

A photograph showing several European Union flags on tall, silver flagpoles. The flags are blue with twelve yellow stars arranged in a circle. They are set against a modern building with a grid-like facade of windows. The scene is brightly lit, suggesting a sunny day.

Environmental Rule of Law and National Recovery and Resilience Plans: Transparency and Public Participation

Legal Briefing

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Law at the service of the environment

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The rule of law, one of the fundamental values of our European Union¹, is being a key aspect in the negotiations for the Multiannual Financial Framework and the Recovery and Resilience Facility (RRF). The last European Council of 2020 reached conclusions related to the draft Regulation on a general regime of conditionality for the protection of the EU budget². Negotiations for a Regulation establishing a RRF³, the main instrument of Next Generation EU, are quite advanced. Both instruments emphasize on the need to avoid corruption, fraud and conflict of interests when executing both financial instruments as part of the rule of law.

Rule of law implies that all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, among other aspects. Therefore, the **rule of law** is not only about avoiding corruption, fraud and conflict of interest. It also **implies respecting the EU environmental acquis** (environmental Directives and Regulations) adopted since the 60's of the XXth century. This means that **environmental rule of law has to be part of the RRF and of the national recovery and resilience plans (NRRPs)** that Member States are preparing as well as of the assessment of those plans that the European Commission has to undertake before they are approved by the Council.

¹ Art. 2, TEU.

² Proposal for a Regulation of the European Parliament and of the Council on the protection of the Union's budget in case of generalized deficiencies as regards the rule of law in the Member States. COM (2018) 324 final. Brussels, 2.5.2018.

³ Proposal for a Regulation of the European Parliament and of the Council establishing a Recovery and Resilience Facility. COM(2020) 408 final. Brussels, 28.5.2020.

Among the environmental legal obligations that NRRPs have to be subject to are the following:

1. The procedure for their elaboration has to be transparent and subject to public consultation.
2. They are plans that have to be subject to strategic environmental assessment.
3. Projects which are beneficiaries of the RRF have to be subject to environmental impact assessment when required by the Directive on that matter.

This briefing provides a legal analysis on relevant environmental obligations to be complied with by the NRRPs.

Transparency and public consultation

In accordance with Article 15.3 of the future Regulation on a RRF, one of the elements to be included in the national plan to be submitted to the European Commission for its assessment is:

“a summary of the consultation process, conducted in accordance with the national legal framework, of local and regional authorities, social partners, civil society organisations, youth organisations, and other relevant stakeholders, for the preparation and, where available, the implementation of the plan and how the inputs of the stakeholders are reflected in the plan;(…)”

The legal framework of the EU and Member States on transparency and public participation must be in line with the Aarhus Convention on access to information, public participation in decision-making and access to justice in environmental matters⁴ as the EU and its Member States are Party to this Convention. In accordance with its articles 6 and 7, plans such as the future NRRPs must be subject to early and effective public participation within reasonable time-frames, allowing the public to be prepared and participate effectively during the decision-making process.

The Aarhus Convention requires public participation for any plan, programme or policy relating to the environment. “Whether a particular plan or programme relates to the environment should be determined with reference to the implied definition of “environment” found in the definition of “environmental information (article 2, para. 3)”⁵. In particular, under this Convention, a plan, programme or policy may be considered as “relating to the environment” regardless of whether it “sets the framework” for the development consent of any project or not⁶, “(...) Nor does it exclude financial or budget plans and programmes”⁷.

⁴ Council Decision of 17 February 2005 on the conclusion, on behalf of the European Community, of the Convention on access to information, public participation in decision-making and access to justice in environmental matters. OJ L 124, of 17.5.2005.

⁵ “The Aarhus Convention, An Implementation Guide”, UNECE, p 176, 2014.

⁶ Ibid, p 175, 2014.

⁷ Ibid, p 177.

The NRRPs are plans in the terms of the Aarhus Convention as these are plans affecting or likely to affect the elements of the environment such as air and atmosphere, water, soil, land, landscape and natural sites, biological diversity and its components and the interaction among these elements. The measures to be included in the NRRPs have to contribute to the six pillars of European relevance⁸:

- a) Green transition;
- b) Digital transformation;
- c) Smart, sustainable and inclusive growth, including economic cohesion, jobs, productivity, competitiveness, research, development and innovation, and a well-functioning single market with strong SMEs;
- d) Social and territorial cohesion;
- e) Health, and economic, social and institutional resilience, including with a view of increasing crisis reaction capacity and crisis preparedness; and
- f) Policies for the next generation, children and youth, including education and skills.

For example, the measures supported by the Facility and included in the individual Member State plans should contribute to the green transition including biodiversity or to the challenges resulting from it. “The green transition should be supported by reforms and investments in green technologies and capacities, including biodiversity, energy efficiency, building renovation and the circular economy, while contributing to the Union’s climate targets, fostering sustainable growth, creating jobs and preserving energy security”⁹.

The same happens with digital transformation. Reforms and investments corresponding to the digital pillar should notably promote the digitalisation of services, the development of digital and data infrastructure, clusters and digital innovation hubs and open digital solution.

Those kinds of reforms and investments definitively can affect the elements of the environment.

In spite of these obligations, transparency and public participation as required by the Aarhus Convention is not taking place in most Member States.

⁸ Art.3., future Regulation on a RRF.

⁹ Para 6 (c), Preamble of future Regulation on a RRF.

The NRRPs must be subject to Strategic Environmental Assessments and its projects subject to Environmental Impact Assessment when legally required.

According to the current negotiating text for a Regulation establishing a RRF, the NRRPs are plans that “shall set out the reform and investment agenda of the Member State concerned”¹⁰ and “shall comprise measures for the implementation of reforms and public investment”¹¹. Public investment implies projects that will receive financial support under this Facility. Among the elements to be included in NRRPs are: the envisaged investment projects and how the measures “account for an amount that represent 37% of the plan’s total allocation”¹² based on a methodology which includes projects in the field of renewable energy such as wind, solar, marine, geothermal or storage of water for human consumption which might be dams or waste water collection and treatment projects, among others.

According to the Directive on the assessment of the effects of certain plans and programmes on the environment¹³, (Strategic Environmental Assessment -SEA-Directive), NRRPs are the type of plans under its scope. They are plans¹⁴:

- co-financed by the EU,
- being prepared by national authorities and that will be required by a EU Regulation,
- which cover areas such as energy, telecommunications and tourism, and
- which set the framework for future development consent of projects listed in Annexes I and II of the 2011 Directive on Environmental Impact Assessment (EIA)¹⁵- some examples of those projects were listed before- or which in view of the likely effect on sites, have been determined to require an assessment pursuant to the 1992 Habitats Directive 92/43/EEC¹⁶. One example which supports this line of argument is Royal Legislative Decree 36/2020 of 30 December, approving urgent measures for the modernization of the Public Administration and the execution of the National Recovery, Transformation and Resilience Plan¹⁷ adopted by the Spanish Government which includes a provision excluding certain projects from EIA¹⁸. This contravenes the EIA

¹⁰ Art. 14.1., *Ibid.*

¹¹ *Ibid.*

¹² Art. 15.3.c), *Ibid.*

¹³ 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. OJ L 197, of 21.7.2001.

¹⁴ Arts 2 (a) and 3 (2), SEA Directive.

¹⁵ 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. OJ L 26 of 28.1.2012

¹⁶ Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora. OJ L 206, of 22.7.1992.

¹⁷ Spanish Official Journal, BOE num. 341, of 31 December 2020.

¹⁸ These are those projects financed in whole or in part under the European Recovery and Resilience Facility, consisting on simple modernization or improvement of existing installations, which do not involve the construction of a new plant, the increase of the surface area concerned, the addition of new

Directive itself but also shows that NRRPs establish the framework for future development consent of projects listed in Annexes I and II of that Directive.

The SEA procedure requires an early and effective public consultation within appropriate time frames for the public to express their opinion on a draft plan.

However, as occurred with the first National Energy and Climate Plans (NECPs) under EU Regulation on the Governance of the Energy Union and Climate Action, again a EU legal text, the future Regulation of a RRF does not require NRRPs to be subject to SEA.

Conclusions

In spite of the requirements under EU environmental rule of law, the preparation of NRRPs is not being subject to SEA and public consultation procedures are being poor or absent and not in line with the Aarhus Convention requirements. The “do no significant harm” principle enshrined in the so-called Taxonomy Regulation¹⁹ and which under the RRF requires an explanation of how the NRRPs ensure that no measure for the implementation of reforms and investments included in the plan causes a significant harm to environmental objectives²⁰ is not enough nor a substitute of other environmental protection legislation.

Economic responses to Covid-19 are essential and necessary but these cannot be at the expense of environment rule of law and even less so when NRRPs must contribute to the EU Green Deal.

constructions, or do not affect water resources, and where the requirements for financing and approval include the improvement of environmental conditions, such as energy efficiency or the use of natural resources, the reduction of their environmental impact or the improvement of the sustainability of the existing installation.

¹⁹ Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088. OJ L 198, of 22.6.2020.

²⁰ Art. 15 (3) (ba), future Regulation on a RRF.