

UN TAKES INTO CONSIDERATION ECOCLUB'S COMPLAINT ABOUT INADEQUATE PUBLIC PARTICIPATION IN EIA AND SEA PROCESSES

What is the problem?

There are two procedures in Ukraine designed to prevent hazardous environmental impacts of business activities: environmental impact assessment (EIA) and strategic environmental assessment (SEA). Subject to EIA are individual projects that may have a significant impact on the environment. SEA safeguards sustainable development in general and therefore relates to planning documents at the national level, including national and local plans and programs, territorial development plans, etc.

To build a plant, you would need to purchase or rent a land plot and obtain several permits. In particular – a conclusion for environmental impact assessment (EIA), which is obligatory for the projects that may have a significant impact on the environment (according to the [Law of Ukraine "On Environmental Impact Assessment"](#)). In addition, a land development plan (LDP), which [includes a Strategic Environmental Assessment \(SEA\) report](#), must be developed and approved. After that, one would need to obtain a permit to start construction. These permits are approved and issued by the respective authorities.

The first problem is the requirement for an investor to obtain land ownership or use rights before the start of the permitting procedures. The EIA Law requires alternatives locations to be considered, but an investor wouldn't buy several plots in different locations just to "consider alternatives" for the EIA. Therefore, it is impossible to fulfill this requirement in the EIA process.

Secondly, the SEA is just a section of the LDP, and the content of this section is actually much shorter than provided for by the Law of Ukraine "On Strategic Environmental Assessment". As a result, participants of public consultations regarding the SEA do not receive complete information on environmental impacts, as required by law.

Thirdly, a permit for pre-construction preparatory works may be issued even before public consultations on the SEA and LDP. This permit cements the decision to erect the plant in a particular location. In instances when the SEA and LDP are approved after the preparatory construction permit, the public has no say in the early stages of project decision-making. Similarly, even before the EIA and SEA are discussed, the plant may start building ancillary facilities, such as warehouses, access roads, etc.

Kronospan plant is a common investment project in Ukraine that involved construction. The woodworking plant was to process 36% of commercial roundwood in Ukraine (the estimated need for commercial roundwood supplies was estimated by the developer at 3,277

thousand m³ per year, 1,392 thousand m³ for chipboard production and 1,885 thousand m³ for OSB production, EIA Report, 2020). In order to build and operate the plant, it had to undergo a number of permitting procedures: LDP, EIA, SEA, and get a construction permit. Ecoclub participated in public consultations regarding the EIA report, received a lawsuit from Kronospan for criticizing the conclusion for the EIA, and appealed the positive EIA conclusion in courts.

During these activities, we learned that the EIA system in Ukraine does not fulfill its function of helping investors protect the environment and ensuring consideration of community's opinion. Both because of the difficulties for public participation and because of the gaps that allow construction of potentially hazardous facilities.

Glossary

- *EIA - environmental impact assessment - a permitting procedure that must be completed by a project that anticipates significant environmental impact. EIA concludes with permission or prohibition of the activity by the Ministry of Environment or the local administration. This conclusion is based on the EIA report and is issued after public consultations. ([The Law of Ukraine on Environmental Impact Assessment](#))*
- *SEA - strategic environmental assessment is aimed at assessing, preventing and reducing environmental impacts from the implementation of state planning documents (plans, programs, strategies). One of the SEA outputs is a report (when an LDP is developed, the output becomes a section of the report ([Law of Ukraine on Strategic Environmental Assessment](#))).*
- *LDP - a land development plan (both urban planning documentation at the local level and land management documentation that defines the planning and development of the territory), which ends with the approval and publication of documentation at the local level ([Law of Ukraine On Regulation of Urban Planning Documentation](#)).*
- *Aarhus Convention - the UN Economic Commission for Europe Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters ([Text of the convention](#)).*

Why do EIA and SEA procedures not sufficiently protect the environment and public health?

EIA is a permitting procedure that results in a binding conclusion. The conclusion is issued by the Ministry of Environment or a local administration. It determines the admissibility or justifies the inadmissibility of the proposed activity and defines the environmental protection measures that are mandatory for the project.

Environmental impact assessment is a procedure that involves

- preparation of an EIA report and public consultations;
- analysis of the report and information submitted by the public by the competent body;
- issue by the competent body of a conclusion for EIA, which must be based on the EIA report and the results of public consultations.

In reality, the EIA procedure is usually carried out as follows:

- after the purchase of a land plot for a proposed activity;
- simultaneously with land planning activities;
- prior to the SEA in the middle of obtaining various construction permits for "pre-construction preparatory works", including demolition.

Environmental impact assessment should ensure timely, adequate and effective public information (according to the EIA Law), namely:

- All information related to the EIA (*notification of the proposed activity, announcement of the start of public consultations regarding the EIA report, information on the EIA conclusion and decision to commence the proposed activity*) is published on the official website of the competent local body, in print media, on notice boards of local self-government bodies or in other public places in the territory where the proposed activity is planned to be carried out;
- The environmental impact assessment report and other documentation required for the environmental impact assessment provided by the business entity are publicly available and provided by the competent body, local authorities and the business entity for review;
- The Ministry of Environment and local administration provide free public access to all information related to the conclusion adoption process as it becomes available;
- The business entity is responsible for publishing the information.

Once a land plot is acquired, political and commercial pressure make it impossible to consider alternatives during public consultations of the LDP, EIA and SEA in the future. For example, at the regional level, regional administrations have to ensure public participation. Usually, they have conflicting interests. On the one hand, they ensure public participation and environmental protection, and on the other hand, they are interested in selling the site to an investor for already planned activities and attracting investment to the region and creating jobs. This makes following public participation ineffective and symbolic.

- Conflict of interests: the authorities represent the interests of business, not the community. The same authority promotes business development while participating in permitting procedures for the same business. In the case of Kronospan, the Rivne Regional State Administration, interested in attracting investments, sold land plots for investment projects. The Department of Environment, responsible for public participation and involvement in decision-making at such investment projects is subordinate to the regional administration. This situation renders impossible independent evaluation and permitting.
- The SEA does possess the necessary informative and research value, being an LDP section. In the case of Kronospan, after the local administration published the SEA notification in April 2020 and the SEA report and draft LDP became public, a simultaneous public consultations process (both on LDP and SEA) started. The public was invited to comment on the draft LDP and the SEA report by May 13, 2020. The LDP was approved on July 20, 2020, which meant the end of the SEA procedure. However, [the approved LDP](#) did not include the section on environmental protection or any reference to the SEA. The SEA report existed as a separate document, which already violates the Law on urban planning documentation. In particular, the SEA report does not contain information on the consideration of alternatives, measures to minimize and compensate for possible risks to the environment, including public health.
- The inconsistency of permitting procedures (EIA, SEA, LDP, construction permit) makes early public participation in decision-making impossible. A construction permit is obtained in parallel with urban planning and SEA. It might be obtained even before the LDP and SEA are approved and related public consultations complete. In the case of Kronospan, after the purchase of the land plots, draft LDP, SEA, pre-construction preparatory works, and preparation of the EIA – all happened simultaneously. Which resulted in a construction permit being issued. That is, when the planning and consultations were ongoing, pre-construction preparatory works had already begun.

The role of the public in EIA

Any investment project that may have a significant impact on the environment in accordance with parts [two](#) and [three](#) of Article 3 of the Law on EIA is required to undergo an environmental impact assessment before its implementation. This procedure assesses the risks of the proposed activity to the environment, ensures measures to minimize and compensate for them, considers alternative project options, and ensures that the public influences the project decision.

Public consultations allow for the identification, collection, and consideration of comments and suggestions from a wide range of interested people and organizations. The Law on EIA mandates public consultations. The latter is also required by the Aarhus Convention, to which Ukraine is a party. Public involvement helps to critically assess the safety of the project, as the investor and even the permitting authorities might be biased.

The Law on EIA guarantees for the public:

- timely, adequate, and effective information;
- free access to EIA materials;
- due account of the proposals for planned activities, the scope of research and the level of detail of information subject to EIA;
- mandatory consideration of all received proposals and comments by the competent body (usually the Ministry of Environment or local administration).

The role of the public in the LDP and SEA procedures

[Public consultations on the SEA report](#) and the draft LDP are [part of the consultations on draft urban planning documents at the local level](#):

The customer (investor) of the urban planning documentation (LDP) ensures:

- 1- publication of the decision on the development of the LDP with the estimated consequences for the environment, including public health;
- 2- publication of the draft LDP, the section "Environmental Protection" (i.e., report on SEA) on their official websites, as well as free access to such information for the public;
- 3- registration, review and consideration of proposals submitted by the public to the draft LDP;
- 4- conducting public hearings on the draft LDP;
- 5- settlement of disputable issues between the public and the customer of the LDP (investor) through the conciliation commission;
- 6- publication of the results of consideration of public proposals to the draft LDP.

Public proposals are submitted within a period of not less than 30 days from the date of publication of the draft LDP. Public hearings are held no earlier than 10 days from the date of publication of the draft urban planning documentation at the local level.

The Strategic Environmental Assessment Report is prepared prior to the approval of the LDP.

The case of Kronospan:

Events are described in chronological order:

- April 2019: The developer (Technopryvid Invest Group, later renamed Kronospan Rivne) started buying up several adjacent land plots for the project.
- 26.04, 03.25.06, 15.07 2019: The head of the Rivne Regional State Administration signed a number of orders to sell land plots to the developer "at the request of the developer". These decisions obliged the Rivne Regional State Administration to conclude land sale/purchase contracts with the developer.
- 09.08.2019: the head of the Rivne Regional State Administration signed a *decree to develop a detailed land development plan at the request of the developer* (hereinafter - LDP) for the reconstruction of existing facilities "into a woodworking plant in the territory of Horodok village."
- 18.08.2019: The developer started the EIA procedure by publishing a notice of proposed activities.
- From 06.12.2019 to 15.01.2020: public consultations of the EIA report were ongoing. During them local residents protested, and Ecoclub submitted comments to the EIA report on the inadmissibility of the proposed activity, which were not taken into account when forming the EIA conclusion.
- 22.10.2019: Rivne Regional Administration signed a cooperation agreement with the developer for the construction of a woodworking plant.
- 11.11.2019: The developer filed a declaration (RV 061193110352) for pre-construction preparatory works for the construction of warehouses on one of the land plots.
- 14.02.2020: The developer filed a declaration (RV 010200451268) for pre-construction preparatory works for the reconstruction of a complex of industrial facilities into a "woodworking plant".
- 20.02.2020: The EIA was completed with conclusions (decisions) on environmental impact assessment.
- 06.03.20: the SEA was publicly announced.
- 04/13/2020: the local administration published the SEA report and the draft LDP.

- 29.04.2020: The developer received a construction permit for the reconstruction of a high-voltage transformer station on the territory of the prospective plant.
- 13.04.2020-13.05.2020: The public was invited to provide comments on the draft LDP and the SEA report.
- 16.06.2020: The developer received a construction permit for the reconstruction of the complex into a woodworking plant.
- 20.07.2020: The LDP was approved, which means the end of the SEA procedure.

Ecoclub identified the following shortcomings of public participation in permitting procedures:

1. Inability to consider location alternatives at the stage of public consultations, as the land plot is usually acquired at that point, and the investor, in practice, can only perform EIA for the acquired site (this is required by the planning).
2. Insufficient coordination between EIA procedures and other related procedures (development of the LDP, SEA and obtaining construction permits).
3. Bias: when the authorities have already sold the land plot to an investor, they are inclined to launch the project and therefore are less attentive to critical aspects of its implementation, including possible environmental damage.

Based on the identified shortcomings, the failure to take into account public requests, which led to the conclusion that the developer's planned activities were permissible, Ecoclub filed a complaint with the **Aarhus Convention Compliance Committee regarding Ukraine's failure to comply with its obligations.**

An international issue

As a result of all the vicissitudes with the Kronospan case, Ecoclub filed a complaint with the Aarhus Convention Secretariat to influence the Ukrainian legislative body to improve the EIA and SEA procedures. On March 21, 23, the Aarhus Convention Compliance Committee decided to proceed with consideration of the Ecoclub's complaint.

The Aarhus Convention is the [Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters](#). Its purpose is to promote the protection of people's rights to live in an environment fostering health and well-being. It guarantees the rights to access information, public participation in decision-making, and access to justice in environmental matters. Ukraine ratified the Convention (gave legal effect

to the document by signing it by each of the parties) by Law No. 832-XIV (832-14) of July 06, 1999, i.e., it became legally binding through approval of each of the parties. The Convention entered into force for Ukraine on October 30, 2001.

The Convention provides for the following:

- *Access to information*: the government is obliged to provide the public with access to environmental information related to EIA and SEA procedures, including the information on planned projects, their environmental impact and other important details.
- *Public participation*: the right of the public to participate in environmental decision-making is guaranteed. This includes expressing their views, submitting proposals and participating in consultations and public hearings.
- *Access to justice*: guarantees public access to justice in environmental cases. Civil society organizations and citizens have the right to go to court to protect their rights and interests in cases related to EIA and SEA.

The Convention requires:

- early public participation, when all options are open and effective public participation may take place (Article 6, paragraph 4);
- the discussion should include "an outline of the main alternatives" (Article 6, paragraph 6(e));
- public participation "within transparent and fair framework " (Article 7);
- public participation and access to justice, as well as proper enforcement measures to implement provisions of the convention (Article 3(1)).

We believe that public participation is not fully ensured as required by the following provisions of the Aarhus Convention:

Article 6, paragraphs 4 and 6(e):

The existing legal framework for planning and development of territories provides for that the developer is required to obtain land ownership or use rights before starting the permitting procedures for construction. This excludes any possibility for consideration of location alternatives during future public consultations.

Article 7, sentences 1 and 2:

Public consultations on the draft LDP are the corresponding SEA report useless. As they have to be carried out after the location and main characteristics of the project are approved.

Respectively, public participation in the LDP and SEA procedures do not abide by the principles of "fairness" and "transparency".

Article 6, paragraphs 4 and 8:

According to this case, public participation is ensured by the SEA procedures under the LDP and EIA. No other means of public participation are provided for in the construction permitting procedures.

Public consultations after the start of pre-construction preparatory works does not guarantee that the public participates "when all options are open".

Article 3, paragraph 1

The described inconsistency of public participation in the LDP, SEA, EIA procedures, indicates that the state regulatory framework does not establish "clear" and "transparent" measures to fulfill the provisions of the Convention.

In relation to the Ecoclub's long-lasting litigation with Kronospan, which limits public access to justice, Ecoclub appealed to the Aarhus Convention Committee, an international institution that is tasked with ensuring compliance with the Aarhus Convention, in particular within the frameworks of EIA and SEA.

Since 2002, the Convention Compliance Committee has received [200 complaints from the public](#). Only [67% were accepted](#) or preliminarily accepted for consideration. The fact that the Aarhus Committee accepted Ecoclub's complaint for consideration indicates that the EIA procedure in Ukraine does ensure public participation sufficiently, as is confirmed by the case of Kronospan. In addition, this case highlights the importance of aligning Ukraine's legal framework with international standards and conventions, such as the Aarhus Convention.

As of today, the Convention is working through the materials received from the Ecoclub and the Ministry of Environmental Protection and Natural Resources of Ukraine for further decision. If concerns relating Ukraine's non-compliance with the Convention are raised, the Government may receive a warning and a request to align national legislation and practices with the provisions of the Convention. Failure to comply may result in the suspension of special rights and privileges under the Convention.

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