

To the
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of Ukraine
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Chair of Ukrainian Parliament
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Ministry of Ecology suggests the changes to the EIA system that will negatively impact the process of Ukraine joining the EU

Ministry of Ecology suggests the changes to “The Law on Environmental Impact Assessment”. The changes threaten EU membership perspectives of Ukraine, because of their incompliance with EU acquis.

On August 26, 2022, Ukraine’s Ministry of Ecology and Natural Resources published the draft law "On changes to the law on EIA" for public consultations.¹ This draft proposes an array of profound changes to the effective law.

We have analyzed the draft law in the light of Ukraine’s aspirations towards the EU to answer the following questions:

- Do the suggested changes meet the EU legislation requirements and Ukraine's obligations under the Association agreement?
- How adoption of the changes will influence the process of accession to the EU.

The explanatory note states that "the draft law does not contain the articles that relate to Ukraine's obligations in the area of EU integration". Which is not true.

EIA is a European tool for state regulation in the area of environmental protection that was implemented by Ukraine as an outcome of the obligations taken under the Association agreement, and some other international treaties. This fact is also supported by the submissions of MPs who, at the proper time, registered the law 2009a-d2² and the protocols of its consideration by the parliament and its committees.

Do the suggested changes meet EU legislation requirements and Ukraine's obligations under the Association agreement?

¹ <https://mepr.gov.ua/news/39614.html>

² http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=58257

The compliance of national legislation in the area of EIA with the EU acquis should be considered on the basis of analyzing its compliance with two legislative acts of the EU: **The Directive 2011/92/EU** On the assessment of the effects of certain public and private projects on the environment (codification) with changes and amendments, introduced by the Directive 2014/52/EU and **The Directive 2003/4/EU** On public access to environmental information and repealing Council Directive 90/313/EEC. Both the directives are among Ukraine's obligations under the Association Agreement.

Keeping in mind the changes suggested to the law on EIA, this analysis focuses on compliance with the **Directive 2011/92/EU** only.

- **The introduced norm on the possibility of consultations with other state and local authorities during EIA process**

The draft proposes to amend the first part of Article 2³ with the new part 1¹ reading as follows:

*"1¹. When performing an environmental impact assessment, a competent local body, and in the instances defined by parts 3 and 4 of Article 5 of this law – a competent central body, **could** carry out consultations, including through mail aimed at collecting comments and suggestions to impact assessment of planned activity on the environment with other executive authorities, their local branches, local authorities according to their competence in the issues related to the environment" (the bold highlight has been added by us).*

The involvement of other concerned authorities is among the requirements of the Directive 2011/92 EU. The involvement is obligatory, it should be prescribed by detailed law requirements and mustn't bear characteristics of discretionary powers (i.e. "**could**"). Therefore, the suggested changes do not comply with Article 6, and Article 5, part 3 of the Directive on EIA. Besides that, the draft law does not require publishing outcomes of such consultations, which goes against Article 9 (1)(b); it also does not require informing the authorities about an adopted decision (art. 9(1)(a) of the directive). It's worth mentioning that the actual law on EIA does not comply with the directive regarding this issue either.

- **The changes of the requirements for publishing the information during EIA process**

The suggested changes totally remove the requirement to publish in media a notification about the planned activity, which is subject to EIA, and an announcement of a start of public consultations on an EIA report. Instead, the draft law suggests the following mandatory means for publishing the information (part 3 Art. 4):

*"The notification about the planned activity, which is subject to EIA, the announcement of a start of public consultations on an EIA report are published by a governing body **in at least three public locations** (namely, notice boards in buildings of local authorities, public facilities, post offices, stationary bus stops, in places designated and equipped by local authorities, and other similar places where the population gathers) on the*

³ В оприлюднених документах зазначено різні статті (стаття 1 в проєкті закону та стаття 2 в порівняльній таблиці), проте йдеться, мабуть, про статтю 2 ЗУ «Про ОВД».

territory where the planned activity is held and in the territorial units that can be impacted by the planned activity” (the bold highlight was added by us).

The suggested norm implies that the least requirement is to place the information in three public locations only. But even if understood broadly, the requirement is too narrow and can't ensure a proper informing of the public. For example, in the hypothetical case of possible impact on Kyiv oblast, three public locations can't even theoretically cover most of the population of settlements located in the oblast. Given that the first sentence in the suggested part three of Art. 4 includes no quality requirement (which is moved to the next sentence, where it reads about possible but not required, auxiliary means of informing), the suggested changes altogether do not meet the requirements of Art 6(2) and 6(5) of the **Directive 2011/92/EU**.

Digital means (a registry) can't ensure proper informing even in conjunction with the requirement of three public locations.

- **Changes to the duration of public consultations and provision of a conclusion on an EIA report.**

The suggested changes significantly shorten the period for the provision of a conclusion on an EIA report - from 25 to 15 business days. We hold the opinion that the requirement is impossible to meet, and it only aggravates the formal and procedural nature of the existing EIA system in Ukraine. It's impossible to properly review an EIA report in such a short term

Additionally, inclusion of the requirement that reads as “the start date of the terms required by the law is the date indicated in the Unified registry of EIA reports” in real world could lead to uncertainty in the public consultations process, because the start date for participation in the consultations remains unclear: the dates when the information is made visible in public locations could significantly differ from the dates in the registry.

- **The reasons for rejection and negative conclusion on an EIA report**

While it does not go against the Directive, the absence of reasons for rejection and negative conclusion on an EIA report is a serious flaw of the actual law.

The draft law suggests including the list of reasons for rejection of a conclusion on an EIA report (new Article 9¹). On the other hand, the legal implications of (the means of) correcting the deviations prescribed by part 2 of this article do not comply with the foundations of the EIA procedure, which is an integral process and can't begin midway. In contrast, the content of the part 2 Art. 9¹ leads to the conclusion that after the deviations are corrected (or with the aim of correcting certain deviations) the ensuing EIA procedure is fast-tracked.

The draft law suggests the following reasons for a negative conclusion on an EIA report:

“6¹. The reasons for providing a conclusion on an EIA report that identifies the planned activity as unacceptable are:

*1) If there are **laws that impose explicit bans or limitations** that make the planned activity impossible to perform.*

*2) It is proven that, considering the requirements of part 1 of this article, and even after the implementation of all the measures aimed to prevent, reduce, mitigate the impact on the environment, and/or introduction of additional reasonable environmental requirements, the impact of the planned activity remains such that makes the planned activity unacceptable **according to the legislation**" (the bold highlight has been added by us).*

First, the list is exhaustive. Second, both reasons are derived from certain legal requirements or laws. But if there are no requirements, no reasons will arise. In its essence, the norm establishes presumed approval of the planned activity. Such an approach, in our opinion, contradicts with the purpose and foundations of EIA, as they were laid out by the Directive 2011/92/EU. EIA in its essence is an assessment tool that requires expert conclusions on the significance and negative effects of impact, rather than its compliance with law. What's more, the Directive bases immediately on key principles of primary law of the EU: precaution and prevention (see items 2 and 15 of the preamble). Therefore, such reasons for a negative conclusion do not meet the foundations of EU legislation and the Directive 2011/92/EU.

How will the adoption of the changes influence the progress towards EU membership?

As it was known, in June 2022 the Council of Europe granted Ukraine the status of a candidate country for EU membership. Before that, the European Commission preliminary assessed the readiness of Ukraine to assume obligations, which was based on the questionnaire completed by the Ukrainian Government.⁴ The second part of the questionnaire included an assessment of the implementation of environmental policy and EU acquis, including in the field of EIA. In this part, Ukraine has explained the complete incompliance of the actual laws with the directive on EIA.

When the negotiations on the EU membership start (we hope it will happen in the first half of 2023), Ukraine and the EU will begin detailed consultations on all main components of EU acquis and policies⁵, including the climate change and environmental issues.

In our opinion, the actual law on EIA does not fully meet the Directive 2011/92/EU requirements. However, a part of the suggested changes aggravates the discrepancy even further. Obviously, the rollback changes will not be left unattended by civil society in Ukraine and the EU, as well as by competent EU bodies.

As a result, the suggested changes pose risks for Ukraine's accession to the EU and threaten the process of opening the negotiations on EU membership. The Government and Parliament of Ukraine must approach the changes to the legislation with proper responsibility, as the changes are subject to EU acquis requirements and full compliance of changes must be ensured.

Signatories:

⁴ <https://www.kmu.gov.ua/news/ukrayina-peredala-yes-zapovnenu-drugu-chastinu-opituvalnika-neobhidnu-dlya-otrimannya-statusu-kandidata-na-chlenstvo-v-yes>

⁵ https://neighbourhood-enlargement.ec.europa.eu/enlargement-policy/glossary/chapters-acquis-negotiating-chapters_en

- NGO Ecoclub
- NGO Ecoaction
- NGO Black Sea women's club
- Resource and analysis center "Society and Environment"