Regulation disregards this obligation entirely. It does mention that the draft and the final plans must be submitted with a summary of the public's views or provisional views. This requirement is also listed in article 3 of the Governance

[123] ACCC, Findings and recommendations of the Compliance Committee with regard to communication ACCC/C/2006/24 concerning compliance by Spain, December 2009, par. 98.
[124] ACCC, Findings and recommendations of the Compliance Committee with regard to communication ACCC/C/2006/24 concerning compliance by Spain, December 2009, par. 99.
[125] Not taking the public's view into account in the NECPs while claiming that the plans have been established in consultation with the citizens is a misguiding statement that also constitutes a case of 'citizenwashing' as explained in section I. B. 4.
[126] Aarhus Convention Implementation Guide, p. 156.

Regulation which mentions "*a description of the public consultation and involvement of stakeholders and their results*".[127] A summary does not equal a justification of how the public's views were reflected or not in the plan. The Compliance Committee pointed that out and repeatedly urged the Commission to give clear instructions to Member States in this sense.[128] Article 10 must be revised to explicitly include this requirement.

Lastly, the lack of regard towards the outcome of the public participation can be put into perspective with the assessment of the draft undertaken by the Commission.[129] Indeed, the assessment and the recommendations contained therein must be taken into account in the final NECP.[130] Should a recommendation not be addressed, the Member State in question would have to provide and make public its reasons.[131] It also would have to provide its reasoning for not addressing a specific recommendation either in their final plan or their NECP progress report.[132] This ensures that the decisions taken by the Member States are fact-based and fit within the common objectives and targets of the Energy Union.[133] The iterative discussion enshrined in the Governance framework thus ensures that the Commission's views are properly reflected in the NECPs, whereas the public's views only have to be mentioned but can remain unheeded. This blatant discrepancy should be remedied, and the same language should be used for the Commission's recommendations as well as for the outcome of the public participation.

In theory, the prominent power of the Commission in the establishment and implementation[134] of the NECPs provides more space for increased scrutiny on its part while assessing the compliance of the Member States with the public participation requirements presented in this paper.

This specific role that the European Commission plays in monitoring the establishment and implementation of the NECPs has not eluded the Meeting of the Parties to the Aarhus Convention. It indeed requested that - along with the other adjustments regarding public participation - the European Union adapts the manner in which it evaluates the NECPs.[135]

[127] Governance Regulation, article 3 paragraph 2 (a).
[128] ACCC, Report of the Compliance Committee on compliance by the European Union, 31 Aug. 2021, available here, par. 69.
[129] As required by the article 9 of the Governance Regulation.
[130] Governance Regulation, article 34 paragraph 2 (a).
[131] Governance Regulation, article 9 paragraph 3.
[132] Governance Regulation, article 34 paragraph 2 (b).
[133] Governance Regulation, article 31 paragraph 1.
[134] Governance Regulation, article 34.
[135] Decision VII/8f concerning compliance by the European Union with its obligations under the Convention (ECE/MP.PP/2021/2/Add.1, available here, par. 2 (b).

In its action plan following up on decision VII/8f, the European Commission committed to reflect whether "*Member States provided in their (draft updated) NECPs enough precise information on the consultation process undertaken by each of them.*" and it also committed to assess the qualitative aspects of the public participation processes.[136] The Compliance Committee – as it did for the other segments of the action plan – pointed out that the European Commission did not identify clear normative steps in its action plan that would amount to 'clear instructions' given to Member States as requested by the Meeting of the Parties.[137]

Following the Compliance Committee's comments, it is worth noting that the European Commission did not include a commitment to a more detailed assessment in its guidance for Member States issued in December 2022. It could have informed the Member States of its intent to increase its scrutiny, which could have contributed to better public participation in the drafting of the updated NECPs. It is very likely that the absence of such a mention in the guidance will hamper the effective implementation of decision VII/8f. This absence also undermines the usefulness of the assessment as a tool for more effective public participation in the preparation of the NECPs. The lack of public participation in the updating process that was highlighted by observers[138] might have been avoided if the European Commission had warned the Member States well in advanced that the quality and consideration of the public participation processes would be assessed.

To ensure that public participation requirements are complied with, the Governance Regulation should mention that the Commission's assessment will focus in particular on whether these requirements were met by Member States, especially the requirement to take due account of the public participation outcome.

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[136] European Union, Plan of action for decision VII/8f (European Union), 31 July 2022: "*the Commission will assess the compliance with the requirements under Article 10 and Annex I of the Governance Regulation, in order to show in particular, whether the participation in its Member States is transparent and fair, whether the necessary information was provided to the public, whether the public participation was enabled when all options were open, and whether due account was taken of the outcome of the public participation. If the Commission concludes that the above was not met, it may address the issue in the country specific recommendations*".

[137] ACCC, Email to party concerned providing brief summary of the Committee's concerns on plan of action, 8 Dec. 2022, available here.

[138] Didi Romain, Laugier Romain, Mascolo Federico, *Public participation in National Energy Climate and Energy Plans. Evidence of weak & uneven compliance in Member States*, April 2023. This study showed the lack of public participation in the drafting of the NECP updates.

1.2.6. Identify the participating public while considering the objectives of the Convention

This requirement is set out in the second sentence of article 7 AC. The “public” is defined in article 2 AC as “*one or more natural or legal persons, and in accordance with national legislation or practice, their associations, organizations or groups.*”. The scoping of the different members of the public subject of rights granted by article 7 AC is left to the discretion of the Parties.

A broader interpretation of the term public is here necessary, since article 7 AC does not limit the scope of the public to the members “concerned” in the decision-making as in article 6 paragraph 6(f) AC. The identification of the members of public invited to participate should also be carried out “*while taking into account the objectives of the Convention*”.[139] Among these objectives listed in the Preamble and in article 1 AC, we can find the objective to “*encourage widespread public awareness of, and participation in, decisions affecting the environment and sustainable development*”.[140] This clause has been interpreted as a positive obligation requiring authorities to make the effort to identify the members of the public who should be actively encouraged to participate.[141] It thus aims at streamlining public participation in order to make the process more effective and it should not be interpreted as a tool to limit participation.[142]

In this regard, the Governance Regulation does not define the term “public”, nor does it specify the requirement to identify the public concerned. In the context of the Multilevel climate and energy dialogue it provides a list of stakeholders[143] which are to be involved in such dialogues. These dialogues are not presumed to include discussions on the draft NECPs, even if they can do so.[144] This list cannot amount to the identification of the public needed in the framework of article 7 AC. 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.

[139] Aarhus Convention, article 7.
[140] Aarhus Convention, Preamble par. 14.
[141] Jendrośka Jerzy, Public Participation of the Preparation of Plans and Programs: Some Reflections on the Scope of Obligations under Article 7 of the Aarhus Convention, 6 J. Eur. Envtl. & Plan. L. 495 (2009), p. 514.
[142] Aarhus Convention Implementation Guide, p. 179.
[143] Governance Regulation, article 11 : “*local authorities, civil society organisations, business community, investors and other relevant stakeholders and the general public*”.
[144] Governance Regulation, article 11 : “*Integrated national energy and climate plans may be discussed within the framework of such a dialogue.*”

1.2.7. Public participation in the implementation of the NECPs

Lastly, one of the objectives of the Aarhus Convention is to ensure the right of every person of present and future generations to exercise its right of participating in decision-making in environmental matters.[145] Public participation must be ensured also in the implementation of plans in environmental matters. The level of public participation in national energy and climate policymaking varies among Member States.[146] One point of discussion for future NECPs is whether they should lay out public participation requirements for the implementation of the policies and measures necessary to meet their objectives.

The lack of public participation avenues during the implementation of the NECPs becomes also obvious when one takes a step back and realises that the iterative discussions between the Member States and the Commission leave the public out of the picture completely. The public has no say in how the Member States address the Commission's assessment of their final plans and therefore takes no part in the "ongoing dialogue"[147] between the Member States and the European institution. The public is also not involved in the way Member States address the European Commission's response to insufficient progress towards the Union's energy and climate objectives and targets and their corresponding recommendations.[148] Guaranteeing public participation in the implementation of the NECPs was also suggested in the final opinion of the Fit for Future Platform.[149]

Involvement of the public in the implementation of the NECPs could be ensured by introducing a segment in the policies and measures section (Section A 3. of the NECP template[150]) for each of the five dimensions of the Energy Union explaining how public participation is foreseen in the decision-making process.

[145] Aarhus Convention, article 1.
[146] Duwe Matthias, *Making EU climate governance fit for net zero. An analysis of the current landscape of relevant EU climate policy processes and recommendations for alignment with the climate neutrality objective*. Ecologic Institute, Berlin, February 2022, p. 22.
[147] Governance Regulation, recital 54.
[148] Governance Regulation, article 32.
[149] Fit for Future Platform, Opinion adopted on 5 December 2022, 2022/SBGR1/03, available here.
[150] Governance Regulation, Annex I.

Part 2 - Access to Information: Planning behind closed doors

Access to information is an indispensable tool towards enhancing the quality and the implementation of environmental decisions,[151] and consequently it is also a prerequisite for exercising the other two pillars of the Convention. Participation through dialogue or legal challenge can only be effective if it is properly informed. Not surprisingly, access to information requirements can be found throughout the whole Convention. A specific right to request environmental information is enshrined in article 4 AC, whereas article 5 AC prescribes the categories of environmental information which have to be actively disseminating to the public. Access to information requirements are also present as a prerequisite to public participation procedures in articles 6, 7 and 8 AC and exercise of access to justice rights in article 9 paragraph 5 AC.

Environmental information is defined as "*any information in written, visual, aural, electronic or any other material form*" on the state of elements of the environment, factors, such as substances, energy, activities, measures, policies, plans and programmes affecting or likely to affect the environment, as well as the state of human health and safety.[152] This definition is mirrored in the transposing Access to environmental information Directive 2003/4/EC.[153]

With regards to the Governance Regulation, the compliance assessment will focus first on access to information with regards to the public participation procedures (2.1) and more generally with regards to access to environmental information mentioned in the Regulation (2.2).

Before diving into the different configurations where the Governance Regulation must comply with these access to information requirements, it should be highlighted that NECPs and LTS, as plans relating to climate and energy, and all their draft forms, clearly qualify as environmental information in the meaning of article 2 paragraph 3 AC. They further must be actively disseminated according to article 5 paragraph 5(c) AC which provides that policies, plans and programmes relating to the environment must be available in an electronic database.

[151] Aarhus Convention, recital 9.
[152] Aarhus Convention, article 2 paragraph 3.
[153] See Directive 2003/4/EC of the European Parliament and of the Council of January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC, article 2 paragraph 1.

2.1. Access to information with regards to public participation procedures

2.1.1. Relevant requirements under the Aarhus Convention

As mentioned above, it should be noted that some information must be provided specifically in the framework of article 7 AC, which is listed in article 6 paragraph 2 of the Convention. Not all information listed in this paragraph is necessary for an effective participation in the framework of article 7 AC.[154] The information on the public participation procedure can take the form of a public notice that mentions *inter alia*: the proposed programme or plan in form of a draft, the public authority responsible for making the decision, the envisaged procedure including the commencement of the procedure, opportunities for the public participate, an indication of what environmental information relevant to the plan or programme can be found, etc.[155] This list has been made more explicit in the Maastricht Recommendations on Promoting Effective Public Participation in Decision-making in Environmental Matters, which also mention access to draft texts, cost-benefit analysis, information on the possible effects of the plan or programme.[156] Moreover, all this information should be easy to understand and accessible, factual, objective and tailored to the proposed plan or programme.[157]

This requirement is also supported by the more general obligation in article 5 paragraph 7(a) AC to "*publish the facts and analyses of facts which it considered relevant and important in framing major environmental policy proposals*".[158]

2.1.2. Compliance of the Governance Regulation

The Governance Regulation provides in its article 10 that "*Each Member State shall ensure that the public is informed*"[159] and in its article 9 paragraph 4 that "*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.*".[160] Recital 29 of the Governance Regulation gives also further indication on how to inform the public: "*When carrying out public consultations, and in line with the Aarhus Convention, Member States should aim to ensure* [...] *that the public is*

[154] Aarhus Convention Implementation Guide, p. 177.
[155] See the list in Aarhus Convention, article 6 paragraph 2.
[156] Maastricht Recommendations, p. 49.
[157] Maastricht Recommendations, p. 50.
[158] Aarhus Convention, article 5 paragraph 7 (a).
[159] Governance Regulation, article 10 paragraph 2.
[160] Governance Regulation, article 9 paragraph 4.

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.".[161] The same criticism expressed by the Compliance Committee with regards to the aspirational language in the Regulation also applies here. Apart from these two mentions, no specific requirements are laid out in the text of the Regulation to implement the above-mentioned obligations.

The manner in which article 9 paragraph 4 is worded can also be misleading and render the public participation guarantee void. Indeed, by providing that the drafts are to be made available in the context of the public consultation, one can understand that Member States should publish a draft of their NECP for the public to consult in the framework of the participation procedures in order to make informed contributions. However, they should always submit a different version to the European Commission has foreseen in article 9 paragraph 1, having taking account of the public's view. Both drafts cannot be referencing to the exact same document, or the requirement of article 6 paragraph 8 AC to modify the NECP and incorporate, or at least address the public's concerns would be completely disregarded. Nevertheless, the Regulation text does not differentiate between versions of the drafts as it should.

Without directly referring to the public participation procedure, the Governance Regulation requires Member States to "*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.*".[162] This relates to the analytical basis of the NECP which must be described in the plan itself.[163] This could partially implement the requirement to make all relevant information necessary for the decision-making process available. However, there is no specified timeline for this requirement to be met, so Member States could wait until the drafts, or even the final plans, are submitted to disclose this information, and such information would therefore not enlighten the public in their participation. There are also no requirements on the accessibility of the information to non-specialised audiences in formats which allow a wide subsection of the public to meaningfully engage. The lack of clear requirements as to what has to be disclosed and when in order to have an 'informed' public entering public participation procedures should be remedied.

[161] Governance Regulation, recital 29.

[162] Governance Regulation, article 8 paragraph 3.

[163] Governance Regulation, Annex I Section B "Analytical basis".

Furthermore, the legal basis is unclear regarding the applicability of these existing requirements to the update of the NECPs as required by article 14 of the Governance Regulation. Paragraph 6 of this article refers to the application of article 10 of the Governance Regulation to the updating process. The public must then be informed throughout the public participation process. Article 9 paragraph 2 is also mentioned but not paragraph 4. From a systematic point of view, this would lead to a possible disregard of the requirement to make the draft update available. This risk would be avoided by revising article 14 paragraph 6 to include an explicit reference to article 9 paragraph 4.

The Commission Guidance, however, specifies that "*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*".[164] The draft update can be considered as "a relevant document". This constructive and Aarhus consistent interpretation is however not binding as it is only mentioned in the Commission Guidance. The Governance Regulation must therefore be revised also in this regard so that it becomes mandatory.

2.2. Access to environmental information

2.2.1. Relevant requirements under the Aarhus Convention

Environmental information as defined above must be disseminated *inter alia* in the configurations listed in article 5 AC. In this regard, state of the environment reports, information on the quality of the environment, policies, plans, programmes and agreements relating to the environment are among the information which must be provided to the public and actively disseminated. For example, progress reports on implementation of strategies, policies, programmes and action plans relating to the environment[165] and reports on the state of the environment.[166]

[164] European Commission, Commission Notice on the Guidance to Member States for the update of the 2021-2030 national energy and climate plans, 29 December 2022, 2022/C 495/02, par. 3.2.
[165] Aarhus Convention, article 5 paragraph 5 (a).
[166] Aarhus Convention, article 5 paragraph 3 (a).

2.2.2. Compliance of the Governance Regulation

The governance framework is supplemented by the Access to Environmental Information Directive,[167] adopted in 2003 to implement the first pillar of the Aarhus Convention in both aspects: the access to information upon request and the collection and dissemination of information. This Directive is not mentioned in the Governance Regulation text but that does not affect its application to the governance framework.

The iterative governance framework created by the Governance Regulation is based on the sharing of information between Member States and the European Commission. It replaced the previous reporting mechanism adopted in 2013 to monitor and report greenhouse gas emissions and other information relevant to climate change.[168] The Governance Regulation also lays down a monitoring mechanism for greenhouse gas emissions required under the UNFCCC and the Paris Agreement as well as in the Effort Sharing Regulation and LULUCF Regulation. Member States are also required under the Governance Regulation to report every two years on the status of implementation of their NECP by means of a NECP progress report.[169]

Those reports can be qualified as environmental information and fall under article 5 paragraph 5(a) AC and also under article 5 paragraph 3(a) AC. They must be made available to the public in an electronic database. The Governance Regulation requires Member States to make the NECP reports available to the public.[170] Furthermore, the establishment of an electronic database (an "*eplatform*") is foreseen in the text of the Regulation to, *inter alia*, facilitate public access to information.[171] That platform must be used by Member States to submit reports,[172] whereas the Commission must use it to make publicly available the final NECP, their updates and the LTS.[173] This platform is a webpage on the European Commission website.[174]

The NECP progress reports, however, are not directly available, but are submitted via two separate platforms, depending on each "dataflow". The first, Reportnet3, is a website[175] available

[167] Directive 2003/4/EC of the European Parliament and of the Council of January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC.
[168] Regulation (EU) No 525/2013 of the European Parliament and of the Council 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, available here.
[169] Governance Regulation, article 17 paragraph 1.
[170] Governance Regulation, article 17 paragraph 7.
[171] Governance Regulation, recital 46 and article 28 paragraph 1.
[172] Governance Regulation, article 28 paragraph 2.
[173] Governance Regulation, recital 47 and article 28 paragraph 3.
[174] Available here.
[175] Available here.

to the public but where the information submitted by the Member States can be restricted from public view by the submitting country. The second, ReportENER, is a platform[176] which is only accessible to Member States. During the first round of biennial reports due March 15th 2023, the Commission specified on its website[177] that the progress reports will go through a quality assurance and control process coordinated by the Commission services and should all, even the ones submitted via ReportENER, be made available on the *eplatform* following finalisation of this process. The Member States are also allowed to make the reports submitted publicly available ahead of the completion of this process.[178]

The publication of the NECP progress reports raises two questions. Firstly, their publication cannot be considered timely. They are to be published by June 30th 2023, which coincides with the deadline for submitting the draft updates.[179] The Commission encouraged Member States in its Guidance Notice to use the NECP progress reports when preparing their updated NECP both for the analytical basis of the plans, the planned policies and measures,[180] and for assessing the environmental impacts.[181] The relevance of the progress reports for the NECP updates is even mentioned in the Governance Regulation text, which provides that "*as part of the updates, Member States should make efforts to mitigate any adverse environmental impacts that become apparent as part of the integrated reporting.*"[182] The progress reports will be a cornerstone in assessing in which of the five areas of the Union of Energy and how each Member State must increase its ambition. Insofar as they are a building block of the updated NECP, they should be made accessible to the public as part of the analytical basis and relevant environmental information necessary to participate according to article 7 AC and article 10 of the Governance Regulation. The timeline provided by the Commission does not allow for them to be published in their entirety before the submission of the drafts, which should logically happen after completion of a first round of public participation as stated in the first section. Furthermore, even after the 30th of June deadline, not all progress reports have been made available by the European Commission on the dedicated platform.[183] This is in part due to

[176] Available here.
[177] Available here.
[178] For example, Slovakia made available its progress reports even before completion of the quality control, available here (accessed 2 June 2023).
[179] Governance Regulation, article 14 paragraph 1.
[180] European Commission, Guidance Notice, paragraph 3.1.2.
[181] European Commission, Guidance Notice, paragraph 3.5.2.
[182] Governance Regulation, recital 34.
[183] As of mid-August 2023, only 13 country reports, not all in full, were available in the folder on CIRCABC available here. As of mid-September 2023, all Member States submitted their progress reports but only 15 of them were available on the dedicated CIRCABC platform, see the document "SoP for CIRCABC – 1 September 2023" available here.

the fact that Member States did not all submit their progress reports on time, as the state of play provided by the European Commission and dated from September 1st indicates.[184]

Secondly, the content of these reports is questionable. The Governance Regulation provides that they "*should be carried out in order to ensure transparency towards the Union, other Member States, regional and local authorities, market actors including consumers, any other relevant stakeholders and the general public*."[185] They follow a template created by the European Commission in an Implementation Regulation[186] accompanied by Reporting Guidelines[187] prepared by the European Commission and the European Environment Agency. The outcome is a compilation of excel sheets that are hardly intelligible. 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.[188] It was also pointed out[189] that the complexity of the reporting system was the reason why so many Member States submitted their progress reports much later than the March 15th 2023 deadline.[190] The Reporting Guidelines should then be revised to enable intelligible and accessible progress reports, that will both improve the iterative dialogue between Member States and the Commission and effectively inform the public.

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[184] See he document "SoP for CIRCABC – 1 September 2023", available on the dedicated CIRCABC platform available here

[185] Governance Regulation, recital 40.

[186] Commission Implementing Regulation (EU) 2022/2299 of 15 November 2022 laying down rules for the application of Regulation (EU) 2018/1999 of the European Parliament and of the Council as regards the structure, format, technical details and process for the integrated national energy and climate progress reports, available here.

[187] Not published by the European Commission but available on the Spanish government website here.

[188] Governance Regulation, article 29.

[189] Hudec Michal, "Slovakia failed to inform Commission about energy, climate plan progress", *Euractiv*, 28 March 2023, available here.

[190] As of beginning of June, there were still 9 Member States which did not have submitted the entirety of the NECP progress reports or even none.

Part 3 - Access to Justice: Untapped remedies for lacking climate action

The right to an effective remedy, also commonly known as access to justice, is the third pillar of the Aarhus Convention, enshrined in its article 9. It ensures enforcement of the first two pillars but also guarantee individuals and NGOs the right to challenge acts or omissions by private persons or public authorities which contravene environmental law.[191]

In the context of the governance framework, access to justice could become relevant through a twofold approach. Firstly, the question arises whether members of the public can challenge NECPs and LTS in front of the national courts. 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 LTS issued by the European Commission according to article 13 and 15 of the Governance Regulation.

Although the second option has been recently explored through internal review requests filed to the European Commission[192] and whose appeals are pending before the General Court of the European Union,[193] the following analysis will focus only on the first approach. More specifically it will consider whether the European Union has put in place a proper framework to ensure that NECPs and LTS can be challenged throughout the EU Member States. The reflection may feed into the discussion around the opportunity to engage in litigation regarding climate action reflected in the NECPs, as illustrated in the Spanish cases mentioned above.[194]

3.1. Relevant requirements of the Aarhus Convention

According to article 9 paragraph 2 AC, each Party shall ensure that members of the public concerned have access to a review procedure before a court of law and/or another independent and impartial body to challenge the legality of any decision, act or omission subject to the provisions of article 6, and where provided for under national law and without prejudice to article 9 paragraph 3, or other relevant provisions of the Convention.[195] Article 9 paragraph 3 AC is intended to provide members of the public, which meet the criteria, if any, laid down by Parties in their

[191] Aarhus Convention, article 9 paragraph 3.
[192] See the Response by the European Commission to the internal review requests, April 2022, ENER/DJ/ad(2022)2507188, available here.
[193] See for example the action brought on 3 June 2022 by Föreningen Svenskt Landskapsskydd v Commission, T-346/22, summarised here.
[194] Spanish Supreme Court, 24 July 2023, judgment no 1079/2023, available in Spanish here.
[195] Aarhus Convention, article 9 paragraph 2.

national law, with access to adequate remedies against a broader range of acts and omissions than paragraph 2, namely against all “acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment”.[196] When determining how to categorize a decision under these two paragraphs, the Compliance Committee specified that the relevant criteria is the legal functions and effects of a decision, i.e. whether it amounts to a permit to carry out an activity in the sense of article 6 AC.[197] As previously discussed, the NECPs do not qualify as permits in the sense of article 6 AC.[198]

Article 9 paragraph 2 AC cannot therefore be applied to guarantee an access to justice path to challenge NECPs and LTS under the Aarhus Convention. It should however be noted that it has been argued that the references to article 6 AC in article 7 AC should trigger mandatory application of article 9 paragraph 2 AC.[199] This interpretation, which is supported by some authors will however not be adopted in this paper. Article 9 paragraph 2 AC can however apply to plans and programmes if a State Party makes use of its procedural autonomy and extends the review procedures prescribed in article 9 paragraph 2 AC to other relevant provisions of the Convention.[200] This could include article 7 AC with regards to the public participation procedures and all acts or omissions related to these processes.[201]

Paragraph 2 and 3 of article 9 are not mutually exclusive. This means that article 9 paragraph 3 could apply independently.[202] As mentioned above, paragraph 3 allows more flexibility to the Parties while at the same time providing access to judicial reviews for members of the public of a larger number of acts and omissions than in paragraph 2.[203] As argued below, this paper maintains that NECPs pass the relevant tests to qualify for application of article 9 paragraph 3 AC.

As regards plans and programs, the central question is whether they can be interpreted as “acts of public authorities” in the meaning of the Aarhus Convention. The Compliance Committee pointed out that the concept of “acts” under article 9 paragraph 3 AC is to be given a broad

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[196] Aarhus Convention, article 9 paragraph 3.

[197] ACCC, Findings and recommendations with regard to communication ACCC/C/2005/11 concerning compliance by Belgium, 6 June 2006, available here, par. 53.

[198] See Section I A. 1.

[199] ClientEarth, *Access to Justice in European Union Law, A Legal Guide on Access to Justice in environmental matters*, 2021 edition, p. 14 and 36.

[200] Aarhus Convention, article 9 paragraph 2.

[201] Aarhus Convention Implementation Guide, p. 193.

[202] Aarhus Convention Implementation Guide, p. 193.

[203] Aarhus Convention Implementation Guide, p. 197.

interpretation.[204] As mentioned above, whether a decision should be challengeable is determined by its legal functions and not its label under national law.[205] The Aarhus Convention does not give Parties any discretion as to the acts that can be excluded from the scope of this article.[206]

Delving into the findings of the Compliance Committee, it remains unclear whether plans or programs must have a normative character or effect in order to be considered "administrative acts". On the one hand, the Compliance Committee used a first test of "binding effect" to review the possibility to challenge general and detailed spatial plans.[207] On the other hand, the Compliance Committee found the European Union to be in non-compliance for having created a criterion of "legally binding and external effect" as a pre-condition to challenge acts of the European institutions in the Aarhus Regulation.[208] This leaves us with a first test which may however not be decisive.

The Compliance Committee has also highlighted, that the decisive second test to qualify as an "administrative act" in the sense of article 9 paragraph 3 AC is whether the act or omission in question can potentially contravene provisions of national law relating to the environment. The Compliance Committee also noted that there is nothing in the wording of article 9 paragraph 3 AC that would limit the review of plans and programmes relating to the environment to those which may be subject to SEA.[209]

Turning to academic literature, we can observe that interpretations also vary. Part of the literature refuted altogether the possibility of subjecting plans and programmes to judicial review under article 9 paragraph 3 AC.[210] A more constructive interpretation has also been adopted, namely that plans and programs with a regulatory nature can be covered by article

[204] ACCC, Report of the Compliance Committee, Compliance by Germany with its obligations under the Convention, July 2017, available here.
[205] ACCC, Findings and recommendations with regard to communication ACCC/C/2011/58 concerning compliance by Bulgaria, 11 January 2013, available here, par. 53.
[206] ACCC, Findings and recommendations of the Compliance Committee with regard to communication ACCC/C/2008/32 (part II) concerning compliance by the European Union, June 2017, available here, par. 54.
[207] ACCC, Findings and recommendations with regard to communication ACCC/C/2011/58 concerning compliance by Bulgaria, 11 January 2013, available here, par. 64 & 67.
[208] ACCC, Findings and recommendations of the Compliance Committee with regard to communication ACCC/C/2008/32 (part II) concerning compliance by the European Union, June 2017, available here, par 103 & 104.
[209] ACCC, Second progress review of the implementation of decision V/9h on compliance by Germany with its obligations under the Convention, February 2017, available here, paragraph 45.
[210] Jendrośka Jerzy, Public participation in the preparation of plans and programs: some reflections on the scope of obligations under Article 7 of the Aarhus Convention, *Journal for European Environmental & Planning Law*, 2009, issue 6, 4, p. 500.

9 paragraph 3 AC.[211] The paragraphs below will consider the first test of "binding effect" and the second decisive test of "contravening provisions of national law relating to the environment".

Applying these reflections to the NECPs and LTS, it should firstly be noted that the contentious application of the SEA criteria – setting the framework future development consent – that was discussed in this paper at length,[212] does not influence the possibility of these plans to fall into the scope of article 9 paragraph 3 AC. Looking at the first test of "binding effect", NECPs seem to fail the check. According to the Governance Regulation, preparing and submitting NECPs following the rules laid out in articles 3 to 8 of the Regulation are European obligations that Member States must comply with. However, the contents of the NECPs themselves are not binding for Members States at the European level. The national objectives, targets and contributions and other policies and measures listed in the NECPs are merely tools to meet binding targets such as the Union-wide binding 2030 climate target of reduction of net greenhouse gas emissions by at least 55%.[213] A few of these objectives, targets, contributions and policies featured in the NECPs may be legally binding due to other pieces of EU law but their inclusion in the NECPs is not what gives them their binding nature. As for the national level, the binding effect of the NECPs in domestic law is also not prescribed in the text of the Governance Regulation. A study from the environmental organisation Justice and Environment found that the normative character of NECPs depends on the transposition of the Regulation into domestic law and in many Member States NECPs are lacking normative character.[214] The same reasoning can be applied for the LTS. NECPs and LTS as a whole therefore fail the first test.

However, if we apply the decisive second test identified by the Compliance Committee – the possible contravention of provisions of national law relating to the environment – this does not preclude NECPs from falling under article 9 paragraph 3 AC. The Compliance Committee considers that applicable European law relating to the environment should be considered as part of the domestic national law of a Member State.[215] In the context of the EU's constitutional

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[211] Squintani Lorenzo, Plambeck Ernst J.H., "Judicial Protection against Plans and Programmes Affecting the Environment. A Backdoor Solution to Get an Answer from Luxembourg", *Journal for European Environmental & Planning Law*, 2016, issue 13, p. 303.

[212] See Section I B. 1. a).

[213] Governance Regulation recital 56, article 1 paragraph 1 (a) ; European Climate Law, article 4 paragraph 1.

[214] Lueger Priska, Statement Aarhus Convention Task Force on Access to Justice, *Options to challenge NECPs and SEA decisions in different EU Member States*, 27-28 April 2022.

[215] ACCC, Report by the Compliance Committee on Compliance by Denmark with its obligations under the Convention, April 2008, available here, paragraph 27.

relationship with its Member States, the Governance Regulation is directly applicable in the Member States according to article 288 of the Treaty on the Functioning of the European Union. The establishment and implementation of the NECPs may contravene the environmental democracy requirements enshrined in the Governance Regulation. The content of the NECPs can also contravene other substantive European environmental law enshrined in other legal instruments, e.g. be inadequate to enable the collective European achievement of the climate-neutrality objective set out in article 2 of the European Climate Law.[216] Consequently, NECPs pass the second decisive test identified by the Compliance Committee.

Lastly, it must be recalled that the *rationale* behind the access to justice pillar is to provide procedures and remedies to ensure the effectiveness of the rights enshrined in the Convention.[217] Access to effective judicial mechanisms is a valuable tool for the public to ensure that their interests are protected and that the rights of the Convention are enforced, as recognised in the recitals of the Convention.[218] Limiting the benefice of article 9 AC to plans and programs which have a binding nature, would leave members of the public without a path for, *inter alia*, challenging the infringement of the public participation procedures laid out in article 7, and would therefore undermine the rule of law in environmental matters. Consequently, the stance adopted here is that the Aarhus Convention should be interpreted as requiring Parties to provide for access to justice rights to challenge NECPs and LTS. This is nonetheless an issue that would be clarified ideally by the Compliance Committee in future findings or recommendations.

3.2. Compliance of the Governance Regulation

The Governance Regulation itself does not include any access to justice provisions, as other sectoral legislations do.[219] During the adoption of the European Climate Law,[220] the European Parliament proposed to add an access to justice provision to the text guaranteeing that

[216] Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 ('European Climate Law').
[217] Aarhus Convention Implementation Guide, p. 187.
[218] Aarhus Convention, recital 18.
[219] For example in the Industrial Emissions Directive, the EIA Directive or the Environmental Liability Directive.
[220] Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999, ('European Climate Law').

individuals and NGOs could challenge NECPs and LTS for violating European environmental law.[221] The proposal did however not survive in the final text.[222]

Faced with this fact, it is necessary to analyse whether access to justice avenues are provided indirectly. Compliance with article 9 AC must indeed be assessed via examination of the transposition of the wording of the Convention into domestic law as well as through practice and relevant case law.[223]

The European legislator, while transposing article 9 paragraph 2 AC into European law, made use of its procedural autonomy aforementioned and chose the minimalist option restrained to challenges of decisions subject to article 6 AC.[224] It codified access to judicial review in the Public Participation Directive and, through it, modified the Integrated Pollution Prevention and Control Directive (IPPC Directive)[225] and the EIA Directive to include an access to justice provision. As explained above, none of these legal instruments include plans and programmes in their scope of application.

Furthermore, article 9 paragraph 3 AC was not adequately transposed by the European Union. An attempt in 2003 to adopt a directive dedicated to access to justice at national level that would have applied horizontally across all sectors failed.[226] Access to justice regarding plans and programmes can also not be directly derived via a direct effect of article 9 paragraph 3 AC at national level, for the CJEU ruled that this provision does not have direct effect, although national courts must interpret the national standing rules to the fullest extent possible in accordance with the objectives of article 9 paragraph 3 AC.[227]

[221] ClientEarth, *Access to justice under the EU Climate Law*, December 2020.

[222] The European Commission however issued the following statement upon adoption of the European Climate Law: "When performing their obligations under Regulation (EU) 2018/1999 concerning the involvement of the public in the preparation of the national energy and climate plans and the consultations on the long-term strategies, Member States should ensure that the public concerned is granted access to justice in case of breach of such obligations. This shall be in line with the relevant case law of the Court of Justice of the European Union related to access to justice in environmental matters and in full respect of the obligations Member States have undertaken as parties to the Aarhus Convention.", available here.

[223] ACCC, Findings and recommendations with regard to communication ACCC/C/2008/31 concerning compliance by Germany, June 2014, available here, par. 65.

[224] Jendrośka Jerzy, « Accès à la justice : remarques sur le statut juridique et le champ des obligations de la Convention d'Aarhus dans le contexte de l'Union européenne » in *Revue Juridique de l'Environnement*, 2009, Hors-série, p. 39.

[225] The predecessor of the IED.

[226] See Proposal for a Directive of the European Parliament and of the Council on access to justice in environmental matters, October 2003, available here.

[227] CJEU, 8 March 2011, *Lesoochranárske zoskupenie,* C-240/09, paragraph 52.

The SEA Directive was thereby not amended accordingly to provide for access to justice avenues. However, the CJEU has observed, in the context of the environmental impact assessment, that, where procedural rights are granted with the purpose of ensuring the effective implementation of European environmental law, Member States must not prevent individuals from relying on them before national courts.[228] The same reasoning was transposed to the strategic environmental assessment in a subsequent ruling.[229] Infringements of procedural rights laid out in the SEA Directive, such as public participation obligations, should therefore be challengeable before national courts.[230] The arguable application of the SEA Directive discussed above[231] could therefore influence the possibility for members of the public to challenge NECPs and LTS before national courts, as far as public participation requirements are concerned. It can also be argued that the public participation requirements laid out in the Governance Regulation are procedural rights granted with the purpose of ensuring effective implementation of EU environmental law, and, that their infringement *per se* should be subject to challenge in front of national courts.

A further argument to defend a comprehensive access to justice avenue, not limited to challenging infringements of public participation requirements but also covering substantive parts of the plans and strategies before the national courts can be based on article 47 of the EU Charter of Fundamental Rights. This article guarantees the right to an effective remedy and must be read in conjunction with article 19 of the Treaty on European Union, which provides that "*Member Sates shall provide remedies sufficient to ensure effective legal protection in the fields covered by the Union law*". Infringements of the Governance Regulation, which, as a regulation, has a direct effect in the Member States according to article 288 TFEU, [232] must therefore be challengeable in front of national courts.[233]

To support this argument, the CJEU has identified a number of plans foreseen in European legislation which must be challengeable in front of national courts even though no access to justice provision was included in the respective legislation. It did so by relying on the doctrine

[228] CJEU, 24 October 1996, *Kraaijeveld*, C-72/85, paragraph 56.
[229] CJEU, 28 February 2012, *Inter-Environnement Wallonie*, C-41/11, paragraph 42.
[230] European Commission, Commission Notice on access to justice in environmental matters, 18 August 2017, par 47; *ClientEarth, Access to Justice in European Union Law, A Legal Guide on Access to Justice in environmental matters*, 2021 edition, p. 35.
[231] See section I. B. 1. a).
[232] Treaty on the Functioning of the European Union, article 288: "*A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States*".
[233] Provisions enshrined in regulations can only mobilised only if they are clear, precise and pertinent enough in the individual case according to CJEU, 14 December 1971, Politi, C-43/71.

of direct effect of directives[234] according to which a provision enshrined in a European directive, for which the transposition time limit has expired or which was not adequately transposed into national law, can be relied on by individuals in national courts if, *inter alia*, it imposes an unconditional and sufficiently precise obligation on the Member States.[235] The CJEU ruled for example that members of the public with a specific interest must be able to challenge the failure to adopt an action Plan according to Ambient Air Quality Directive.[236]

In practice, challenging NECPs and LTS on the ground of the Governance Regulation is limited to claims that the instruments were not established according to the applicable procedure and does not follow the mandatory content set out in the Regulation. The particular choices, policies and measures in the NECPs are however not prescribed and are left to the discretion of the Member States as explained above. These measures, the "core" of the plans, could however violate European or domestic environmental law. These specific infringements can therefore not be challenged by members of the public only on the grounds of the Governance Regulation. Litigants must rather invoke violations of European environmental law with direct effect or domestic law. This conclusion, that could seem satisfying on paper, is far from what might happen in reality. Without sufficient practical evidence, we could tentatively say that NECPs may fall out of the scope of acts challengeable in front of many national courts because of their non-binding character, even though this was demonstrated as a non-critical hurdle that can be overcome with the aforementioned arguments. Without a clear harmonised provision guaranteeing access to justice across the EU, it has been shown that implementation of this right varies significantly amongst Member States.[237]

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.

[234] ClientEarth, *Access to Justice in European Union Law, A Legal Guide on Access to Justice in environmental matters*, 2021 edition, p. 33.
[235] CJEU, 4 December 1974, *Van Duyn*, C-41/74, p. 1348-1349.
[236] CJEU, 25 July 2008, *Janecek*, C-237/07, paragraph 42.
[237] See for example Milieu, Study on EU implementation of the Aarhus Convention in the area of access to justice in environmental matters, final report, September 2019.

This unsatisfactory situation did not elude the European Commission. It indeed published a statement after the failed attempt in interinstitutional negotiations to include a requirement in the revision of the Effort Sharing Regulation and the LULUCF Regulation for Member States to provide access to justice to members of the public. In this 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*.".[238]

This statement from the Commission can be seen as a recognition of the need to establish specific access to justice provisions in European climate and energy legislation, which civil society organisations have long been advocating for.[239] It is at least a step towards the recognition of the importance of access to judicial review at national level, more meaningful than the negotiated recital in the adopted revision of the Effort Sharing Regulation and LULUCF Regulation namely: "*The Union and the Member States are parties to the United Nations Economic Commission for Europe Convention on access to information, public participation in decision-making and access to justice in environmental matters (the 'Aarhus Convention'). Public scrutiny and access to justice are essential elements of the democratic values of the Union and tools to safeguard the rule of law*". [240]

This review report should be published within six months of each "global stocktake" agreed under Article 14 of the Paris Agreement. The first global stocktake is supposed to happen in 2023, and the subsequent ones every five years unless otherwise decided by the Conference of the Parties.[241] The process started back in 2021 and the outcome should be presented at the COP 28 in Dubai in December 2023.[242] The review report is currently being prepared by the European Commission, which opened a call for evidence in Summer 2023 and should be published in the first quarter of 2024.[243]

[238] European Commission, "Draft Regulation of the European Parliament and of the Council amending Regulation (EU) 2018/842 on binding annual greenhouse gas emission reductions by Member States from 2021 to 2030 contributing to climate action to meet commitments under the Paris Agreement, and Regulation (EU) 2018/1999 (first reading) - Adoption of the legislative act = Statement, 20 March 2023, 7396/23 ADD 1, available here.
[239] *Oberthür Sebastian, Moore Brendan, von Homeyer Ingmar, Söebech Ólöf, Towards an EU Climate Governance Framework to Deliver on the European Green Deal*, Policy Options Paper, February 2023, available here, p. 31.
[240] Regulation (EU) 2023/857 of the European Parliament and of the Council of 19 April 2023 amending Regulation (EU) 2018/842 on binding annual greenhouse gas emission reductions by Member States from 2021 to 2030 contributing to climate action to meet commitments under the Paris Agreement, and Regulation (EU) 2018/1999, recital 22, available here.
[241] Paris Agreement to the United Nations Framework Convention on Climate Change, 12 December 2015, article 14.
[242] Chronology of events and inputs available here.
[243] Governance Regulation, article 45. The preparation of the review report has already started with a call for evidence published in July, available here.

Conclusion

This assessment of the governance framework's compliance with the Aarhus Convention has shown abundantly clearly that the governance of the Energy Union fails to meet the environmental democracy standards established by the Aarhus Convention.

The main instrument upon which the governance framework is based, the NECPs, are a powerful tool to outline each country's targets and projections to tackle climate change and collectively achieve the Union-wide targets. The innovative iterative process between Member States and the Commission creates a permanent dialogue to ensure coherence and harmonisation across the EU and guarantees that the Union-wide targets will be reached by 2030 and beyond.

Meaningful involvement of members of the public in this fruitful dialogue is however not enabled by the governance framework. In order to bring the governance framework into compliance with the Aarhus Convention requirements a number of normative measures would have to be taken, ideally on the occasion of the review report of the Governance Regulation required in its article 45. These seemingly small adjustments are already in line with the 2022 Commission Guidance and could help bring the whole framework into compliance by the next Meeting of the Parties to the Aarhus Convention in 2025.

The preparation of the NECPs should be subject to a mandatory SEA in accordance with the process described in the SEA Directive. This would put an end to the confusion created by article 10 of the Regulation and would also allow an extensive assessment of the impacts of the NECPs in each country. Application of the SEA Directive would trigger the applicability of the public participation requirements enshrined therein, which are already well known to the Member States, and which, although not perfect, constitute a minimum standard to guarantee meaningful public participation. The Governance Regulation could also complement this framework with the help of clearer mention of the procedural guarantees laid out in the Aarhus Convention. The temporal and material scopes of the public consultation requirement in article 10 of the Governance Regulation should be clarified to close the loopholes created by the current wording, which allows Member States to opt out of this requirement in certain situations, for example by only conducting a public consultation on the draft version and not also on the final version of the NECP. The European Commission should also use its assessment of the NECPs to increase its scrutiny of the quality of the public participation procedures in the current process of updating the NECPs. It could also take enforcement action, including launching infringement procedures if necessary.

Proactive implementation of the second pillar of the Aarhus Convention also involves ensuring that the public is able to participate in the decision-making processes that will result from the implementation of the NECPs. The NECP template should be modified to systematically include a section for each of the five dimensions of the Energy Union about how the public will be involved in the implementation of the policies and measures presented.

The obligations of the first pillar of the Convention are also not satisfactorily complied with in the governance framework. Transparency in the iterative dialogue between the European Commission and the Member States should be meaningfully enhanced. This entails providing a list of the necessary information that needs to be made available to enable informed participation. As part of the public participation procedures, it should also be highlighted in the text of the Regulation that the public must have access to and express its views on the draft NECP before its submission to the Commission. This implies publishing different versions of the drafts, both for the initial establishment and during the updating procedure described in article 14 of the Regulation. It also implies that information is available in digestible formats which require little technical background. The iterative dialogue is also materialised by the reporting process, which as it stands, is opaque and unintelligible to the public. The progress reports are indeed environmental information in the sense of the Aarhus Convention and should be made available in accordance with the formatting and procedural safeguards set out in the Convention. The Commission should reflect on these issues, as well as on the timeliness of the submission of the progress reports in its State of the Energy Union report.[244]

This paper has also shown that the third pillar of the Aarhus Convention is not implemented in the current framework, and that individuals and NGOs are not granted a clear, harmonised, and effective right to challenge NECPs and LTS. The Commission should act on its statement and propose to introduce a horizontal access to justice provision in the Governance Regulation, to facilitate access to remedy regarding these plans and strategies. This would ensure enforcement of the two other pillars, and especially the public participation requirements, as well as guarantee that members of the public are able to challenge unambitious plans that run counter to other European environmental commitments and obligations.

[244] Governance Regulation, article 29 paragraph 7: *"The Commission shall report on its assessment in accordance with this Article as part of the State of the Energy Union report referred to in Article 35."*.

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