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ВИХРИСТ

Introduction of the EU model of EIA and SEA in Ukraine

Association Agreement. The introduction of the EU model of environmental impact assessment and strategic environmental assessment paves the pathway for better environmental governance, sustainable development, responsible and transparent decision-making, protection of citizens' environmental rights and compliance with international obligations of Ukraine in the field of environment.

Keywords: environmental impact assessment, strategic environmental assessment, proposed activity, public planning document.

For about 15 years Ukraine was in a continuous non-compliance with its international obligations under a number of multilateral environmental agreements, in particular, those related to environmental assessment. The post-soviet system of ecological expertise and, in particular, its application to urban development projects showed grave inconsistencies with the principles of environmental democracy and participatory decision-making leading to substantial hurdles in exercising citizens' environmental rights, taking due account of environmental considerations in granting development consent as well as effective employment of environmental impact assessment in a transboundary context. The reform of urban development legislation and the system of environmental authorities undertaken in Ukraine in 2011 exacerbated the problem. A number of initiatives aimed at rectifying the situation did not entail any considerable progress.

The objective of the present article is to prove the decisive role of the EU-Ukraine Association Agreement and the approximation of the environmental legislation of Ukraine to the EU law, prompted thereby, in bringing about Ukraine's compliance with its international obligations in the field of environmental assessment.

At its second session (Almaty, Kazakhstan, 25-27 May 2005) the Meeting of the Parties to the United Nations Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (hereinafter – Aarhus Convention) adopted Decision II/5b, whereby declared for the first time that Ukraine was not in compliance with its obligations under the Convention [1, p. 2]. In its findings with respect to compliance by Ukraine, the Compliance Committee to the Aarhus Convention observed that the lack of clarity with regard to public participation requirements in environmental impact assessment and environmental decision-making procedures for projects, such as time frames and modalities of a public consultation process, requirements to take its outcome into account and obligations with regard to making information available in the context of Article 6, indicated the absence of a clear, transparent and consistent framework for the implementation of the Convention and constituted non-compliance with Article 3 (1) of the Aarhus Convention [1, p. 2].

At its third session (Riga, Latvia, 11-13 June 2008) the Meeting of the Parties to the Aarhus Convention adopted Decision III/6f, whereby issued a conditional caution to the Government of Ukraine [2, p. 2].

At its fourth session (Chisinau, Moldova, 29 June - 1 July 2011) the Meeting of the Parties to the Aarhus Convention adopted Decision IV/9h, whereby issued a caution to Ukraine, requested the Compliance Committee to establish the successful fulfilment of Decision II/5b of the Meeting of the Parties, adopted in 2005, and to report to the fifth session of the Meeting of the Parties on whether Ukraine has fulfilled Decision II/5b, with a view to the Meeting of the Parties deciding whether to suspend the special rights and privileges accorded to Ukraine under the Aarhus Convention [3, p. 58]. The latter would have become unprecedented.

At its meeting held on 26-29 June 2012 in Geneva, Switzerland, the Compliance Committee to the Aarhus Convention found that Ukraine had not fully satisfied the conditions of the above Decision of the Meeting of the Parties, and was of the view, therefore, that the caution, issued by the Meeting of the Parties to the

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Aarhus Convention in its Decision IV/9h, could not be lifted [4, p. 9]. With the letter of 14 August 2012 the Compliance Committee informed the President of Ukraine about the continuous non-compliance by Ukraine with its international obligations under the Aarhus Convention.

At its fifth session (Maastricht, the Netherlands, 30 June - 2 July 2014), the Meeting of the Parties to the Aarhus Convention adopted Decision V/9m, by paragraph 6 (a) of which maintained the caution issued to Ukraine. Paragraph 5 of the Decision listed a number of concrete measures to be implemented by Ukraine. At the same time, Decision V/9m provided for the caution to be lifted if the Party concerned had adopted the necessary measures to bring its legislation into full compliance with the provisions of the Convention and had notified the secretariat of this fact until the sixth session of the Meeting of the Parties [5, p. 73].

Under another multilateral environmental agreement – at the fourth session of the Meeting of the Parties to the UNECE Convention on Environmental Impact Assessment in a Transboundary Context (hereinafter – Espoo Convention) (Bucharest, Romania, 19-21 May 2008) – the Parties, on the basis of findings and recommendations of the Implementation Committee to the Espoo Convention, adopted Decision IV/2, whereby issued a declaration of non-compliance and a caution to the Government of Ukraine. In particular, Decision IV/2 found Ukraine's non-compliance with its obligations under Articles 2, 3, 4, 5 and 6 of the Espoo Convention [6, p. 80].

At its fifth session (Geneva, Switzerland, 20-23 June 2011) the Meeting of the Parties to the Espoo Convention adopted Decision V/4, whereby declared that the caution to the Government of Ukraine issued in its fourth session was effective and requested the Government of Ukraine to report by the end of each year to the Implementation Committee on the implementation of the strategy of the Government of Ukraine to implement the Convention, in particular on concrete legislative measures adopted to that effect [7, p. 19].

At its sixth session (Geneva, Switzerland, 2-4 June 2014) the Meeting of the Parties to the Espoo Convention in its Decision VI/2 endorsed the finding of the Implementation Committee that, despite some steps taken, Ukraine had not yet fulfilled all its obligations under Decision V/4 and declared that the caution to the Government of Ukraine issued at its fourth session was still effective [8, p. 10].

Under the Energy Community on 6 September 2016 the Energy Community Secretariat sent an Opening Letter to Ukraine thereby initiating a dispute settlement case against Ukraine (ref. # Case ECS-13/16) for non-compliance with the Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment (hereinafter – EIA Directive). In its Opening Letter, the Secretariat addressed the lack of complete transposition of the EIA Directive into Ukraine's national law, the deadline for which for Ukraine, as set by its Accession Protocol to the Energy Community Treaty, expired on 1 January 2013 [9].

Pursuant to the Rules of Procedure for Dispute Settlement under the Energy Community Treaty [10] the Energy Community Secretariat initiated the so-called 'three-step procedure', where a preliminary procedure precedes the submission of a case of non-compliance to the Ministerial Council (Articles 11 (1&2), 12(2), 13, 15, 16 (1) and 29 (1) of the Rules of Procedure). The purpose of the preliminary procedure was to give Ukraine the opportunity to react to the allegation of non-compliance with Energy Community law within two months (Article 13(1) of the Rules of Procedure) and to enable the Secretariat to establish the full background of the case.

As the next step, on 12 January 2017, the Energy Community Secretariat sent a Reasoned Opinion to Ukraine (Article 14 of the Rules of Procedure), which, inter alia, stated that on 4 October 2016 the Verkhovna Rada of Ukraine adopted the Law "On Environmental Impact Assessment", which could have addressed the Secretariat's concerns as described in the Opening Letter. However, on 31 October 2016 the President of Ukraine refused to sign it and referred it back to the Verkhovna Rada for reconsideration. Therefore, the Energy Community Secretariat concluded that Ukraine was still not fulfilling its international obligation to transpose the EIA Directive into its national law, and had two months to react to the allegation of non-compliance with Energy Community law. In the light of the reply or in absence of a reply from Ukraine, the Energy Community Secretariat warned that it might bring the matter to the attention of the Ministerial Council by way of a Reasoned Request in accordance with Articles 15 and 29 of the Rules of Procedure.

On 19 May 2017 the Energy Community Secretariat submitted a Reasoned Request to the Ministerial Council.

The above inevitably shows that the most fundamental reason for Ukraine's continuous non-compliance with its international obligations in the field in question was the lack of environmental assessment procedures, in particular, the environmental impact assessment (hereinafter – EIA) and the strategic environmental assessment (hereinafter – SEA) procedures compliant with the established international standards.

Implementation of the EU-Ukraine Association Agreement has become a decisive impetus for conceptual rectification of the situation in place. Article 363 of the Association Agreement provides for gradual

approximation of Ukrainian legislation to EU law and policy on environment to proceed in accordance with Annex XXX to that Agreement.

Since the instruments of environmental governance and integration of environment into other policy areas are crosscutting for all sectoral policies (transport, energy, agriculture, tourism, etc.), they are widely known as 'horizontal' instruments constituting the so-called 'horizontal' sector of the EU environmental law. The EU 'horizontal' environmental law regulates general issues of environmental governance and concerns some of the cornerstone elements like the access to environmental information, public participation, SEA of plans and programmes and EIA of projects.

It should be mentioned that in the course of its development the EU 'horizontal' environmental law has been brought into compliance with and integrated thereto the provisions of the Aarhus and Espoo Conventions. Therefore, the issues of compliance with the requirements of the above conventions and the approximation of the Ukrainian legislation to the EIA Directive and the Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment (hereinafter – SEA Directive) are interrelated. It is virtually impossible to effectively approximate to the 'horizontal' sector environmental directives under the Association Agreement while not implementing the provisions of the Aarhus and Espoo Conventions. And, vice-a-versa, proper implementation of the directive specific implementation plans for the 'horizontal' sector environmental directives, the immediate measures of which provided for the adoption of the Laws of Ukraine "On Environmental Impact Assessment" and "On Strategic Environmental Assessment", basically ensures Ukraine's implementation of its international obligations under the Energy Community, the referred conventions and the UNECE Protocol on Strategic Environmental Assessment, to which Ukraine has become a Party in 2015.

The Law of Ukraine "On Environmental Impact Assessment" # № 2059-VIII was adopted on 23 May 2017. The Law sets legal and organisational policies for the EIA with a view to avoid and prevent environmental damage, ensure environmental safety, environmental protection, rational use and restoration of natural resources, in the process of decision-making on economic activity likely to cause a significant impact on the environment, taking into account state, public and private interests. It establishes a transparent participatory decision-making procedure, inter alia, by means of the free-access online Single EIA registry.

The Law of Ukraine "On Strategic Environmental Assessment" # № 2354-VIII was adopted on 20 March 2018. The Law stipulates that SEA is a procedure of identifying, describing and evaluating effects of implementation of a public planning document on the environment, including human health, reasonable alternatives, developing measures to prevent, reduce and mitigate possible adverse effects, which includes the scoping of SEA, the preparation of SEA report, the carrying out of public consultations and consultations with authorities (where necessary – transboundary consultations), the taking into account of the SEA report and the results of the above consultations in the public planning document, the provision of information on the adoption of the public planning document, and which is carried out pursuant to the procedure established by the Law of Ukraine "On Strategic Environmental Assessment".

Before adoption, both laws were made subject to the preliminary compliance quality check by the European Commission and were found to meet in substance the requirements of the relevant EU 'horizontal' environmental instruments. Not long after the adoption of the above laws, the Energy Community and the UNECE reacted on Ukraine's compliance with its international obligations under the relevant multilateral environmental agreements.

Thus, in its report the Compliance Committee to the Aarhus Convention concluded that "the Party concerned has adopted the necessary measures to bring its legislation into compliance with the Convention, and in particular has satisfied the requirements of paragraph 5 (a)-(c) of Decision V/9m. The Committee accordingly finds that the Party concerned is no longer in a state of non-compliance with [...]" the Aarhus Convention. "In the light of [...] the above the caution issued by the Meeting of the Parties at its fourth session should now be lifted, [...] the special rights and privileges accorded to the Party concerned should not be suspended" (paragraphs 65-66) [11, p. 13].

At its sixth session (Budva, Montenegro, 11-13 September 2017) the Meeting of the Parties to the Aarhus Convention adopted Decision VI/8, whereby welcomed the committed action of Ukraine to fully address the recommendations made by the Meeting of the Parties through Decision V/9m, and to bring its legislation and practice into compliance with the Aarhus Convention (paragraph 15 of the Decision) [12, p. 34].

The Ministry of Energy and Coal Industry of Ukraine informed the Energy Community Secretariat about the adoption of national measures transposing the EIA Directive into the national law, including the adoption of the Law of Ukraine "On Environmental Impact Assessment". The Energy Community Secretariat arrived at the conclusion that with the adoption of such legislation, Ukraine has formally rectified the breaches identified in Case ECS-13/16. It, therefore, decided to withdraw the Reasoned Request submitted to the Ministerial Council and to close the Case ECS-13/16.

Activities aiming at the final lifting of sanctions under the Espoo Convention are pending. This is due to the fact that non-compliance under the Espoo Convention was related both to inconsistencies in the legal framework (which has been successfully rectified) as well as concrete cases of EIA in a transboundary context.

To conclude with, it should be acknowledged that the provisional application and eventual entry into force of the EU-Ukraine Association Agreement have become decisive in shifting from the system of ecological expertise to the EU model of EIA and SEA in Ukraine and with that bringing about Ukraine's compliance with its international obligations in the field of environmental assessment. Further practical application and development of both procedures in line with the principles of environmental democracy and participatory decision-making will significantly contribute to better environmental governance and sustainable development of Ukraine.

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