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**Public participation procedure in the new Ukrainian legal
framework on environmental impact assessment in the
light of the requirements of international, EU and Polish
law**

**Procedura udziału społeczeństwa w nowej regulacji prawnej ocen
oddziaływania na środowisko przedsięwzięć na Ukrainie w świetle
wymagań prawa międzynarodowego, unijnego i polskiego**

SUMMARY

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Introducing international and European standards regarding public participation in the environmental impact assessment (EIA) procedure is important in pursuit of aspiration to introduce the principles of participatory democracy, civil society and the rule of law into public life in Ukraine, as well as in furthering environmental protection and harmonization of Ukrainian legislation on EIA with environmental *acquis communautaire*. This was the aim of developing new Ukrainian EIA Act¹, which was expected to introduce the requirements of the Aarhus Convention², the Espoo Convention³, and the EIA Directive⁴, into Ukrainian law⁵. That was required pursuant to art. 363 of the Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part⁶, as well as pursuant to art. 2 of the Protocol on the Accession of Ukraine to the Energy Community⁷. This thesis analyses current Ukrainian provisions in order to assess its compliance with the Aarhus Convention and the EIA Directive as well as its comprehensiveness and internal coherence, while due to research constraints it only occasionally refers other international or European legal acts, such as the Espoo Convention.

As the public participation procedure in EIA is quite new in Ukraine, it has not been a subject of comprehensive legal analysis and comparison to systems functioning in other countries, while such a comparison seems to be beneficial for the development of Ukrainian legislation as well as for the institution of the environmental impact assessment as such. Polish EIA Act⁸ seems to be a good point of reference in developing current Ukrainian legislation on public participation as Poland being in some terms similar to Ukraine country possesses longer EIA and participatory tradition and is a Member State of the EU.

1 The Act on environmental impact assessments of 23 May 2017 (*Zakon Verkhovnoi Rady Ukrayiny vid 23.05.2017 No. 2059-VIII Pro otsinku vplyvu na dovkilliya*; Vidomosti Verkhovnoyi Rady Ukrainy of 2017, No. 29, item 315).

2 The UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters signed on 25 June 1998 in the Danish city of Aarhus and adopted by Ukraine on 6 July 1999.

3 The UNECE Convention on Environmental Impact Assessment in a Transboundary Context signed at Espoo on 25 February 1991 and adopted by Ukraine on 19 March 1999.

4 Initially the Council Directive 85/337/EEC of 27 June 1985 on the assessment of certain public and private projects on the environment (OJ L 175, 5.7.1985, p. 40), codified by the EIA 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, 28.1.2012, p. 1) and amended by the Directive 2014/52/EU of the European Parliament and of the Council of 16 April 2014 amending Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment (OJ L 124, 25.4.2014, p. 1).

5 It is stated in the information on EIA draft law (*Podannya*) [online:] <http://w1.c1.rada.gov.ua/pls/zweb2/webproc34?id=&pf3511=58257&pf35401=378289> [access: 21.12.2019].

6 Oficijnyj Wisnyk Ukrainy 2014, No. 75, vol. 1, page 83, item 2125.

7 The Protocol was ratified by the Law of Ukraine No. 2787-VI of 15.12.2010 (*Zakon Verkhovnoi Rady Ukrayiny vid 15.12.2010 2787-VI Pro ratyfikatsiyu Protokolu pro pryednannya Ukrayiny do Dohovoru pro zasnuvannya Enerhetychnoho Spivtovarystva*; Vidomosti Verkhovnoyi Rady Ukrainy of 2011, No. 24, art. 170).

8 *Ustawa z dnia 3 października 2008 r. o udostępnianiu informacji o środowisku i jego ochronie, udziale społeczeństwa w ochronie środowiska oraz o ocenach oddziaływania na środowisko* (the Act of 3 October 2008 on environmental information, public participation in environmental protection and on environmental impact assessments) (Journal of Laws No. 199, item 1227, as amended).

The analysis of international, European, Polish and Ukrainian legislation on public participation in the process of the EIA procedure was based on conceptual differences between Western and Eastern concepts of the procedure of assessing expected environmental impacts of the planned activity and a place of public participation in environmental decision making. It is important that previously effective Ukrainian legislation on assessing environmental impacts of the planned activities (so-called OVOS/expertiza system) was based on the Eastern concept that was developed for centrally planned economy, focused on substantive and not procedural grounds, had technical, not participatory nature, with formal public participation usually conducted by a project proponent interested in the implementation of the planned activity. Due to these features the Eastern concept of the procedure of assessing expected environmental impacts of the planned activity was found to be inconsistent with the Aarhus and Espoo Conventions⁹.

At the same time the provisions of the article 6 of the Aarhus Convention regulating public participation in the environmental decision-making regarding specific activities have been designed to fit the “Western model” of EIA in which the authority competent to take a decision regarding authorisation of the activity is also primarily responsible for conducting public participation procedure and taking due account of its results. The interconnection of these models and the possibility of previous Ukrainian legislation to comply with international standards are analysed in the thesis.

In Western concept used as a background of current international and European EIA law, public participation is a procedure allowing public opinion to be taken into account via informing the public on the possibilities to participate, providing it with the access to relevant information, gathering public opinions and taking them into account during issuing the final decision, which the public should also be informed about. The thesis analyses current Ukrainian provisions in order to

⁹ See, e.g. Decision V/4 taken by the fifth session of the Meeting of the Parties to the Espoo Convention (2011; ECE/MP.EIA/15) [online:] http://www.unece.org/fileadmin/DAM/env/documents/2011/eia/decision_V4.e.pdf [access: 01.06.2019], paras. 17-28; Andrusyevych A. (2006), *Dotrymannya Ukrayinoyu svoikh zobov'yazan' vidpovidno do Konventsiyi pro dostup do informatsiyi, uchast' hromads'kosti u pryynyatti rishen' ta dostup do pravosuddya v ekolohichnykh pytannyakh* (Ukraine's Compliance with its Obligations under the Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters), “Environment People Law Journal” No. 1 (31) [online:] <http://epl.org.ua/wp-content/uploads/2016/12/V31-2.pdf> [access: 03.06.2019]; Cherp A., Laevskaya E. (2008), *Independent review of Ukraine's legal, administrative and other measures to implement the provisions of the Espoo Convention*. Annex to follow-up to the Decision taken by the fourth session of the Meeting of the Parties to the Convention No. IV/2 on the review of compliance regarding Ukraine, ECE/MP.EIA/IC/2009/5 [online:] <https://www.unece.org/fileadmin/DAM/env/documents/2009/eia/ic/ece.mp.eia.ic.2009.5.e.pdf> [access: 20.09.2019], para. 8; Rachyns'ka V.Ya. (2012), *Ekolohichna otsinka za zakonodavstvom Yevropeys'koho Soyuzu i Respubliki Pol'sheha ta yiyi ukrayins'ki vidpovidnyky* (Environmental assessment under the legislation of the European Union and the Republic of Poland and its Ukrainian counterparts), “Malyj i Serednij Biznes (Prawo, Derzava, Ekonomika)”, No. 3-4(50-51), p. 104; *General guidance on enhancing consistency between the Convention and environmental impact assessment within State ecological expertise in countries of Eastern Europe, the Caucasus and Central Asia* adopted by Meeting of the Parties to the Convention on Environmental Impact Assessment in a Transboundary Context (Sixth session, Geneva, 2–5 June 2014, ECE/MP.EIA/2014/2), para. 7.

assess its compliance with the Aarhus Convention and the EIA Directive as well as its comprehensiveness and internal coherence. The attention is also paid to uniqueness of Ukrainian public participation system as some solutions adopted in Ukraine are typical for the countries of the former Soviet Union; while some solutions are innovative and can serve as a model for other countries. The analysis covers not only generally binding acts of positive law, but also other documents in the form of decisions, opinions and guidelines of relevant international, EU, Polish and Ukrainian bodies, judicial decisions as well as views of doctrine.

The thesis includes nine chapters, first five of which present the prerequisites and general legal framework of the EIA and public participation procedure, as well as main features of the public participation procedure. In Chapter I titled *Introduction* the legal background of the analysed issues is scrutinised. On the basis of current legal framework on the public participation in the process of EIA in Ukraine in the light of relevant Polish, European and international legislation the choice of the topic is substantiated. Its importance is argued on the basis of the tendency of European integration in Ukraine as well as lack of comprehensive scientific research on this topic. In the Chapter the conceptual background of EIA and public participation and main concepts such as EIA and public participation and their interconnection are discussed. The Chapter also provides information on the research methods used in the current thesis as well as main hypotheses to be analysed.

Chapter II titled *Environmental impact assessment as an institution of environmental law* presents the milestones of the recent historical development of the international, European, Polish and Ukrainian law on EIA as well as current legal framework on this issue. During the presentation of current legal framework of key elements of the EIA procedure in Espoo Convention, European, Polish and Ukrainian law are discussed, such as the determination of planned activities subject to EIA, setting the scope of the information to be included in the EIA report, preparing and discussing the EIA report, transboundary EIA, and taking into account the results of the EIA procedure in the final decision in the proceedings.

Chapter III titled *Public participation procedure in environmental decision-making – an overview* investigates the milestones of development of international, European, Polish and Ukrainian legal framework of public participation as well as current legal framework including key elements of the Aarhus Convention, the EIA Directive, Polish and Ukrainian EIA Acts. An attention is paid to the drawbacks of previous Ukrainian public participation procedure and the key differences between current Ukrainian and Polish legal framework of public participation in environmental decision-making.

Chapter IV titled *Objective scope of public participation in environmental impact assessment*

of specific activities presents the concept of the public and its derivatives (mainly the public concerned), as well as the concepts of “every person”, “parties to the proceedings” and “participants with the rights of a party” used in Polish law. The application of the principle of non-discrimination in the public participation procedure and the rights of the environmental organisations in environmental decision-making in international, European, Polish and Ukrainian law are also scrutinised.

Chapter V titled *Subject matter and basic principles of public participation in environmental impact assessment of specific activities* investigates the decision-making procedures (in Ukraine it is only the EIA procedure), in which public participation is required, as well as the ways of determination of the planned activities subject to EIA in Poland and in Ukraine. Additionally, it elaborates on the compliance of current Ukrainian law with international and European requirements regarding early public participation and establishing reasonable time-frames for the different phases of public participation procedure.

Next four chapters are distinguished on the basis of different stages of public participation procedure. Each chapter usually consists of the subchapters analysing international, EU, Polish and Ukrainian law regulating each aspect of public participation and conclusions from this analysis.

Chapter VI titled *Notifying the public on the initiation of the decision-making and of the commencement of the public participation procedure* is dedicated to the first stage of the public participation procedure, namely to notification of the public. Firstly, it elaborates on the entities entitled to get notified and the entities responsible for ensuring public notification and focuses on the differences of international, European, Polish and Ukrainian provisions in this respect. Secondly, it examines if the requirement on an adequate, timely and effective manner of public notification from the Aarhus Convention is included in the EU, Polish and Ukrainian legislation and the consequences of its presence or absence. Thirdly, in this Chapter of the thesis a list of information to be included in the notice according to the mentioned legal systems is analysed. And, finally, it explores the various forms of public notification, in particular public and individual notice.

Chapter VII titled *Providing access to information relevant to the decision-making* analyses international, European, Polish and Ukrainian provisions on public access to the relevant information in the public participation procedure by investigating the entities required to ensure public access to this information and entities entitled to be provided with such an access, the scope of information to be accessible (including the role of the EIA report and opinions and reports of the public authority responsible for issuing the decision, as well as of other public authorities), the procedural requirements to access to information, such as a necessity to submit a request to get an

access to information, and providing access to information for examination at its location free of charge. In this context it analyses a peculiar feature of Ukrainian legislation, which provides the possibility to get access to relevant information through a central electronic portal, the so-called Single EIA Registry (ukr. *Yedynyj reyestr z otsinky vplyvu na dovkillya*).

Chapter VIII titled *The possibility for the public to submit comments and opinions* elaborates on the third stage of the public participation procedure. Namely, this Chapter similarly as previous ones, includes the discussion regarding the objective scope of the right to submit public comments and opinions. It also analyses the subject matter of public comments and opinions along with the issue, if they should be justified and the possibility to submit not only comments and opinions, but also questions. The forms of submitting public comments and opinions (in writing, in electronic form, at a public hearing) are also presented in this Chapter. And finally, the time period of submitting public comments and opinions is discussed.

Chapter IX titled *Consideration of public comments and opinions and taking a decision* is focused on meaning of the requirement to take due account of the outcome of the public participation and of the obligation to provide reasons and considerations, on which a decision is based according to international, European, Polish and Ukrainian law. It also analyses the legal framework of the public notification of the issued decision. Thirdly, the providing the public with the access to the text of the decision along with the reasons and considerations on which the decision is based is analysed.

Analysis carried out on the basis of the assumptions presented above led to conclusions on the compliance of Ukrainian legislation on public participation in environmental decision-making with the respective international and European requirement (even in situations when these requirements are not consistent with each other), as well as on the development in Ukraine a clear legal framework on public participation in EIA including legal provisions similar to the respective Polish provisions and specific for Ukraine solutions. Some of these specific solutions seem to facilitate public participation procedure and EIA as a procedure creating frames for public participation, while some of them seem to stem from the OVOS/expertiza tradition or could be questionable from the point of view of effectiveness of the public participation. This analysis was put to practical usage during formulation *de lege ferenda* conclusions related to proposals aimed at ensuring facilitation public participation in environmental decision-making.