

Public participation in the preparation of the Integrated National Energy and Climate Plan: an obligation

February 2019





The **Instituto Internacional de Derecho y Medio Ambiente, IIDMA** (International Institute for Law and the Environment) is a non-profit organization registered in Spain and founded in December 1996 with the aim of contributing to environmental protection and sustainable development through the study, development, implementation and enforcement of Law from an international and multidisciplinary approach. Since 1998, IIDMA is accredited as observer to the United Nations Environmental Assembly of UN Environment. In 2001 it was declared of public interest by the Spanish Ministry of Home Affairs.

IIDMA is grateful to the European Climate Foundation (ECF) for its support, which has made the elaboration of this report possible.

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Acronyms

BOE	Boletín Oficial del Estado (Official State Journal)
OJ	Official Journal of the European Union
EIA	Environmental Impact Assessment
EP	European Parliament
EU	European Union
LEA	Law on Environmental Assessment
NECP	National Energy and Climate Plan
SEA	Strategic Environmental Assessment

Introduction

Public participation in decision-making processes is essential to the health and vitality of democracy¹. Transparent and open processes subject to public participation promote public confidence in the legitimacy of decision-making processes².

Public participation can be defined as the opportunity of people to influence the outcome of plans and work processes. It also plays an essential role in the planning, development and implementation of public policies. The Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters³, known as the Aarhus Convention, recognizes in its preamble that:

in the field of the environment, improved access to information and public participation in decision-making enhance the quality and the implementation of decisions, contribute to public awareness of environmental issues, give the public the opportunity to express its concerns and enable public authorities to take due account of such concerns

Nowadays, the social response to climate change, whose paradigm is the Paris Agreement, requires the adoption of many regulatory instruments to address this enormous challenge we face⁴. In order to comply with its commitments under that Agreement and, as part of the "Clean Energy for All Europeans" package⁵, the European Union (EU) requires Member States to draw up an Integrated National Energy and Climate Plan (NECP) in accordance with the Regulation on the Governance of the Energy Union and Climate Action (the Governance Regulation)⁶. Spain is immersed in the full process of drafting the NECP which shall be approved by Royal Decree⁷.

The purpose of this report is to introduce the public participation procedure that must be undertaken throughout the NECP preparation process. To this end, the provisions contained in the Governance Regulation concerning the obligation to undertake public participation are first analyzed. Secondly, it evaluates the obligations on public participation contained in the Spanish legal system. Finally, the report provides the main conclusions of this analysis.

¹ Barreira A., "Transparencia y Participación: Elementos para una Gobernanza Eficaz de los Recursos Hídricos" Revista de la Real Academia de Ciencias Exactas, Físicas y Naturales Vol. 98 nº 2, 2004. ISSN 1137-2141.

² Ibid.

³ Spain is a Contracting Party to this Convention. Instrument of Ratification of the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, done at Aarhus (Denmark), on 25 June 1998 (BOE No 40, of 16.02.2005).

⁴ The especial report of 1.5° C of the Intergovernmental Panel on Climate Change indicates that it is still possible to limit the increase in temperature to 1.5°C and to limit the negative effects it can have on human and its environment, provided that specific public policies are adopted and well-targeted investments are made.

⁵ http://europa.eu/rapid/press-release_IP-16-4009_es.htm.

⁶ See IIDMA, "Análisis de los elementos y pautas para la elaboración del Plan Nacional Integrado de Energía y Clima", available at: http://www.iidma.org/attachments/Publicaciones/Analisis_PNIEC_v2.pdf.

⁷ Article 4, Spanish Climate Change and Energy Transition Draft Bill.

1. Public Participation in the Governance Regulation

The Governance Regulation⁸ emphasizes the need to ensure public participation in the preparation of NECPs. Its preamble states⁹:

The implementation of policies and measures in the areas of the energy and climate has an impact on the environment. Member States should therefore ensure that the public is given early and effective opportunities to participate in and to be consulted on the preparation of the integrated national energy and climate plans in accordance, where applicable, with the provisions of Directive 2001/42/EC of the European Parliament and of the Council⁽¹⁴⁾ and the United Nations Economic Commission for Europe ("UNECE") Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters of 25 June 1998 (the "Aarhus convention"). Member States should also ensure involvement of social partners in the preparation of the integrated national energy and climate plans and aim to limit administrative complexity when fulfilling their obligations with regard to public consultation.

When carrying out public consultations, and in line with the Aarhus Convention, Member States should aim to ensure equal participation, that the public is 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.

The EU Governance Regulation contains several obligations concerning public participation in the process of preparation of NECPs.

On the one hand, when referring to the sections to be included in the NECPs, Article 3 requires those plans to contain a description of the public consultation, the involvement of interested parties and their outcomes.¹⁰

On the other hand, article 10, entitled public consultation, provides as follows:

“Without prejudice to any other Union law requirements, each Member State shall ensure that the public is given early and effective opportunities to participate in the preparation of the draft integrated national energy and climate plan —as regards the plans for the 2021 to 2030 period, in the preparation of the final plan well before its adoption— as well as of the long-term strategies referred to in Article 15¹¹. Each Member State shall

⁸ 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 (OJ L 328, of 21.12.2018).

⁹ Whereas (28) and (29), Governance Regulation.

¹⁰ Article 3(2) (a) provides:

“The integrated national energy and climate plans shall consist of the following main sections:

a) an overview of the process followed for establishing the integrated national energy and climate plan consisting of an executive summary, a description of the public consultation and involvement of stakeholders and their results, and of regional cooperation with other Member States in preparing the plan, as established in Articles 10 to 12 and in point 1 of Section A of Part I of Annex I;(…)”

1.3 of the section A of Part I of Annex I requires this description to contain at least: “**Consultations and involvement of national and Union entities and their outcome:** i. Involvement of the national parliament ii. Involvement of local and regional authorities iii. Consultations of stakeholders, including the social partners, and engagement of civil society *and the general public* iv. Consultations of other Member States v. Iterative process with the Commission.

¹¹ This article requires Member States to prepare a first long-term strategy with a perspective of at least 30 years, by no later than 1 January 2020. It also requires the European Commission to adopt a proposal for a Union long-term strategy by 1 April

attach to the submission of such documents to the Commission a summary of the public's views or provisional views. In so far as Directive 2001/42/EC is applicable, consultations undertaken on the draft in accordance with that Directive shall be deemed to satisfy the obligations to consult the public under this Regulation.

Each Member State shall ensure that the public is informed. Each Member State shall set reasonable timeframes allowing sufficient time for the public to be informed, to participate and express its views.

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

This article is crucial to the public participation process. Firstly, it must be emphasized that the wording is contrary to law because it eliminates the public participation procedure at a very early stage of the preparation of plans for the 2021-2030 period by stating "**as regards the plans for the 2021-2030 period, in the preparation of the final plan well before its adoption**". The EU is a Contracting Party to the Aarhus Convention¹², which requires public participation in the preparation of plans and programs relating to the environment, such as NECPs, to start at the beginning of the procedure¹³, without allowing any exception to this requirement.

Secondly, Article 10 of the Governance Regulation provides that consultations on the NECP draft carried out in accordance with the Strategic Environmental Assessment (SEA) Directive¹⁴ are compliant with the obligations arising from that Regulation. It is crucial to take into account that NECPs are plans that must be subject to SEA in accordance with the provisions of that Directive:

1. It refers to a plan which is subject to preparation and/or adoption by an authority at a national, regional or local level or which is prepared by an authority for adoption, through a legislative procedure by Parliament or Government, and which is required by a regulatory provision such as the EU Governance Regulation¹⁵.
2. The NECP is a plan prepared in relation to energy and has also impacts on sectors such as agriculture, industry, transport, tourism, town and country planning, or land use. Furthermore, it will set the framework for future development consent of projects listed in Annexes I and II of the Environmental Impact Assessment Directive¹⁶ (EIA)¹⁷. For instance, section 2.4 of the NECP which relates to the internal energy market dimension requires to include in the section about energy transport infrastructure those key projects relating to electricity and gas transport infrastructure¹⁸ and, where appropriate, those modernization

2019. The strategic long-term vision for a prosperous, modern, competitive and climate-neutral economy by 2050 - A Clean Planet for All was presented by the European Commission on 28.11.2018.

¹² 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 15.05.2005).

¹³ Articles 6 and 7, Aarhus Convention.

¹⁴ 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 programs on the environment (OJ L 197, of 21.7.2001).

¹⁵ Article 2(a), SEA Directive.

¹⁶ 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 28.01.2012)

¹⁷ Article 3(2), SEA Directive.

¹⁸ Annex I of the EIA Directive includes among the projects to be subject to EIA pipelines with a diameter of more than 800 mm and a length of more than 40 km: (a) for the transport of gas, oil or chemicals.

Annex II of the EIA Directive requires Member States to determine whether to subject to EIA projects such as industrial installations for the production of electricity, steam and hot water (projects not included in Annex I); industrial installations for carrying gas, steam and hot water; transmission of electrical energy by overhead cables (projects not included in Annex I) and installations for the harnessing of wind power for energy production (wind farms).

projects necessary for the achievement of general and specific objectives pursuant to the five dimensions of the Energy Union Strategy. Likewise, it is quite likely that these projects will have an effect on protected areas under the Habitats Directive¹⁹, which requires them to be subject to EIA on the basis of this Directive.

Given that the Directives previously mentioned have been transposed into the Spanish legal order, it is necessary to analyze the manner in which the obligations on public participation in the NECP preparation procedure are foreseen therein. This includes an analysis of the requirements on public participation included in the SEA process, since the NECP will have to be subject to such assessment procedure.

Prior to this, it is necessary to point out that the Governance Regulation also requires Member States to establish a multi-level climate and energy dialogue. In this dialogue local authorities, civil society organizations, business community, investors, other relevant stakeholders and the general public will participate and discuss the different scenarios envisaged for energy and climate policies, including for the long term, and review progress made, unless it already has a structure which serves the same purpose²⁰. While in Spain the National Climate Council may initially appear to be such structure, it does not respond to the multilevel dialogue required by said provision, since it does not include representatives of investors or the general public.

2. Public participation in the preparation of the NECP in Spain

According to the preamble of the Spanish Draft Bill on Climate Change and Energy Transition submitted on 13 November 2018, one of its aims is "to implement governance instruments for ensuring citizen participation". However, Title VIII relating to Governance does not include any provision to ensure such participation as stated in the preamble of this draft.

Nonetheless, Law 27/2006, of 18 July, on the rights on access to information, public participation and access to justice in environmental matters²¹ contains crucial provisions for public participation procedures as regards access to information. Likewise, regarding the procedure to be followed in public participation procedures of plans and programs which are "affected by legislation on the evaluation of the effects of plans and programs on the environment", Law 27/2006 makes a reference to said legislation.

3. Public participation in the SEA process

Law 21/2013, of 9 December, on Environmental Assessment²² (LEA) recognizes public participation as an inherent principle of environmental assessment²³. Title II (Chapter I) of this Law establishes specific obligations on public participation applying to both ordinary and simplified Strategic Environmental Assessment (SEA) procedures, to which plans that may have significant effects on the environment must

¹⁹ 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 22.07.1992).

²⁰ Article 11, Governance Regulation.

²¹ BOE No 171, of 19.07.2006.

²² BOE No 296, of 11.12.2013.

²³ Article 2 (i), LEA.

be subject in accordance with its article 6. **The NECP must be subject to ordinary SEA** because it is a plan defined in the SEA Directive²⁴ (see preceding section). This requirement is envisaged in article 6 of LEA:

1. Plans and programs, as well as their amendments, that are adopted or approved by a public Administration and whose preparation and approval is provided for in a legislative or regulatory instrument or by agreement of the Council of Ministers or of the Government Council of an autonomous community, shall be subject to an ordinary strategic environmental assessment where they:

a) Set the framework for the future authorization of projects legally subject to environmental impact assessment and relate to agriculture, livestock, forestry, aquaculture, fisheries, energy, mining, industry, transport, waste management, water resource management, occupation of the maritime terrestrial public domain, use of the marine environment, telecommunications, tourism, urban and town planning, or land use; or,

b) Require an assessment as they would affect Natura 2000 Network sites in the terms provided in Law 42/2007, of 13 December, on Natural Heritage and Biodiversity.

c) Those included in section 2 when so decided on a case-by-case basis by the environmental body in the strategic environmental report in accordance with Annex V criteria.

d) The plans and programs included in paragraph 2, when so decided by the environmental body, upon request of the developer.

2. The following shall be subject to a simplified strategic environmental assessment:

a) Minor amendments of plans and programs referred to in the previous section.

b) Plans and programs referred to in the previous section which determine the use, at local level, of small areas.

c) Plans and programs which, establishing the framework for the future authorization of projects, do not meet any of the other requirements referred to in the previous section.

The **ordinary SEA procedure** consists of seven stages, some of them simultaneous, regulated in articles 17 to 28 of Law 21/2013, in which the right of public participation must be guaranteed in three specific phases.

- **Phase 1: Request for initiation of an ordinary strategic environmental assessment**

As part of the substantive procedure for the adoption or approval of the plan or program, the developer must submit to the substantive body, together with the documentation required under sectoral legislation, a request to initiate the ordinary strategic environmental assessment accompanied by the draft plan or program and an initial strategic document.

²⁴ Article 9 (1), LEA.

Taking into account the sectors addressed by the NECP, we understand that the plan's developers shall be, at least, the Directorate General for Energy Policy and Mining²⁵ and the Spanish Office for Climate Change²⁶, which also corresponds to the substantive body.

Afterwards, the substantive body will provide the request for initiation and the documents to be attached to the environmental body. In this case, the environmental body is the Directorate General for Biodiversity and Environmental Quality²⁷.

- **Phase 2: Prior consultations with public authorities and interested parties** (Draft plan and initial strategic document):

Once the request for initiation has been accepted, and in order to elaborate the SEA scoping document, the environmental body must subject the draft plan and the initial strategic document to consultations involving the public administration concerned and the **interested parties**²⁸. The legally established period for participation is of **45 working days** from the receipt of the documents subject to consultation. In accordance with the Fourteenth Additional Provision of Law 21/2013, public authorities must adopt **adequate measures to identify the interested parties that must be consulted**, so as to ensure their effective participation in the environmental assessment procedure.

After replies to consultations are received, the environmental body must elaborate the SEA scoping document and provide it to both the developer and substantive body, together with the comments received. The SEA scoping document must be made available to the public through its publication on the websites of the environmental and substantive bodies²⁹. The LEA requires to undertake consultations and to prepare the SEA scoping document **within a period not exceeding three months** from the receipt of the developer's request to initiate the SEA process.³⁰

- **Phase 3: Elaboration of the strategic environmental study**

Taking into account the scoping document, the developer must elaborate the SEA study where it shall identify, describe and assess the likely significant environmental effects of implementing the plan or program, as well as reasonable alternatives —technically and environmentally feasible— taking into

²⁵ The competences of this Directorate General include: "The elaboration of regulatory initiatives and their monitoring within the framework of competencies of the General State Administration in the matters of mining, hydrocarbons, electrical energy, nuclear energy, renewable energy, rational use of energy and energy efficiency, liquidations and inspections, as well as the preparation of the necessary proposals for its adaptation, where appropriate, to European Union legislation" (Article 3 (1) (b) Royal Decree 864/2018, of 13 July, developing the basic organic structure of the Ministry for Ecological Transition (BOE No 170, of 14.07.2018).

²⁶ The competences of this Office include: "To formulate the national policy on climate change, in accordance with the international and European Union legislation in the matter, as well as to propose regulations and to develop planning and administrative tools which allow to comply with the objectives established by said policy". (Article 6 (1) (a), *Ibid*).

²⁷ The competences of this General Directorate include: "The processing and resolution of strategic environmental assessment procedures of plans and programs under State competence and of environmental impact assessment of projects under State competence". (Article 7 (1) (c), *Ibid*).

²⁸ For "interested parties" in the environmental assessment procedure it must be understood: i) those meeting any of the requirements provided for in Article 4 of Law 39/2015 of 1 October on the Common Administrative Procedure, and ii) NGOs meeting the requirements provided for in Article 23.1 of Law 27/2006, of 18 July, on access to information, public participation and access to justice in environmental matters. (Article 5 (i), LEA).

²⁹ Article 19, *Ibid*.

³⁰ Article 17.2, *Ibid*.

account the objectives and the geographical scope of the plan or program. The SEA study is considered an integral part of the NECP.

- **Phase 4-5: Public information period and consultations with public authorities and interested parties:** (SEA study and preliminary version of the plan):

Once the developer has prepared the SEA study and the preliminary version of the plan, the substantive body must subject both documents to **public information, prior announcement** in the Official State Journal (BOE), and in its website. The public information period **shall not be less than 45 working days**. Public information must involve the general public.

The documents subject to public information must include, among others, a non-technical summary of the SEA study. Furthermore, the Law expressly requires the substantive body to adopt **all necessary measures to ensure the widest dissemination of the documents subject to consultation among the public**, by using media and, preferably, electronic channels.

Simultaneously to the public information period, the substantive body must subject the SEA study together with the preliminary version of the plan to consultations with the public authorities and interested parties initially involved in the prior consultation phase (Phase 2). Consultations must be carried out by conventional, electronic or other means, provided that its completion is accredited, and its duration must **not be of less than 45 working days** from the receipt of the relevant documents. During this consultation period, both parties involved may issue the reports and comments they consider appropriate³¹. These reports and comments will have to be taken into consideration, including any transboundary consultation that may have taken place, during the drafting phase of the plan's final proposal. It is important to point out that in case the implementation in Spain of a plan such as the NECP is likely to have significant effects on the environment of other EU Member State such as France and Portugal, the Ministry of Foreign Affairs and Cooperation must initiate transboundary consultations. Such consultations include an obligation to ensure that the public authorities concerned and the interested public in that Member State have a real possibility to participate in the environmental assessment procedure³².

The LEA establishes a **maximum period of fifteen months**, from the notification of the scoping SEA documents to the developer, for elaborating the SEA study and undertaking the public information and consultation procedures³³. If, during the technical assessment of the SEA file, the environmental body considers that the information and participation procedures, including transboundary consultations, have not been undertaken in accordance with Law 21/2013, the SEA administrative file must be subject to remedy by the substantive body within a period of three months. Otherwise, the environmental body must bring the ordinary SEA to an end³⁴.

³¹ Article 22, Ibid.

³² See Chapter III of Title III, Ibid.

³³ Article 17.3, Ibid.

³⁴ Article 24.3, Ibid.

- **Phase 6: Final plan or program proposal:**

After taking into consideration the outcomes of public information and consultation procedures, including transboundary consultations, where appropriate, the developer will amend, if necessary, the SEA study and will elaborate the final proposal of the plan or program³⁵.

- **Phase 7: Strategic Environmental Statement:**

Once the technical assessment of the SEA file is finalized, the environmental body will formulate the Strategic Environmental Statement (SEA Statement) within four months from the receipt of the complete file. This period may be extended to two additional months for justified reasons duly motivated and communicated to the developer and the substantive body. The SEA Statement is a report of mandatory and decisive nature. It must include, inter alia, the outcomes of the public information period and consultations and, where appropriate, of transboundary consultations.

The SEA Statement must be published in the Official State Journal (BOE) within 15 working days from its formulation, notwithstanding its publication in the website of the environmental body.

- **Adoption of the Plan**

Subsequently, the developer must incorporate the content of the SEA Statement in the plan or program and, in accordance with sectoral legislation, it will subject such plan or program to adoption or approval by the substantive body. Once adopted, the plan shall be published in the BOE and will include, among other documents, a summary explaining how outcomes of public information and consultation procedures were taken into consideration in the plan³⁶.

4. Conclusions

Under the Spanish legal system, the NECP must be subject to both a SEA process and a public participation procedure from its initial stage of preparation, following the requirements set therein. By excluding public participation in the initial stage of preparation of NECPs for the 2021-2030 period, the Governance Regulation is contrary to both EU law and the Spanish legal system. It should be noted that the "Rule of Law" is one of the values of the EU³⁷. Therefore, this wording should be subject to review. Regardless of this issue, Member States must respect the obligations established in their legal systems when preparing their INECPs, otherwise such plans could be subject to appeals in the future.

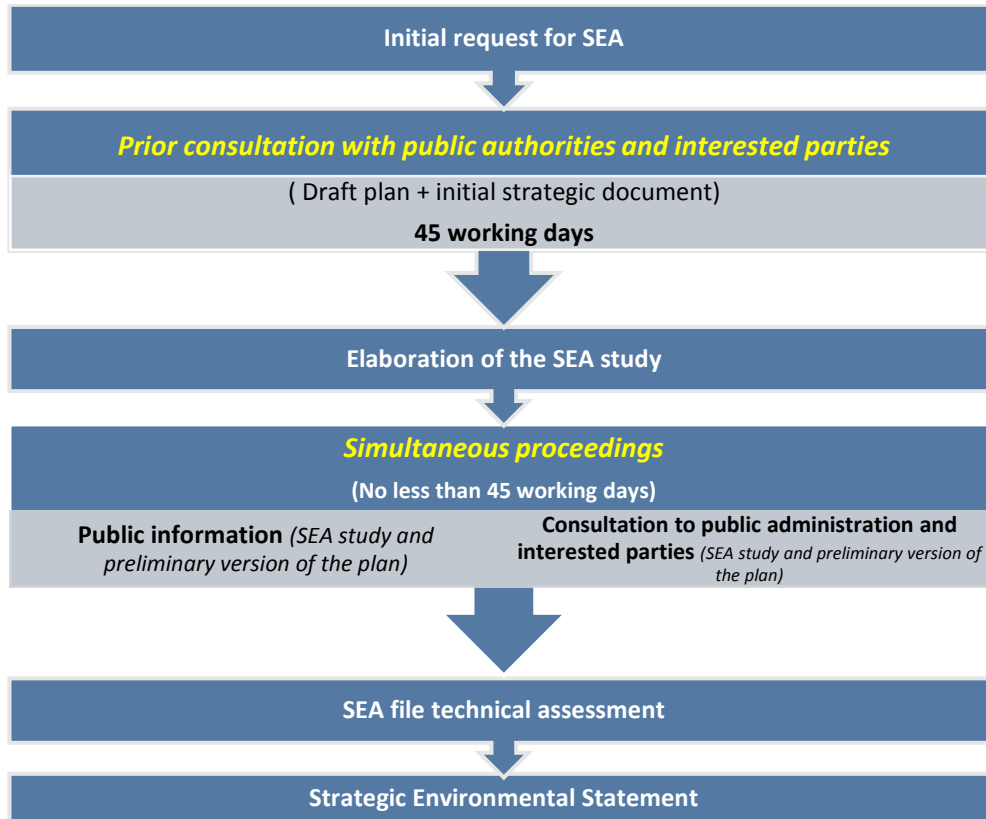
Finally, we cannot forget that both the EU and Spain have committed themselves to achieving the Sustainable Development Goals (SDG) of the 2030 Agenda. Among them, and along SDG 13: Climate Action, SDG 16: Peace, Justice and Strong Institutions includes in its targets ensuring responsive, inclusive, participatory and representative decision-making at all levels. In fact, SGD 16 is one of the topics to be addressed in detail by the High Level Political Forum on Sustainable Development in 2019.

³⁵ Article 23, Ibid.

³⁶ Article 26 (2) (b) item 2, Ibid.

³⁷ Article 2, Treaty of the European Union.

In consequence, both the EU and its Member States are required under International Law to undertake a public participation procedure in the preparation of NECPs, and thus contribute to the achievement of the SDGs.



(*) The phases in which public participation must take place during the ordinary SEA procedure are highlighted in yellow.

