



Understanding the EU's Association Agreements
and Deep and Comprehensive Free Trade Areas
with Ukraine, Moldova and Georgia

Environmental impact assessment in the EU as a roadmap for reforms in Ukraine

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Abstract

This paper aims to provide an overview of the environment impact assessment system in the EU, which should help Ukrainian policy-makers to understand better the procedures as well as associated benefits and costs of the EIA model in the EU compared to the one in Ukraine. It describes the legislative background, procedures and scope of the EIA in the EU, elucidates provisions for public consultations and discusses costs and benefits of the EIA. The paper also presents previous and current EIA procedures in Ukraine and briefly describes legislative initiatives aiming to harmonise Ukrainian legislation with the EU *acquis*. Finally, conclusions and recommendations are made for the implementation of the EU EIA procedures in Ukraine.

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Abbreviations

EE - Ecological Expertise

EIA - Environmental Impact Assessment

EC - European Commission

EP - European Parliament

EMP - Environmental Management Plan

SEE - State Ecological Expertise

Environmental impact assessment in the EU as a roadmap for reforms in Ukraine

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Executive Summary

The first environmental impact assessment (EIA) projects were initiated in the late 1960s. However, the legislative basis for such assessments was established ten years later in the US, and in the case of Europe 20 years later with the approval of the Directive 85/337/EEC. The Directive was later amended three times, and codified by the Directive 2011/92/EU '*On the Assessment of the Effects of Certain Public and Private Projects on the Environment*'.

Directive 2011/92/EU defines procedures for EIA and sets minimal requirements to be implemented by the Member States. EIA is mandatory for a range of projects listed in Annex I, which are considered to have significant environmental effects. Annex II defines a list of projects, which might not have considerable effects on the environment and, thus, these projects are subject to "screening procedure", i.e., Member States' competent authorities decide whether particular project should go via EIA procedure or not based either on a case by case examination or on certain thresholds/criteria.

Public consultation is one of the key components of the EIA, which has been an essential part of the EIA studies since 1970's. Directive 2011/92/EU states that effective public participation increases accountability and transparency in the decision-making process and enhances support for the decisions taken. The Directive is fully compliant with the Aarhus Convention (on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters). It also incorporates provisions of the Espoo Convention (on Environmental Impact Assessment in a Transboundary Context).

In 2009, the European Commission started a more fundamental revision of the EIA Directive to take into an account recent environmental and socio-economic developments and correct deficiencies. Finally, a newly amended Directive 2014/52/EU came into effect on the 15th May 2014, which should be introduced by the Member States into National legislation in three years.

Considering that the EIA Directive has been in force almost 30 years already, numerous EIA studies have been carried out in the EU Member States. Clearly, implementation of the EIA Directive entails costs for both private and public sectors. These include *inter alia* direct costs for preparing the EIA report, losses due to delays in project development, expenditures on the implementation of measures envisioned in the Environmental Management Plan (EMP), administrative costs of competent authorities on the revision of the EIA report, issuing permits, etc. The costs of performing of the EIA vary greatly from one project to another depending on its type and location. For small projects, it could cost about €10 thousand and more than €100 thousand for large projects and over €0.5 m for exceptionally large projects. The share of EIAs in total projects costs ranges from 0.1% for larger projects to 1% for smaller ones. EIA system also entails costs for the government on the administration of the EIA procedures, particularly, carrying out reviews of EIAs, an organisation of public consultations, follow-up, and enforcement. However, specific estimates of administrative costs are unavailable.

Though there are no quantitative estimates of benefits derived from EIA simply because they could not be expressed in monetary terms, it is widely believed that the benefits steamed out from performing of the EIA studies outweigh the costs. Main benefits derived from EIA are improved environmental quality due to prevented damage to human health and environment as EIA stimulates more 'environmentally friendly' decisions; smoother authorisation process with less public resistance due to improved stakeholder involvement and information disclosure; modifications of the project design as project alternatives are considered and analysed at an early stage.

Environmental impact assessment system in Ukraine consisted of two procedures prior to 2011. First, EIA materials were prepared in line with the DBN A.2.2-1-2003 "*Structure and content of the documentation for environmental impact assessment (EIA) in designing and building industrial enterprises, buildings, and structures*". Then, state ecological expertise (SEE) of EIA materials was carried out by competent authorities, which issue the decision regarding implementation of project activities. SEE was mandatory for certain types of environmentally hazardous economic activities and objects approved by the Cabinet of Ministers.

On 17th of February, 2011, the Law #3038-VI "On Regulation of Urban Development" was adopted, which considerably altered EIA procedures in Ukraine and effectively eliminated fire, sanitary and ecological expertise to simplify legal requirements for construction of new objects. Instead, only one expertise should be carried. Experts argue that previous model of the EIA and SEE could have provided compliance with international obligations of Ukraine under the condition of approval of additional procedures and norms. However, amendments approved in 2011 distance Ukrainian EIA system from the EU one even further than before.

Although norms for public participation are reflected in many legislative acts, these are often poorly implemented in practice. Investors and project developers do not think that public could have a positive impact on EIA process and, thus, have a rather formal approach to legislative requirements on public participation looking for all possible deficiencies in legislation to minimise effective participation of civil society. As a result, public often does not have neither an access to information on planned activities and mitigation measures, nor real means to influence EIA process.

Ukraine is a party to Energy Community Treaty since 2009 and also signed and ratified Association Agreement with the EU in 2014 both of which envision approximation with the EU *acquis* on energy and environmental issues. Implementation of the Directive 2011/92/EU is essential for reforming of environmental law and policy in Ukraine. Although several draft laws were registered in the Parliament to serve this goal, neither of them was approved. For example, the draft law #4972 "On Environmental Impact Assessment" registered in the Parliament as of 30th of May, 2015, was widely supported by a range of national experts from leading think tanks, NGOs and also Energy Community Secretariat, which considered it *as "...a very good basis for transposing the EIA Directive into national law"* subject to minor corrections. However, it was declined due to the resistance of government officials and business interested in preserving status quo.

New draft law #2009a was registered in the Parliament on 3rd of June, 2015. It ensures compliance of Ukraine with Aarhus and Espoo Conventions as well as 2011/92/EU Directive similar to the draft law mentioned above. Importantly, the draft Law #2009a proposes more clear and transparent procedures than existing EIA system and sets timeframes for all EIA procedures and public consultations. It was included on the agenda of the of the IVth Session of the Parliament and, hopefully, will be approved in the near future.

Ukraine should speed up the process of harmonisation of National environmental legislation with the EU *acquis* not only to comply with its international obligations but also to harvest associated benefits reflected in reduced administrative burden for business, improved investment climate, and inclusiveness of all interested stakeholders in the decision-making process, which will increase support for decisions taken.

1. Introduction

Both in the USA and in the EU environmental impact assessment emerged as an instrument for taking into an account environmental considerations before decisions are made regarding the construction of large-scale industry or infrastructure projects as well as developments in other sectors of the economy. Environmental impact assessment (EIA) is a cornerstone of EU environmental policy, which adheres to the precautionary principle¹, preventative action, and the polluter-pay-principle.

Ukraine inherited its EIA model from the Soviet Union, which until 2011 was represented by two components – EIA and State Ecological Expertise (SEE). This model had some deficiencies. In particular, it entailed high corruption risks, which resulted in mistrust from investors and civil society. It was also cost-inefficient because too many projects went through SEE², most of which did not have considerable environmental impacts and would not require EIA in other countries. Since 2011, the EIA system underwent considerable changes, which *de facto* eliminated SEE, weakened provisions for public participation and distanced national EIA system from that of the EU even further.

Several bilateral agreements between the EU and Ukraine contain requirements on the harmonisation of the Ukrainian EIA legislation with the *acquis communautaire*. In particular, Law of Ukraine □ 2787-VI3 as of 15th of December, 2010, ratified the Protocol on the Ukraine’s accession to the Treaty establishing the Energy Community, which requires *inter alia* implementation of the Directive 85/337/EEC on the assessment of the effects of certain public and private projects (with amendments introduced by the Directive 97/11/EC and Directive 2003/35/EC) by the 1st of January, 2013. Several draft laws were registered in the Parliament aiming to review EIA model inherited from the Soviet Union and to ensure approximation with the EU legislation, however, not a single one was approved by March 2016.

The Association Agreement signed and ratified⁴ by the European Parliament, and Ukraine also introduces requirements for harmonisation of national legislation on environmental issues with the EU *acquis*. The Agreement highlights that Ukraine should fulfil its obligations under Energy Community Treaty to strengthen its energy security. Article 363 of Chapter 6 “Environment” (Title V “Economic and sector cooperation”) envisions gradual approximation of Ukrainian legislation to the EU law and policy, which should be undertaken within the timeframes indicated in Annex XXX. It is stated in the Annex that Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment (codification) shall be implemented within 2 years of the entry into force of this Agreement (except for projects falling under the Energy Community Treaty for which provisions should have been implemented by 01.01.2013).

Thus, this paper aims to provide an overview of the environment impact assessment system in the EU, which should help Ukrainian policy-makers to understand better the procedures as well as associated benefits and costs of the EIA model in the EU compared to the one in Ukraine. The next section describes the legislative background, procedures and scope of the

¹ Article 191 of the Treaty on the Functioning of the European Union.

² In 2008, about 6000 projects were subject to SEE while in Germany and Spain only 1000 EIAs were carried out, source (http://rac.org.ua/fileadmin/user_upload/documents/ppapers/Ocinka_vplivu_na_dovkillja_v_Ukrajini.pdf).

³ <http://zakon2.rada.gov.ua/laws/show/2787-17>

⁴ On 16th of September, 2014 (<http://zakon2.rada.gov.ua/laws/show/1678-18>).

EIA in the EU. It also elucidates provisions for public consultations and discusses costs and benefits of the EIA. The subsequent section presents previous and current EIA procedures in Ukraine and briefly describes legislative initiatives aiming to harmonise Ukrainian legislation with the EU *acquis*. Finally, conclusions and recommendations are made for the implementation of the EU EIA procedures in Ukraine.

2. Environmental impact assessment in the EU

2.1 Legislative background

Historically, first environmental impact assessment projects were carried out in late 60's due to increasing environmental awareness. However, in the US legislative basis for such assessments was formally established only in the late 70's with the introduction of the National Environmental Policy Act (1969). In Europe legislative provisions for EIA were introduced in mid-80's with the approval of the European Economic Community Directive 85/337/EEC⁵. Since then EIA has rapidly spread worldwide and become an important component of the environmental policy in over 100 countries⁶.

Directive 85/337/EEC was later revised three times. In 1997, it was amended by the Directive 97/11/EC to widen the scope of the project covered and the number of projects for mandatory impact assessment, review screening arrangements for Annex II projects and also harmonise the Directive with the [UN ECE Espoo Convention](#) on EIA in a Transboundary Context. Directive 2003/35/EC brought the EIA Directive in line with the Aarhus Convention on public participation in decision-making and access to justice in environmental matters. Directive 2009/31/EC introduced projects on the transport, capture and storage of carbon dioxide (CO₂) to the Annexes I and II of the EIA Directive. In 2011, all amendments were codified by the Directive 2011/92/EU⁷ on the assessment of the effects of certain public and private projects on the environment.

In 2009, the European Commission started a more fundamental revision of the EIA Directive⁸ to take into an account recent environmental and socio-economic developments and correct deficiencies. The report on the application and effectiveness of the EIA Directive⁹ was issued on July 2009, and wide public consultations took place in 2010. As the result of this process, Commission adopted its initial proposal for the revision of the EIA Directive, which was later amended by the European Parliament (EP). Provisional agreement on the revised EIA Directive was reached on the 12th March 2014, when the EP adopted its position on a first reading, which Council of Ministers approved on the 14th April. Finally, newly amended Directive 2014/52/EU¹⁰ took effect on the 15th May 2014. However, Member States are allowed three years to introduce new rules and adopt National legislation (by 15th of May, 2017).

The Directive 2014/52/EU aims to simplify the rules and introduce the principles of smarter regulation, i.e., reduction of administrative burden but the improvement of environmental

⁵ <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31985L0337&from=EN>

⁶ http://siteresources.worldbank.org/ENVIRONMENT/Resources/Getting_to_Green_web.pdf

⁷ http://ec.europa.eu/environment/eia/pdf/EIA_Directive_informal.pdf

⁸ For more detailed description of the revision process see <http://ec.europa.eu/environment/eia/review.htm>.

⁹ <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52009DC0378&from=EN>

¹⁰ <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0052&from=EN>

protection via stimulation of more sustainable decisions on the public and private investments. The new Directive also pays more attention to such issues as resource efficiency, climate change and disaster prevention which were not considered as important 30 years ago. One of the most important amendments is introduction of the timeframes for the different stages of the EIA, particularly, screening decisions should be made within 90 days (but extensions could be granted), at least 30 days should be allowed for public consultations and "reasonable period of time" should be given for final decisions. Moreover, conditions for public participation are enhanced as consent decisions¹¹ must be made more transparent and clear. The quality of EIA reports will also be improved, and they will be made understandable to the public. Importantly, in case projects likely to have serious detrimental environmental effects, developers will be required to take all necessary measures to prevent or curtail such consequences and these projects will be monitored according to existing procedures in the Member States.

2.2 EIA Procedure and scope

The EIA Directive¹² defines procedures for environmental impact assessment and sets minimal requirements to be implemented by the Member States. It applies to a broad range of projects¹³ either in the public or private sector. EIA is mandatory for a range of projects, which are considered to have significant environmental effects (listed in Annex I of the Directive 2011/92/EU). These include 43 specific categories of projects including crude-oil refineries, nuclear power stations, thermal power stations (larger 300 MW), long-distance railway lines, installations for the disposal of hazardous and non-hazardous waste, installations for the extraction of asbestos and integrated chemical installations, etc. Annex II defines a list of projects, which might not have significant effects on the environment and, thus, these projects are subject to "screening procedure", i.e., competent authorities of Member States decide whether a particular project should go via EIA procedure. The decision is made based either on a case by case examination or on certain thresholds/criteria. However, criteria presented in Annex III should be taken into an account. Annex II covers all other types of projects (87 in total) not covered in Annex I, which are likely to have negative environmental consequences, particularly, agricultural projects, underground mining, geothermal drilling, coke ovens, cement manufacture installations, etc.

EIA procedure could be presented in the following major steps (see also Figure 1) described in detail in UNEP (2004)¹⁴ and Glasson, Therivel and Chadwick (2012)¹⁵:

- **Screening** is the initial phase of the EIA, which aims to determine whether the project is subject to EIA or not. At this stage, it is important not to overlook proposals, which should go through comprehensive impact assessment, but also not to impose an excessive burden on investors in projects, which might not have negative

¹¹According to the Directive 2011/92/EU, 'development consent' means "the decision of the competent authority or authorities which entitles the developer to proceed with the project" (Article 1).

¹² Here and later in the text the Directive 2011/92/EU is considered as Ukraine is obliged to implement this particular version of the Directive according to Association Agreement.

¹³ According to the Directive 2011/92/EU, 'project' means "the execution of construction works or of other installations or schemes, other interventions in the natural surroundings and landscape including those involving the extraction of mineral resources" (Article 1).

¹⁴ <http://www.unep.ch/etu/publications/textONUbr.pdf>

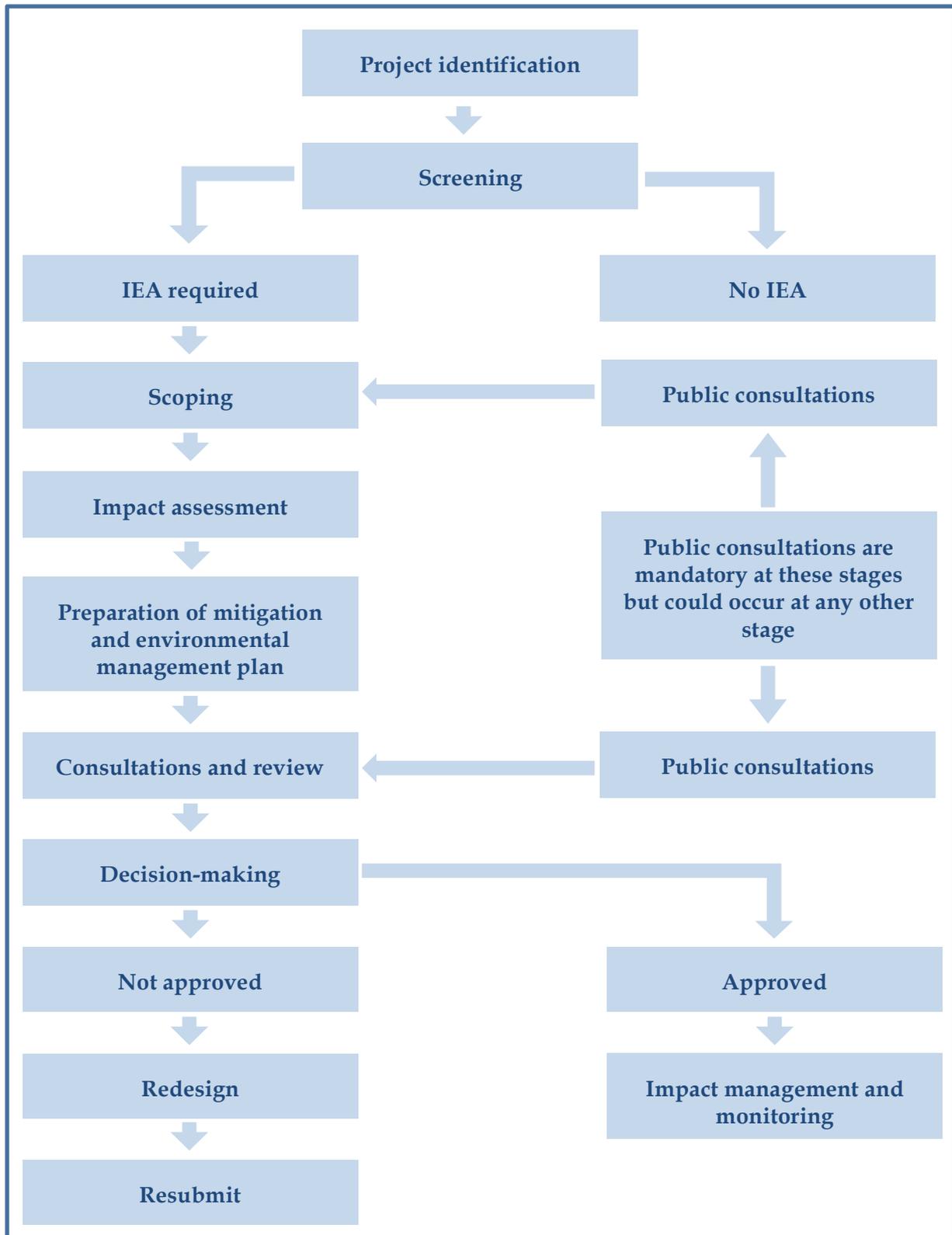
¹⁵ Glasson J., R. Therivel and A. Chadwick. 2012. Introduction to Environmental Impact Assessment. 4th edition, Routledge: New York.

environmental effects. In this regards, Directive 2011/92/EU offers a well-balanced approach presenting a list of projects in Annex I of which carrying out of EIA is unequivocal and Annex II for which EIA is discretionary.

- **Scoping** stage envisions elaboration of the specific issues to be included in the EIA report, which is prepared by the competent authority upon the request of the developer. Scoping is crucially important for performing of both effective and efficient EIA as it requires narrowing down all possible impacts to the most important ones, which should save time and money for the developer.
- **Impact prediction and assessment** is a central component of the EIA process, which typically involves the application of a variety of methods. Expected impacts are usually assessed in comparison to environmental baseline represented by a set of indicators for air/water quality, biodiversity, etc. Identification and comparative assessment of alternative project development are used to distinguish optimal ways to prevent or avoid negative social or environmental impacts and select an optimal option, i.e., the one which is likely to cause the lowest impacts while yielding expected benefits. Typical EIA study often covers a maximum of five alternatives including no action alternative. All significant environmental and social impacts of each alternative are assessed.
- **Preparation of mitigation and environmental management plan (EMP)** entails a practical problem-solving purpose to address adverse impacts and suggest measures to prevent, reduce or offset them where possible. EMP should include a detailed description of selected mitigation measures for each adverse impact.
- **EIA report** presents all critically important information to be submitted to competent authority responsible for approval of the project. EIA explicitly specifies what kind of data must be included in Annex IV. This covers, particularly, a description of the project including physical characteristics and production process as well as expected residues and emissions; an outline of the main alternatives examined and argumentation for the chosen project; a description of significant effects, methods of their estimation and EMP to address these impacts. Importantly, EIA report is a public document, which should present all findings in a technically accurate manner but also describes key conclusions in an accessible format to all interested stakeholders. Executive summary usually serves this purpose.
- **Consultations** with environmental authorities and the public as well as the Member States. The public concerned should be provided with sufficient time, and effective opportunities to participate in the decision-making process but detailed procedures for consultations should be developed by the Member states.
- **The decision of the competent authority** whether to refuse or approve of the project proposal taking into consideration outcomes of consultations and what additional conditions must be met for authorisation.
- **Informing the public about the final decision** which can be questioned in courts. In particular, competent authorities should provide to the public information on any conditions attached to the decision, main reasons and consideration taking into account and description of key measures to prevent or reduce largest adverse effects.

- *Impact management and monitoring* is a post-approval stage which aims to control adverse effects during project implementation phase through the application of the measures planned in the EMP and introducing any corrective actions if necessary. Though it is not formally required by the Directive 2011/92/EU monitoring of the state of the environment with the project impact area and inspection whether the developer adheres to EMP and meets all required environmental standards is largely a responsibility of local competent authorities and public concerned.

Figure 1. EIA process



Source: Adopted from http://eia.unu.edu/course/index.html%3Fpage_id=101.html

2.3 Public Consultations

Public consultations are one of the key components of the environmental impact assessment, which has been an essential part of the EIA studies since 1970's¹⁶. Well-planned public participation will positively contribute to successful project design and implementation. It also reinforces the effectiveness of the EIA study as public involvement provides a valuable source of information on key effects, possible mitigation measures, and potential alternative developments. Moreover, public scrutiny increases robustness and improves the quality of the EIA reports and also leads to more environmentally and socially acceptable project alternatives.

The EIA Directive states that effective public participation increases accountability and transparency in the decision-making process and enhances support for the decisions taken. The Directive is fully compliant with the Aarhus Convention (on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters), which was signed by the European Community on 25 June 1998, and ratified on 17 February 2005.

Notably, the Directive highlights the need for public involvement at the early stages of the EIA process. According to the Article 6 of the EIA Directive, the public should be informed on the following issues either by means of public notices or electronic media as soon as such information can be provided:

- project developer requested for development consent;
- whether the project should go through the EIA procedure and whether other Member states were invited for consultations;
- details of the competent authorities responsible for taking the decision and involved in the consultation process and time schedule allowed for comments or questions;
- the nature of possible decisions or the draft decision if available;
- an indication whether the EIA report is available;
- details on time and means of publication of relevant information;
- details of the preparations for planned public participation.

As the EIA Directive incorporates provisions of the Espoo Convention (on Environmental Impact Assessment in a Transboundary Context¹⁷), Member states, which are likely to be affected by the proposed project due to possible transboundary effects, should also take part in consultations regarding adverse impacts and mitigation measures to address them. In turn, the Member States concerned are responsible for providing information to competent authorities and interested public within their territories and ensuring that both the former and the later are given the opportunity to forward their opinion to the competent authority of the projects developer's Member state before the decision regarding development consent is made.

¹⁶ <http://www.unep.ch/etu/publications/textONUbr.pdf>

¹⁷ It was signed by the European Community on 25 February, 1991, and ratified it on 24 June, 1997.

2.4 Costs and benefits

Considering that the EIA Directive has been in force almost 30 years already, numerous EIA studies have been carried out in the EU Member States. Clearly, implementation of the EIA Directive entails costs for both private and public sectors. These include *inter alia* direct costs for preparing the EIA report, losses due to delays in project development, expenditures on the implementation of measures envisioned in the EMP, administrative costs of competent authorities on the revision of the EIA report, issuing permits, etc.

The costs of performing of the EIA vary greatly from one project to another depending on its type and location. A study by Technopolis (2008)¹⁸ suggests EIAs for small projects could cost about EUR 10 thousand and more than EUR 100 thousand of large projects and over EUR 0.5 m for exceptionally large projects. The share of EIAs in total projects costs ranges from 0.1% for larger projects to 1% for smaller ones. These expenses are usually covered by project developer¹⁹ under the self-assessment process, which is quite logical because it is the developer who will obtain the largest benefits from implementation of the project and, thus, should take the responsibility of associated costs due to environmental damage, which is in line with “polluter pays principle”.

Oosterhuis (2007)²⁰ reviewed existing studies, which explored costs and benefits associated with carrying out EIA studies. The author found out that in most cases costs of undertaking EIAs are less than 1% of overall capital costs. Generally, the larger is the project, the smaller is relative cost of the EIA. In addition, to the size of the project, type of the project also has a huge impact on the overall EIA cost. Particularly, EIA of such projects as routes and electricity lines construction, nuclear and industrial activities, projects associated with marine environment and projects where comprehensive health impact assessment is needed, will be more expensive than others.

According to UNEP (2004)²¹, at the post-approval stage, expenditures on the introduction of EMP measures could contribute to costs increase from 1% to 15% of the total investments. However, it should be noted that EIA studies could trigger changes in project design and site, which could eventually save project owner’s time and money. A well-designed EMP could result in considerable cost reductions for the project developer. For instance, waste and effluent treatment by means of recycling and recovery measures could not only reduce the costs of meeting environmental standards but also result in the production of marketable by-product.

EIA system also entails costs for the government for administration of the EIA procedures, particularly, carrying out reviews of EIAs, organisation of public consultations, follow-up, and enforcement. However, these costs can be recovered by application of standard fees for providing administration services, e.g., on a review of the report and issue of approval or permit for project development.²² In this case, administrative costs will be transferred to private sector.

¹⁸ <http://ec.europa.eu/environment/eia/pdf/Evaluation%20of%20EIA.pdf>

¹⁹ <http://www.unep.ch/etu/publications/textONUbr.pdf>

²⁰ <http://ec.europa.eu/environment/eia/pdf/Costs%20and%20benefits%20of%20the%20EIA%20Directive.pdf>

²¹ <http://www.unep.ch/etu/publications/textONUbr.pdf>

²² <http://www.unep.ch/etu/publications/textONUbr.pdf>

Unfortunately, specific estimates of administrative costs are unavailable²³. This is understandable because EIA often takes place simultaneously with other procedures and it is quite difficult to disentangle costs incurred due to the EIAs from the rest of administrative work. However, when such estimates are available, the range of man-hours spent per EIA is very wide, particularly, from few hours to several months.

Costs incurred by project developers due to delays EIA procedure should also be considered. According to Technopolis (2008),²⁴ preparation of EIA undertaking usually takes from 6 to 12 month plus additional time is required for screening activity and decision-making. However, it is difficult to estimate what amount of time would be required for alternative national regulations instead of EIA. At least for the type of projects, which not always require EIA, securing development consent (which includes EIA procedure) could add up to 6-8 weeks for a procedure that would otherwise take 6-8 months.

Oosterhuis (2007)²⁵ points out that experience of different countries in terms of time lags due to EIA varies greatly. Some studies argue that there are no considerable losses due to delays to EIA while others claim that these delays constitute a considerable share of the overall EIA costs, which is sometimes caused by the lack of resources of competent authorities to timely review EIA reports and make a decision regarding development consent.

Though quantitative estimates of benefits derived from EIA are unavailable simply because they could not be expressed in monetary terms, it is widely believed that the benefits steamed out from perming of the EIA studies outweigh the costs. Technopolis (2008)²⁶ found that EIA has been useful for preventing detrimental environmental effects for a lot of stakeholders, who were interviewed within national evaluations of the EIA.

Oosterhuis (2007)²⁷ argues that main benefits derived from EIA are improved environmental quality due to prevented damage to human health and environment as EIA stimulates more 'environmentally friendly' decisions; results in smoother authorisation process with less public resistance due to improved stakeholder involvement and information disclosure; modifications of the project design as project alternatives are considered and analysed at an early stage.

A study on the effectiveness of the EIA Directive performed by COWI (2009)²⁸ highlights two main benefits of the EIA procedure, which were identified by the member states. The first one is that EIA ensures that environmental issues are considered in the decision-making processes and the second one is that it guarantees transparency. Another major achievement of the Directive is that it has promoted basic rights for public participation in decision-making and by this contributed to democratic developments in several new Member States.

²³ <http://ec.europa.eu/environment/eia/pdf/Costs%20and%20benefits%20of%20the%20EIA%20Directive.pdf>

²⁴ <http://ec.europa.eu/environment/eia/pdf/Evaluation%20of%20EIA.pdf>

²⁵ <http://ec.europa.eu/environment/eia/pdf/Costs%20and%20benefits%20of%20the%20EIA%20Directive.pdf>

²⁶ <http://ec.europa.eu/environment/eia/pdf/Evaluation%20of%20EIA.pdf>

²⁷ <http://ec.europa.eu/environment/eia/pdf/Costs%20and%20benefits%20of%20the%20EIA%20Directive.pdf>

²⁸ http://ec.europa.eu/environment/archives/eia/pdf/eia_study_june_09.pdf

3. Environmental impact assessment in Ukraine

3.1 Previous and current EIA procedures

The environmental impact assessment system in Ukraine was carried out in two stages prior to 2011 when significant amendments were introduced into EIA procedures. It is legally underpinned by the Law of Ukraine “On Ecological Expertise” (1995)²⁹ and the State Construction Norms DBN A.2.2-1-2003 “Structure and content of the documentation for environmental impact assessment (EIA)³⁰ in designing and building industrial enterprises, buildings, and structures”³¹.

First, EIA materials should be prepared in line with the DBN, which describes all procedures and requirements in detail. According to DBN, EIA aims to determine expediency and acceptability of planned activities and justification of economic, technical sanitary and other measures to ensure environmental protection. It should comprehensively describe results of impacts assessments on natural, social (including livelihoods of local communities) and man-made environment. EIA materials together with all project documentation are submitted to authorised state bodies for expert assessment. In fact, EIA materials prepared according to Ukrainian procedures are similar to EIA report in the EU.

Previously, EIA materials were also subject to state ecological expertise (SEE³²) carried out by competent authorities, which then issued the decision regarding implementation of project activities. State Ecological Expertise was mandatory for certain types of environmentally hazardous economic activities and objects. The list is approved by the Cabinet of Ministers³³, and currently, it covers 33 categories of economic activities, which is more or less comparable to the one in the EU (Annex I of the EIA Directive). Implementation of planned projects without the positive decision of the SEE was forbidden. In case the negative decision was taken, the developer had the right to revise project materials and send them for re-examination.

On 17th of February, 2011, the Law #3038-VI “On Regulation of Urban Development”³⁴ was adopted, which considerably altered EIA procedures in Ukraine. In particular, pre-project and project materials were excluded from the list of objects subject to SEE. It has also introduced amendments to the Law “On environmental protection” (1991), Law “On ecological expertise” (1995), Law “On sanitary and epidemiological welfare of population” (1994) and Law “On fire safety” (1993), which came into an effect since 12th of June, 2011. The Law effectively eliminated fire, sanitary and ecological expertise to simplify legal requirements for construction of new objects. Instead, only one expertise should be carried as

²⁹ <http://zakon4.rada.gov.ua/laws/show/45/95-%D0%B2%D1%80>

³⁰ In Ukrainian this stands for “[□□□□□□ □□□□□□ □□ □□□□□□□□□□ □□□□□□□□□□](http://zakon4.rada.gov.ua/laws/show/45/95-%D0%B2%D1%80)”.

³¹ <http://www.minregion.gov.ua/attachments/files/bydivnitstvo/texnichne-regulyuvannya/normuvannja/DBN/2014/DBN%20A.2.2-1-2003.pdf>

³² According to the Law on EE, ecological expertise is a type of scientific and practical activity of authorised state bodies, environmental an expert groups and associations of citizens based on transdisciplinary environmental investigation, analysis and estimation of pre-project, project and other materials or objects, implementation of which could have negative influence or influences environment, and aims to prepare conclusions regarding the compliance of planned or ongoing activities with standards and legal requirements on environmental protection, rational use and restoration of natural resources, ensuring environmental safety.

³³ <http://zakon2.rada.gov.ua/laws/show/808-2013-%D0%BF>

³⁴ <http://zakon2.rada.gov.ua/laws/show/3038-17>

specified in the article 31 of the Law #3038-VI. It is stated that projects of construction objects of IV and V complexity³⁵ categories are subject to mandatory expertise with respect to compliance with standards on sanitary and epidemiological welfare of population, environmental protection, occupational safety, energy saving as well as fire, technogenic, nuclear and radiation safety as also reliability, durability and operational safety of buildings and structures.

According to the Law, the expertise could be carried out by expert organisations of any ownership, which meet criteria of the Ministry of Regional Development, Construction, Housing and Communal Services. The expertise of projects funded through the budget, funds of the state or communal enterprises and also loans provided under government guarantees is carried out by the state expert institutions. According to EPL (2013),³⁶ expertise is usually carried out by the same enterprises, which develop project documentation, including EIA materials. However, it is forbidden for the organisation to conduct both the EIA and also the expertise of the same project. Now, Ministry of Ecology and Natural Resources of Ukraine is not involved in the expertise of the environmentally hazardous projects any longer, and expertise statement is not a document of permissive character, which previously could have been questioned in administrative court. Experts of the Resource-Analytical Centre (2011)³⁷ argue that previous model of the EIA and SEE could have provided compliance with international obligations of Ukraine under the condition of approval of additional procedures and norms. However, amendments approved in 2011 distance Ukrainian EIA system from the EU one even further than before.

3.2 Public participation

The legislative basis for public participation in environmental decision-making and access to information is underpinned by the system of national legislation as well as ratified international treaties. In particular, Ukraine is a party to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice (known by as Aarhus Convention) since 1999³⁸. In addition, provisions for public access to information are provided in a number of laws on access to information (e.g., Law of Ukraine "On information" (1992), Law of Ukraine "On appeals of citizens" (1996), Law of Ukraine "On state secret" (1999), Law of Ukraine "On access to public information" (2011), *etc.*) as well as Law of Ukraine "On environmental protection" (1991).

Law on the EE has several provisions regarding public participation and access to information. In particular, Article 10 states that findings of the EE should be published in mass media. According to Article 11, public opinion should be considered in preparation of the findings of the EE and decision making regarding further implementation of the object subject to the EE.

Certain norms for public participation are also envisioned in the DBN A.2.2-1-2003. In particular, clause 1.6 stipulates that customer and executor of the EIA agree on the Statement of intent and publish it, which include basic information about the project (investor, location

³⁵ Resolution of the Cabinet of Ministers "On the classification of construction objects to the IVth and Vth categories of complexity", <http://zakon2.rada.gov.ua/laws/show/557-2011-%D0%BF>

³⁶ http://epl.org.ua/fileadmin/user_upload/images/publication/Broshura_EPL_2013_CHANGE.pdf

³⁷ http://rac.org.ua/fileadmin/user_upload/documents/ppapers/Ocinka_vplivu_na_dovkillja_v_Ukrajini.pdf

³⁸ <http://zakon4.rada.gov.ua/laws/show/832-14>

of the object, etc.) as well as potential environmental impacts of planned activity and information on possibilities for public participation, i.e., procedures for submission of comments, etc. Provisions for public participation are described in the clause 1.9., which states that the investor ensures informing the public on the planned discussions regarding project activities, an organisation of public consultations and provision of project materials. Customer adopts EIA materials taking into account results of public consultations, which were previously submitted for approval and examination by state authorities. Based on the final EIA report, customer and executor are preparing a Statement on environmental impacts of planned activities and should ensure its publication in the mass media (clause 1.8). Moreover, it is explicitly stated in the clause 1.10 what materials should be included in the final EIA report to confirm that public interests were taken into an account, particularly:

- documentation on the publication of the Statement of intent in the mass media and organisation of the public hearings;
- written and other appeals of citizens;
- a list of materials provided by project developer for consideration of local population and NGOs, a list of comments and questions obtained from the public and provided reasoned answers;
- summarised decision regarding public proposals, which were taken into an account and explanation why some proposals were not taken into an account;
- resolution of the public expertise in case it was carried out.

Although norms for public participation are reflected in many legislative acts, these are often poorly implemented in practice. According to EPL (2013),³⁹ investors and EIA project developers do not think that public could have a positive impact on the EIA process and, thus, have a rather formal approach to legislative requirements on public participation looking for all possible deficiencies in legislation to minimise effective participation of civil society. It is noted in the EPL report that statements of intent often did not meet the requirements, especially regarding information on how project materials could be accessed, where to submit comments and where a public hearing will be organised. Additionally, time for collecting comments from the public was often insufficient because only a few days were allowed for the publication of the Statement of intent, public hearings and finalisation of the EIA report, which made the impossible preparation of any reasonable comments. And even if such comments were submitted they were not reflected in the final EIA materials. Statements on the environmental impacts also did not contain important components, which is against legislative requirements, such as a description of key impacts, indicators of environmental risks, mitigation measures, etc. Besides, such statements were often published in the mass media, the audience of which does not cover interested public, which should be involved in the EIA process, public were not informed of the findings of the SEE, and it was not always possible to obtain them even upon formal request⁴⁰. Prior to 2011, when the investor was required to submit EIA materials to the Ministry of Ecology and Natural Resources or its regional bodies for SEE, responsible bodies did not verify whether procedures for public participation took place in fact and only required confirmation of the

³⁹ http://epl.org.ua/fileadmin/user_upload/images/publication/Broshura_EPL_2013_CHANGE.pdf

⁴⁰ EPL appealed to court against Ministry of Ecology and Natural Resources regarding publication of the findings of the SEE in 2010/2011 and won the case. In 2013, the Ministry published on its website findings of more than 1000 SEEs.

fact that the Statement of environmental impacts is published. The content of such statement was also not considered. As a result, the public did not have neither access to information on planned activities and mitigation measures, nor real means to influence EIA process.

After amendments to the EIA procedures in 2011, formal provisions for public participation were preserved in the legislative acts described above. However, opportunities for effective public participation were weakened even further as the status of SEE is rather vague and laws on urban development do not envision organisation of public consultations for the construction of particular projects⁴¹.

3.3 Estimates of costs for transposition and implementation of the EIA Directive

Approximation of the EIA Directive into national legislation of Ukraine is associated with exclusively administrative expenditures. It is estimated⁴² that about EUR 41.2 thousand is needed to develop required legislation, consultation services, and information activities. Full implementation of the Directive will also require regular expenditures to increase the capacity of responsible administrative bodies. Certainly, the new department will have to be established within the Ministry of Ecology and Natural Resources, and the number of regional representative offices will have to be increased.

As it was mentioned in the section 3.1., EIA materials prepared in line with current requirements of the national legislation are very similar to structure and content of the EIA report developed in accordance with the Directive 2011/92/EU. Hence, the financial burden on business should not increase if transposition of the EIA Directive is undertaken in a way to substitute existing norms avoiding any duplication.

3.4 Legislative initiatives to harmonise Ukrainian legislation with the EU one

In the last few years, several draft laws were registered in the Parliament to ensure compliance with international obligations of Ukraine in areas of Environmental Impact Assessment (EIA) and public participation in environmental decision-making. However, neither of them was approved due to resistance from certain ministries, government officials and business interested in preserving status quo. An example of the well-developed initiative is the draft law #4972 "On Environmental Impact Assessment"⁴³ registered in the Parliament as of 30th May 2015. The draft law envisioned implementation of the EU model of EIA based on key provisions of the Directive 85/337/EEC. It also incorporated provisions to ensure compliance with Espoo Convention (on transboundary EIA). Implementation of this law would have helped to achieve multiple objectives, particularly:

- transparency and elimination of corruption in decision-making;
- establishment of conditions for performing of environmentally hazardous activities;
- approval of informed decisions regarding environmentally hazardous activities;

⁴¹Public hearings are required only for urban development documentation, particularly, master plans of settlements and zoning plans.

⁴²http://www.sbs-envir.org/images/documents/Indicative_cost_assessment_draft_Nov_2015.pdf

⁴³http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=51152

- taking into account interests of all interested stakeholders, which will help to prevent social conflicts;
- avoid unnecessary costs in the process of implementation of investment projects;
- compliance with environmental requirements of the Association Agreement and Energy Community Treaty and other international obligations.

Moreover, proposed implementation of the EU model did not require the introduction of any additional permissive documents but rather a modification of the existing ones, which should have been supported by the business. The draft law was supported by a wide range of national experts representing leading think tanks and NGOs. It was also submitted for the revision to the Energy Community Secretariat, which provided a general support of the draft law stating that *“the draft is a very good basis for transposing the Environmental Impact Assessment Directive into national law and its adoption would surely constitute a major step in Ukraine’s efforts to align its national law with the Energy Community environmental acquis”* and also provided some minor recommendations⁴⁴. However, the draft law was not supported by the Cabinet of Ministers, Ministry of Regional Development, Construction, Housing and Communal Services and Ministry of Infrastructure. Main Scientific-Expert Bureau of the Parliament of Ukraine provided some critical comments and recommended to decline the draft law in the first reading. In turn, the authors of the draft law prepared a response letter explaining key provisions. However, the draft law did not receive a decision of the Parliament Committee on Environmental Policy on time and was not included in the agenda for consideration in the Parliament and, hence, was declined.

On the 16th March 2015, new draft law *“On the environmental impact assessment”*⁴⁵ jointly developed by the interagency working group and civil society was released for public consultations on the website of the Ministry of Ecology and Natural Resources. On the 3rd June 2015, it was registered in the Parliament⁴⁶ under 2009a registration number.

Similar to the draft law mentioned above, draft law 2009a ensures compliance of Ukraine with Aarhus and Espoo Conventions as well as 2011/92/EU Directive. Energy Community Secretariat has provided positive comments⁴⁷ on the draft law stating that approval of this draft law will mean that Ukraine is able to comply with its requirements under Energy Community Treaty. Secretariat has also stressed that Ukraine has already delayed implementation of the EIA Directive, and it is necessary to ensure that this draft law is more successful than the previous ones.

Importantly, the draft Law #2009a proposes more clear and transparent procedures than existing EIA system. Contrary to the SEE model, the draft law contains a list of activities and objects subject to EIA. Directive 2011/92/EC allows Member states to define screening procedures, which could either envision case to case project examination, automatic screening (activities and criteria defined in legislation) or combined approach. In the course of consultations with key stakeholders in Ukraine⁴⁸, business representative insisted that

⁴⁴ <http://necu.org.ua/wp-content/uploads/ECScommentsondraftEIAlawUA.pdf>

⁴⁵ <http://www.menr.gov.ua/press-center/news/123-news1/3605-proekt-zakonu-pro-otsinku-vplyvu-na-dovkillia-na-finishnii-priamii>

⁴⁶ http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=55438

⁴⁷ <http://epl.org.ua/events/1755-yevropeiske-enerhetychne-spivtovarystvo-pozytyvno-otsiniuiie-proekt-zakonu-ukrainy-pro-otsinku-vplyvu-na-dovkillia-2009a-ta-ochikuie-na-ioho-shvydke-pryiniattia>

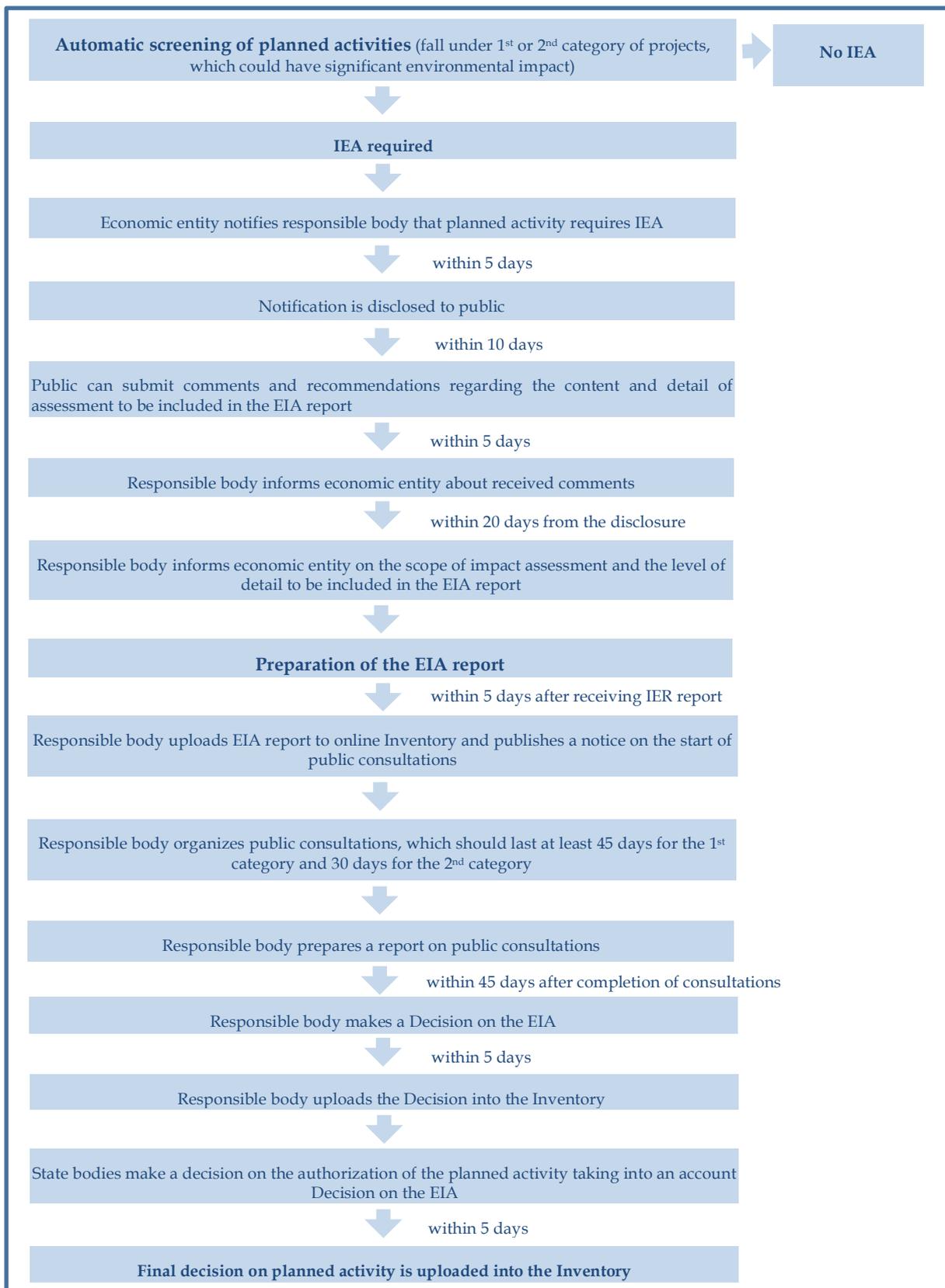
⁴⁸ <http://www.epl.org.ua/events/2019-do-proektu-zakonu-ukrainy-pro-otsinku-vplyvu-na-dovkillia>

automatic screening should be implemented to avoid subjective decisions by competent authorities and, hence, reduce corruption risks.

Moreover, the draft law clearly defines timeframes for all EIA procedures and public consultations (see Figure 2). In particular, it envisions timely and effective informing the public about conducting EIA with respect to the particular project, envisions free access to all information related to planned activity, maintenance of the online Unified Inventory of EIA Projects.

This time Parliament Committee on Environmental Policy gave a positive decision and the draft law, and it was included on the agenda of the of the IVth Session of the Parliament. Hopefully, draft Law #2009a will be finally approved by the Parliament in the near future given the urgency of the matter and both internal and external pressure from the civil society and international partners.

Figure 2. Key EIA stages according to the draft law 2009a (national procedure)



Source: Own presentation based on www.menr.gov.ua/press-center/news/123-news1/3605-proekt-zakonu-pro-otsinku-vplyvu-na-dovkillia-na-finishnii-priamii

Conclusions

- The Environmental Impact Assessment Directive (85/337/EEC) was implemented by the EU almost 30 years ago. It was amended three times and codified by the Directive 2011/92/EU. In 2009, the European Commission started a revision of the EIA Directive to take into account recent environmental and socio-economic developments, and correct deficiencies resulted in approval of Directive 2014/52/EU, which came into effect on the 15th of May, 2014, and should be transposed by the Member States into National legislation within three years.
- Public consultation is one of the key components of the environmental impact assessment, which has been an essential part of the EIA studies since 1970's. Directive 2011/92/EU ensures effective mechanisms for public participation in environmental decision-making, which increases accountability and enhances support for the decisions taken. Provisions of the Aarhus Convention (on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters) and Espoo Convention (on Environmental Impact Assessment in a Transboundary Context) are also incorporated in the directive.
- Implementation of the EIA Directive entails costs for both private and public sectors, which vary greatly from one project to another depending on its type and location. For small projects, EIA could cost about €10 thousand and more than €100 thousand for large projects and over €0.5 m for exceptionally large projects. The share of EIAs in total projects costs ranges from 0.1% for larger projects to 1% for smaller ones.
- Although quantitative assessments of benefits are unavailable, it is widely believed that the overall benefits obtained from EIA studies outweigh the costs reflected in improved environmental quality, smoother authorisation process with less public resistance, modifications of the project design, etc.
- Ukraine inherited its EIA model from the Soviet Union, which consisted of two procedures - environmental impact assessment and state ecological expertise - until 2011.
- One of the important limitations of the EIA system in Ukraine is that it does not guarantee public rights to participate in environmental decision-making. On the one hand, this is due to rather the formal attitude of investors and project developers to compliance with legislative norms on public access to information and public participation in decision-making. On the other hand, government bodies do not properly control how these norms are fulfilled by the business.
- Legislative amendments introduced in 2011 altered Ukrainian EIA system considerably, which distanced national EIA system from the EU even further and weakened provisions for public participation. Although simplification of legal requirements and administrative procedures is necessary to attract investors to Ukraine, these should not compromise the environmental safety of construction objects and disregard public interests.
- Ukraine is a party to Energy Community Treaty since 2009 and also signed and ratified Association Agreement with the EU in 2014; both agreements envision approximation with the EU *acquis* on energy and environmental issues. Implementation of effective EIA model is one of the key reforms required for adaptation of environmental legislation to the EU norms. However, all terms of the

Energy Community Treaty and Association Agreement for transposition of the EIA Directive were considerably exceeded.

- Although several draft laws were registered in the Parliament aiming to implement EU EIA model in Ukraine in the last few years, neither of them was approved as of March 2016 due to the resistance of certain ministries, government officials and business interested in preserving status quo. Ukraine should implement Directive 2011/92/EU as soon as possible not only to comply with its international obligations but also to harvest associated benefits.
- Transposition of the EIA Directive into national legislation will help to achieve a good balance of administrative requirements and inclusiveness of all interested stakeholders. It will also provide additional benefits for the business due to the reduction of administrative burden, improved investment climate and more leverage for civil society to influence decision-making regarding investments in the public and private sectors, which will increase public support for investment projects.

ANNEX I. Projects referred to in Article 4(1) of Directive 2011/92/EU (i.e. requiring mandatory Environmental Impact Assessments)

1. Crude-oil refineries.
2. Thermal power stations.
3. Nuclear power stations, and related installations.
4. Smelting of cast iron and steel.
5. Reprocessing of irradiated nuclear fuel.
6. Production of non-ferrous crude metals.
7. Installations for the extraction & processing of asbestos.
8. Integrated chemical installations.
9. Construction of lines for long-distance railway traffic and airports.
10. Construction of motorways and express roads.
11. Construction of a new road of four or more lanes.
12. Inland waterways and ports for inland-waterway traffic.
13. Ports, piers for loading and unloading.
14. Waste disposal installations or landfill of hazardous waste.
15. Groundwater abstraction or artificial groundwater recharge schemes.
16. Works for the transfer of water resources between river basins.
17. Waste water treatment plants.
18. Extraction of petroleum and natural gas.
19. Dams.
20. Pipelines for the transport of gas, oil, chemicals.
21. Installations for the intensive rearing of poultry or pigs.
22. Industrial plants for the production of pulp and paper.
23. Quarries and open-cast mining.
24. Construction of overhead electrical power lines.
25. Installations for storage of petroleum, petrochemical, or chemical products.
26. Geological storage of carbon dioxide.
27. Installations for the capture of CO₂ streams.
- 28.

Note: The above are abbreviated extracts from Annex I of the Directive. In most cases there are more precise quantitative indications of the size or capacity of the installations above which the EIA is mandatory.

ANNEX II. Projects referred to in Article 4 (2) of Directive 2011/92/EU (i.e. Member States shall determine whether the project shall be made subject to EIA)

1. Agriculture, silviculture and aquaculture (e.g., restructuring of rural land holdings, use of uncultivated land or semi-natural areas, irrigation and land drainage, afforestation and deforestation, intensive livestock installations not included in Annex I, etc.).
2. Extractive industry (e.g., open-cast mining and peat extraction not included in Annex I, underground mining, extraction of minerals, deep drillings, etc.).
3. Energy industry (e.g., electricity, steam and hot water generation installations and not included in Annex I; storages of fossil fuels, natural gas and combustible gases; hydroelectric and wind power for energy production; CO₂ capture and storage, etc.).
4. Production and processing of metals (e.g., production of pig iron or steel, processing of ferrous metals, hot-rolling mills, smitheries with hammers, ferrous metal foundries, swaging by explosives, etc.).
5. Mineral industry (e.g., coke ovens, manufacture of cement, production of asbestos and asbestos products not included in Annex I, manufacture of glass, production of mineral fibres).
6. Chemical industry projects not included in Annex I (e.g., production of pesticides and pharmaceutical products, paint and varnishes, elastomers and peroxides, etc.).
7. Food industry (manufacture of vegetable and animal oils and fats, dairy products, confectionery and syrup manufacture, installations for the slaughter of animals, etc.).
8. Textile, leather, wood and paper industries (e.g., production of paper and board not included in Annex I, tanning of hides and skins, cellulose-processing and production, etc.).
9. Rubber industry (manufacture and treatment of elastomer-based products).
10. Infrastructure projects (e.g., industrial estate and urban development projects, construction of railways, intermodal transshipment facilities and airfields not included in Annex I, oil and gas pipeline installations, etc.).
11. Other projects (e.g., disposal of waste and waste-water treatment plants not included in Annex I, sludge-deposition sites, manufacture of artificial mineral fibres, etc.).
12. Tourism and leisure (e.g., ski runs, ski lifts and cable cars, marinas, holiday villages and hotel complexes outside urban areas, theme parks, etc.).
13. (a) Any change or extension of projects listed in Annex I or this Annex, already authorised, executed or in the process of being executed, which may have significant adverse effects on the environment (change or extension not included in Annex I);
(b) Projects in Annex I, undertaken exclusively or mainly for the development and testing of new methods or products and not used for more than two years.

Note: The above are brief extracts from Annex II of the Directive. In most cases there are more precise specifications of projects, which fall under the responsibility of the Member States to determine whether the project shall be made subject to EIA.