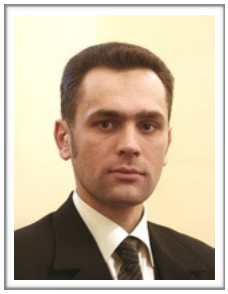
# THE PROBLEMS OF THE ENVIRONMENTAL IMPACT ASSESSMENT IN UKRAINE AND THE WAYS TO SOLVE THEM



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1. The industrial activity causes adverse impact on the environment and human health very often. An environmental impact assessment (hereinafter - EIA) procedure is one of the most efficient tools of reducing the adverse environmental impact. Not only the EIA is the procedure of reducing adverse environmental impact, it is also the tool for taking reasonable decision, which allows avoiding unnecessary spending. Alongside with that the EIA procedure can function promptly only provided that some level of efficacy of the legislation and the practice of its realisation. Without this the EIA become only the administrative barrier, having very little positive consequences.

The development of the Ukrainian legislation is very controversial. The Government of Ukraine was issued the caution by the paragraph 6 of the decision IV/ 9h of the meeting of the parties of the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (hereinafter – Aarhus Convention) [3]. The reason for the caution was the absence of a clear, transparent and consistent framework for the implementation of the Convention in terms of the public participation in the EIA procedure.

Taking into consideration mentioned above, this article aims to explore the main shortcomings of the Ukrainian EIA procedure and to propose the way how they can be solved. It is impossible to comprehend all problems of the Ukrainian EIA procedure, thus we will draw our attention only to the main shortcomings undermining the whole system of the EIA in Ukraine.

2. The EIA procedure in Ukraine was the subject of previous research. The Ukrainian EIA procedure is studied in the Independent review of Ukraine's legal, administrative and other measures to implement the provisions of the Convention [2] (hereinafter – Independent review) . The Ukrainian EIA legislation has been changed drastically since 2009, thus essential part of the Independent review is no longer valid. The Independent review was mostly focused on the Espoo Convention matters

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than on the analysis of the EIA procedure itself. It was not the task of the Independent review to analyse the weaknesses of the Ukrainian EIA procedure (paragraph 44 of the Independent review). Thus the Independent review didn't cover all problems of Ukrainian EIA procedure.

The problems of the Ukrainian EIA system were studied in the Review of the exiting problems with the insufficient framework for implementation of the Aarhus convention (Ukraine) [1]. However, the report had been done in 2010, i.e. before the Law of Ukraine "On Urban Development Activities" was adopted. Thus the big part of the review is no longer valid as well.

A.Andrusevych analysed the problems of the EIA procedure in Ukraine together with the ways they should be solved. He studied the problems of the EIA procedure and proposed several ways how they can be solved in the analytical document dedicated to the EIA procedure in Ukraine[13]. The analytical document contains a lot of important thoughts on EIA procedure in Ukraine, but does not cover some of the most important ones.

Filling this gap is the goal of the article. The author of this work would like to study some of the problems of EIA procedure in Ukraine and the way they should be solved.

3. Before starting to analyse the problems of Ukrainian EIA procedure it is important to remember that by its legal nature the EIA procedure is the procedure for human rights realisation. First and foremost, the EIA is the procedure for human right to environmental safety realisation[10]. Using their right to participate in the decision-making process, public use the opportunity to develop the environmental performance of the proposed activity. The public participating in the decision-making process is entitled to having the developer as well as the public authority to take, if possible, all measures for prevention of reduction of the adverse impact on the environment.

The public should have this right because of their right to environmental safety including the right for taking all measures for preventing environmental risk, which is economically feasible and has no unreasonable harm to other lawful interests. Thus the public authorities, taking the decision regarding the proposed activity, shall strike the balance between different lawful interests. By doing so the public authority shall oblige the developer to take the measures for reducing the adverse environmental impact to the least possible levels, without unreasonable negative effects on lawful interests of others. This concept was approved by the Aarhus Convention Compliance Committee (hereinafter – Compliance Committee), which said "… non-compliance with the operative provisions of the Convention is not in conformity with

the objective of the Convention [Aarhus Convention] as defined in article 1" [6]. According to article 1 of Aarhus Convention "in order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each Party shall guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters in accordance with the provisions of this Convention". Therefore the objective of the right to participate in the decision-making process, envisaged by article 6 of Aarhus Convention, is to contribute to the protection of the right of every person to live in an environment adequate to his or her health and well-being. The thought that the procedural rights (including the right to participate in decision-making process) are underpinned by a fundamental, substantive right to live in an environment adequate for health and well-being, is also stated in the legal literature [8 p. 145].

Not only the EIA is the procedure for human right to environmental safety realisation but also for the property rights. Placing the installation, causing adverse environmental impact, will unavoidably influence the property rights of those, living in the vicinity of the installation. Their property rights could be influenced well (the price of the house increase because of the road has been build) or it could face adverse influence (for instance, the price of the house decreases because of the landfill was placed near the house). Placing the industrial installation inevitably will cause the adverse environmental influence on people's houses and land parcels, thus they shall have the right to ask that all necessary and economically reasonable measures will be done by the developer. Deprivation the owners of such possibility is an unlawful constrain of their property rights. The idea that the impact assessment procedures are related to the protecting of individual property rights has been said in the legal literature [12 p. 7]. Some authors interprets the term "environment" very broadly, thus the EIA in this understanding implies the impact on the property asserts of the person [please refer to 7 p. 1; 20 p. 137-138].

Finally the EIA procedure envisages defining of the proponent's obligation to repair or compensate the future damage, which will appear as a result of the proposed activity. Thus the EIA procedure is the logical extension of the right to compensation [11].

There are reasons to say that the Aarhus Convention as well as the Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effect of certain public and private projects on the environment (hereinafter – Directive 2011/92/EU)[4] embody this understanding of the EIA procedure. Article 6(8) of the Aarhus Convention obliges the Parties of the

convention to ensure that "in the decision due account is taken of the outcome of the public participation". This provision ought to be read in view of paragraph 9 of the preamble of the Aarhus Convention, stating "considering that, to be able to assert this right [the right to live in an environment adequate to person's needs for health and well-being]… citizens must have access to information, be entitled to participate in decision-making and have access to justice in environmental matters …".

The provision of article 6(8) of the Aarhus Convention read in light of paragraph 9 of the preamble of the convention means the obligation of the public authority, taking the final decision about the proposed activity, to strike the fair balance between different interest and different rights. These competing rights are the right to environmental safety and the right to the land parcel of the person living in the vicinity of the installation causing the adverse impact on the environment and not using the installation on the one hand and the property right to the installation or the right to the entrepreneur activity on the other. If the public authority fails to strike the fair balance between these rights, the rights, not fairly disregarded, are violated.

This approach to the public authority obligation to take the outcomes of the EIA procedure into account corresponds with the Compliance Committee understanding of the mentioned above obligation. The last at the end of the paragraph 101 of the Finding and recommendations with regard to Communication ACCC/C/2008/24 concerning compliance by Spain[5] said "…a system where, as a routine, comments of the public were disregarded or not accepted on their merits, without any explanation, would not comply with the Convention". This statement clearly shows that Aarhus Convention means more than merely the right of the public to submit the written comments, which is up to the public authority to take them into account or to disregard them.

The Compliance Committee clearly denied the right of the public to veto the proposed activity. For instance, in paragraph 98 of the Finding and recommendations with regard to Communication ACCC/C/2008/24 concerning compliance by Spain the Compliance Committee stated "… public authorities take due account of the outcome of public participation does not amount to the right of the public to veto the decision, and that this provision should not be read as requiring that the final say about the fate and the design of the project rests with the local community living near the project, or that their acceptance is always needed".

The same understanding of the public authority obligation to take into account of the outcomes of the public participation is embodied in the article 8 of the Directive 2011/92/EU, according to which "the results of consultations and the information gathered pursuant to Articles 5, 6 and 7 shall be taken into consideration

in the development consent procedure". This provision ought to be understood in view of the article 6(8) of Arhus Convention and the mentioned above finding and recommendations of the Compliance Committee.

In order to ensure public with the opportunity to submit the comments to the proposed activity the public needs to know about the proposed activity first. Otherwise it is impossible to submit reasonable comments to the permitting authority and by doing so to promote the future environmental performance of the proposed activity.

The Ukrainian EIA procedure has several different stages. The number of them depends on the complexity of the construction. The construction process for the installation of the IV and V category of complexity (usually – EIA installation) has three stages: the feasibility study stage (hereinafter - SFS), designing stage, construction design stage (paragraph 4.8.3 of state construction norms - DBN A. 2.2-3-2012[14] hereinafter - DBN A.2.2-3-2012). The SFS is aimed to justify the main design choices, production capacity, product nomenclature, the production cooperation, the raw material, materials, intermediate products provision, the supplement of the fuels, electricity and thermal power, water, labour resources, choice of the concrete land parcel for construction, the price of the construction works and main technic-economic indicators (paragraph 5.2 of the DBN A. 2.2-3-2012). Therefore there is no description of the environmental and technical parameters of the installation, except the territorial choice, on SFS. Nevertheless the EIA procedure is prescribed to be conducted on the SFS (according to the paragraph 5.2 (second sentence) of the DBN A.2.2-3-2012 "while the SFS the comprehensive assessment of the proposed activity impact on the environment shall be conducted … the EIA materials, compiled as a separate part (chapter), is a compulsory part of the SFS documentation").

There are some authors supporting this approach. For example Kalynovskii S.V. supports conduction of the EIA procedure on the SFS. The reason for that is the EIA procedure being performed on the SFS allows justifying the territorial choice i.e. the choice of land parcel the installation will be placed on. Conducting the EIA procedure on the further stages will cause the EIA to become the tool for the justification of already chosen way of the proposed activity conduction as opposed to the procedure of choosing the territorial alternative [free interpretation of the 16 p. 20].

As it was mentioned before, the EIA is the procedure for the realisation of the human right to environmental safety, property right and right to compensation. These rights are being realised by the opportunities for the public concerned to submit the comments and thus to improve the environmental conditions of the proposed activity.

On the SFS the developer doesn't have the completed EIA report. Having no completed EIA report the public concerned is unable to assess the future impact of the proposed activity, because there is no information about the technique, which will be used at the installation, there are no other construction choices. There is no completed information about the abatement techniques and it makes it impossible to assess the proposed activity impact on the human health and on the environment.

Virtually, the developer has only the very general data about the future activity and the territorial choice. Therefore the public only has a rough data regarding the technical choices. Having no such information the public concerned can only submit their proposal, prepared using very rough data. Basically it is not an assessment, but submission of information about public needs. It is definitely not the same as the public's concerned right to assess the environmental performance of the proposed activity. It means that there is no sufficient procedure for property right, right to environmental safety, right to compensation realisation. Therefore the EIA procedure in Ukraine doesn't fulfil its function.

The EIA procedure is conceived by the legislator to be a procedure in which the public has the opportunity to express its opinion about the proposed activity. This opportunity is considered to be a sociological measure aimed at gathering the information about the people's opinion about the proposed activity. The last legal acts embody this way of understanding the EIA procedure. For instance, the article 21 of the Law of Ukraine "On Regulation of Urban Development Activities" dated on 17 of February 2011 no 3038-VI [19] establishes the order for the public participation in the procedure of the urban development documentation (hereinafter - UDD) adoption. The Order for Conducting Public Hearings Regarding the Taking into Account the Public Interests while Drafting the Urban Design Documentation on the Local Level, adopted by the Cabinet of the Ministers of Ukraine on 25 of May 2011 no 555 (hereinafter – Order 555) [21]. The UDD is equal to the plans and programs Article 7 of the Aarhus Convention regulated. However the provisions of the mentioned above law show the understanding of the legislator of the essence of the public comments' role in the decision-making procedure. The article 21 of the Law of Ukraine "On Regulation of Urban Development Activities" establishes that the procedure has many shortcomings, but we will be dealing only with the way how the public comments are taken into account.

Article 21(8) of the Law of Ukraine "On regulation of Urban Development Activities" allows the council of the town (village) to create the special resolution committee. The aim of the committee is to solve the disputable points arising in the course of the UDD adoption. The article 8 of the Law of Ukraine "On Regulation of

Urban Development Activities" prescribes the composition of the resolution committee. The representatives of the public shall occupy not less than 50% and not more than 70 % of the resolution committee composition. Under the paragraph 13 of the Order 555 within the 50 to 70 % of the representatives of the public shall be no less than 30% of the representatives of the Ukraine-wide non-governmental organisation and professional associations.

Under the article 21(8)(9) of the Law of Ukraine "On Regulation of Urban Development Activities" the resolution committee takes decision by the majority of its present members. The paragraph 15 of the Order 555 contains the same provision.

These provisions, being juxtaposed with the EIA procedure as a tool for the rights to environmental safety, property right, right to compensation realisation, is in contradiction with them. For instance, if there is only one person, who will experience the adverse environmental impact from proposed activity and if the impact can be removed by the economically reasonable measures, the person, having submitted the relevant comment, has the right that the reasonable measures will be prescribed by the public authority to the developer. The right is based on and is the logical extension of the right to compensation, the property right, and the right to environmental safety. The public authority, refusing the mentioned above demand, violates these rights. It doesn't matter whether the other persons agree or disagree with this decision. As long as the member of the public concerned demands the competent public authority to prescribe the developer with the taking measures, which is inside of the fair balance of the different interest, the representative of the public concerned has the right to that. However the article 21(8)(10) of the Law of Ukraine "On Regulation of Urban Development Activities" says that "the resolution committee takes the decision by the majority of its present members".

The article 21(8)(10) of the Law of Ukraine "On Regulation of Urban Development Activities" shows that the legislation considers public participation as the a process that reveals public opinion reaches the compromise between the members of the public and with the developer or between the members of the public themselves, when possible.

This misunderstanding undermines not only the legislation but also the legal practice of the EIA. The vast majority of the public consider the public participation procedure within the EIA procedure, as their right to veto or as the tick-box work. This situation needs to be changed urgently.

4. One of the main problems of the EIA procedure, playing crucial role for the functioning thereof, is the range of the issues being considered while the final

decision is being taken. This issue connected with the question whether the developer is obliged to reduce adverse environmental impact if it is economically reasonable and if the current one doesn't exceed the norms established by the law. The Aarhus Convention in its article 6(8) prescribes to the Parties to "ensure that in the decision due account is taken of the outcome of the public participation". If the article 6(8) of Aarhus Convention means that the public authority, authorising the proposed activity, is only observing the norms, established by the law, it will make unnecessary or will narrow down the scope for the contribution of the public participation because the public authority shall put the figures, established by the law or other legal act, in the permit or to the other decision, allowing the developer to conduct the proposed activity. It definitely was not the purpose of the Aarhus Convention, because there is a difference between the environment corresponding to the legal requirements or the developer not violating the legal norms, and the environment adequate to the person's health and well-being. The purpose of the Aarhus Convention is to ensure the latter (please refer to the article 1 of Aarhus Convention).

The obligation of the public authority, authorising the proposed activity, to take into account the outcomes of the public participation was also established by the national legal acts of Ukraine. For instance, according to the article 2(3) and 2(8) of the Administrative Legal Procedure Code of Ukraine no 2747-IV, dated 06.07.2005 [18] "in the proceeding against decisions, actions or inaction of public authorities, administrative courts examine whether they are taken (committed): … 3) reasonably i. e. taking into account all relevant for the case circumstances; … 8) proportionally, i.e. striking a balance between all negative outcome for the rights, freedoms and interest of the person and the task the decision has to achieve … ."

The permit for conducting construction works is the final decision in the EIA procedure the most often in Ukraine. In case the permit is the final decision the last is divided into two parts. The first one is the expertise of the design documentation and the second one is the issuing the permit for the construction work. In the first stage the developer submits the design documentation to the expert institution for the expertise review. The expertise review "proves the compliance of the design documentation with the legislation of Ukraine in the construction field, construction norms, standards and rules, initial data, proves the technical-economic parameters of the project, and proves the project to be adopted" (paragraph 9.2.1.second sentence of the national standard DSTU-H Б А.2.2-10:2012[15]).

The design documentation compliance with the requirements of the Ukrainian legislation is understood as a compliance with the clearly stated parameters adopted by the legal acts. The compliance with the legislation doesn't comprise the general

obligation to strike the balance between competing interests, while taking the final decision. This conclusion is supported by the provision of paragraph 4 second sentence of the DSTU-H Б А.2.2-10:2012, which states "the goal of the design documentation expertise is to check the quality of the design choices by detecting the deviation from the requirements of the Ukrainian legislation in the construction field, construction norms, standards and rules … ". Thus the expert institution shall issue the positive review if the design documentation is in compliance with the clearly established legal norms. If there are no norms or if the design documentation is in compliance with the legal norms but it is possible to do additional measures, not causing the unreasonable spending, the expert institution shall give the positive conclusion and may not prescribe to the applicant to do additional measures.

Having the positive review of the expertise the state inspection committee of construction issues the permit for conduction of construction work. The reasons for dismissing the application for the permit for conduction of construction work is listed in the article 37(4) of the Law of Ukraine "On Urban Development Activities" and are the following: 1) the applicant doesn't submit the documents necessary for taking the decision for issuing the permit; 2) submitted documents contradict to the requirements of the legislation; 3) if the permitting authority detects inaccurate information in submitted documents. This is the exhaustive list of the reasons for dismissing the application for the permit.

The expertise helps the inspector of the state inspection committee of construction to deal with the complexity of the design document. The expertise together with the permit for conduction of construction work is intended to check whether the design documents correspond to the legal norm, not including the general obligation to strike a fair balance between different, competing interests. Unlike the Ukrainian legislation the aim of the EIA procedure should be:

•to assess of the design choices justification;

•to strike the fair balance between different, competing interests;

•to decrease the level of the impact on the human health and on the environment, as well as decreasing the risk for the human, even if this impact or risk is lawful, provided that it is economically and technically feasible;

•to define necessary safety measures, when there is not enough knowledge.

The EIA procedure only aimed at checking whether the design documents is in compliance with the legal norms (not including the general obligation to strike the fair balance between different, competing interests or to take the all measures the developer can reasonably take) is unable to perform mentioned above tasks. Therefore the potential of the EIA procedure in Ukraine is still not fulfilled.

5. To conclude mentioned above research, we would like to bring the reader's attention to the following main conclusions.

The EIA is the procedure for the realisation of the human right to environmental safety, property right and right to be compensated, and not merely gathering the information.

These rights are being realised by the possibility of the public concerned to submit the comments and improve environmental performance of the proposed activity. On the SFS the developer doesn't have the completed EIA report. Having no completed EIA report the public concerned is unable to assess the future impact of the proposed activity, because there is no information about the technique, which will be used on the installation, there are no other construction choices. There is no completed information about the abatement techniques, which make it impossible to assess the proposed activity impact on the human health and on the environment. It deprives the entitled persons form the legal procedure to realise mentioned above rights.

The EIA procedure aimed only at checking whether the design documents are in compliance with the legal norms (not including the general obligation to strike the fair balance between different, competing interests or to take all measures, that the developer can reasonably take) is unable to perform EIA procedure's tasks. Therefore the potential of the EIA procedure in Ukraine is still not fulfilled.

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*Статтю присвячено аналізові процедури оцінки впливу на довкілля в Україні. В результаті зазначеного аналізу автор доходить висновку, згідно з яким завданням процедура оцінки впливу на довкілля в Україні є лише забезпечити щоб проектна документація на будівництво була складена відповідно до норм права (не враховуючи загального обов'язку забезпечити справедливого балансу між різними, суперечливими інтересами чи вжити всіх заходів, яких замовник проекту може розумно вжити). Така процедура неспроможна забезпечити виконання завдань процедури оцінки впливу на довкілля.*

*Ключові слова: оцінка впливу на довкілля, екологічні права людини, дозвільна система у сфері охорони довкілля.*

*Статья посвящена анализу процедуры оценки влияния на окружающую среду в Украине. В результате этого анализа автор приходит к выводу о том, что целью процедуры оценки влияния на окружающую среду в Украине*

*является только обеспечение того, чтобы проектная документация на строительство была составлена в соответствии с требованиями норм права (исключая общую обязанность обеспечить справедливый баланс между разными, противоречащими интересам или принять все меры, которых заказчик проекта может разумно принять). Такая процедура неспособна обеспечить выполнение целей процедуры оценки влияния на окружающую среду.*

*Ключевые слова: оценка влияния на окружающую среду, экологические права человека, разрешительная система в сфере охраны окружающей среды.*

*The article is dedicated to the legal analysis of the environmental impact assessment procedure in Ukraine. As a result of the analysis the author has come to conclusion that environmental impact assessment procedure in Ukraine is only aimed at checking whether the design documents is in compliance with the legal norms (not including the general obligation to strike the fair balance between different, competing interests or to take all measures the developer can reasonably take). This procedure is unable to perform tasks of the environmental impact assessment procedure.*

*Key words: environmental impact assessment, environmental permitting system.*