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Dear Members of the "Energy Reforms" coalition,

I would like to express the highest considerations of the Energy Community Secretariat and to thank you for submitting the draft Law of Ukraine on Environmental Impact Assessment for review which I also consider as a very important step in the relations of Ukraine and the Secretariat.

The draft is a very good basis for transposing the Environmental Impact Assessment Directive into national law and its adoption would surely constitute of a major step in Ukraine's efforts to align its national law with the Energy Community environmental *acquis*.

Hereby I am sending you the comments of the Energy Community Secretariat on the draft Law and I am looking forward to our continued cooperation on this matter as well as other issues related to the Energy Community.

Sincerely yours,

Janez Kopač

Director

Energy Community Secretariat

Comments
of the Energy Community Secretariat
on the draft Law of Ukraine on Environmental Impact Assessment

Article 1 – Definitions

Article 1 of the draft Law of Ukraine on Environmental Impact Assessment (hereinafter: “the draft Law”) provides three definitions: on “Environmentally Hazardous Economic Activity”, on “Environmental Impact Assessment” and on “Final Decision”. Potential transposition gaps may arise from the following issues:

- a) The definition of “Environmentally Hazardous Economic Activity” is much broader than the definition of “project” in Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment (hereinafter: the EIA Directive) as the draft Law includes not only activities but also objects. While transposing the EIA Directive’s provisions for a broader scope of projects than it is required by the Directive is perfectly possible, it should be safeguarded that an environmental impact assessment is required for projects listed in Annex I and Annex II of the Directive as a minimum, subject to the conditions included therein.

It is also unclear what “highly” environmentally hazardous types of activities and objects mean in the sense of the definition. Article 2 requires that the list of such activities and objects should be established by the Cabinet of Ministers of Ukraine. This legislative solution could, in principle, ensure that the EIA Directive’s provisions are transposed into national law, although it should be guaranteed that all projects listed in Annexes I and II of the Directive are included in the list.

- b) The definition of “Environmental Impact Assessment” is rather brief and makes only a general reference to the activity’s impacts without providing further details (what kind of impacts, on what environmental media etc.)
- c) A number of definitions are not present in the draft Law, although later on the terms are used in the provisions, with particular regard to the terms “project” and “public”. The term “public concerned” is not used in the draft Law which could impair the right of

non-governmental organisations promoting environmental protection and meeting any requirements under national law to take part in the procedure.

Suggestions: The definition of “project” (potentially replacing that of “Environmentally Hazardous Economic Activity”), “public” and “public concerned” in line with the Directive’s ones could be included. A change to the definition of “Environmental Impact Assessment” in line with Article 3 of the EIA Directive should also be considered.

Article 2 - Scope of Application of Environmental Impact Assessment

Article 2 of the draft Law sets the general requirement for an environmental impact assessment in the case of certain projects. Considering its wording, it could be deemed that the “List of highly environmentally hazardous types of activities and objects” to be established by the Cabinet of Ministers of Ukraine would correspond to Annex I of the EIA Directive (projects in the case of which an environmental impact assessment is mandatory) while the “List of types of activity and objects that are likely to cause an adverse impact on the environment” would correspond to Annex II projects (in the case of which an examination should be carried out on the necessity of an environmental impact assessment).

Similarly to Article 1, it is not unclear what “highly” environmentally hazardous types of activities and objects precisely mean and whether this refers to projects listed in Annex I of the EIA Directive.

As per Article 2(2), reference is made to transboundary impact assessment the detailed rules of which are provided in Article 14.

Suggestions: None so far. Annex I and II of the EIA Directive should serve as a reference when preparing the decision of the Cabinet of Ministers of Ukraine on the list of projects.

Article 3 – Transparency of Environmental Impact Assessment

Article 3 sets out the general framework for public participation the detailed rules for which are provided in Articles 8 and 9.

Suggestions: In relation to Article 1, a definition of “public” and “public concerned” would be welcome therein.

Article 4 – Ascertainment of the Need for Environmental Impact Assessment

Article 4 sets out the general obligation for the developer to inform the competent authority of its intention to undertake an activity subject to environmental impact assessment.

Suggestions: None so far. It should be pointed out, however, that the provision can only be applied in connection with the decision of the Cabinet of Ministers on the list of projects.

Article 5 – Declaration of Intent

Article 5 sets out the procedure to be followed in the case of a mandatory environmental impact assessment. Article 5(1) stipulates that in such cases, an environmental impact assessment should take place regardless of the parameters of the activity or objects (capacity, length, area, output, etc.) This provision constitutes of a more stringent obligation than those of the EIA Directive since Annex I includes thresholds for a large number of projects (e.g. combustion installations of 300 MW or more, airports with a basic runway length of 2 100 m or more, installations for storage of petroleum, petrochemical or chemical products with a capacity of 200 000 tonnes or more).

Article 5(2) provides a list on information the Declaration of Intent should contain, while Articles 5(3)-(5) set out the rules for publication the declaration.

Suggestions: None so far. It should be pointed out, however, that the provisions of the article can only be applied in connection with the decision of the Cabinet of Ministers on the list of projects.

Article 6 – Terms of Reference for the Development of the Report on Environmental Impact Assessment

Article 6 sets out the rules according to which an environmental impact assessment can start. Read in connection with Article 5, it would transpose Article 5 of the EIA Directive into national law.

Suggestions: None.

Article 7 – Report on Environmental Impact Assessment

Article 7 of the draft Law transposes Annex IV of the EIA Directive and is fully compliant with its requirement on the content of the environmental impact assessment.

Suggestions: None.

Article 8 – Public Consultations

Article 9 – Announcement on the Commencement of Public Consultations on the Report on Environmental Impact Assessment

Articles 8 and 9 of the draft Law contain the detailed rules on public participation. Article 8(7) makes reference to the approval of a decision on the procedure for holding public consultations by the Cabinet of Ministers, the content of which decision may have an influence on the transposition of the EIA Directive.

Article 9 lists the pieces of information to be published regarding an environmental impact assessment that corresponds to the list in Article 6(2) of the EIA Directive.

Suggestions: In order to have a coherent legal framework that can be effectively implemented in practice, the definitions of “public” and “public concerned” should be included in the draft Law.

Article 10 – Conclusion on Environmental Impact Assessment

Article 11 - Obligation to Take into Account the Outcomes of Environmental Impact Assessment

Articles 10 and 11 stipulate the rules for the adoption of the development consent, including an obligation to take into account and reflect on the comments gathered through the public

consultation(s) as required by Article 8 of the EIA Directive. The draft Law calls for a wide dissemination of the report on the development consent and that makes a clear link between the final decision on the project and the environmental impact assessment.

Suggestions: None.

Article 12 – Challenging Acts and Omissions of Bodies of Executive Power in the course of Environmental Impact Assessment

Article 12 makes a brief reference to access to justice by providing the general possibility to challenge the decisions on an environmental impact assessment via a judicial procedure, albeit without any further details. The level of transposition of the requirements of Article 10a of the EIA Directive is therefore pending on the adoption of the detailed rules (either via the draft Law or by a separate legislative instrument) on access to justice.

Suggestions: The inclusion of the definition of “public concerned” in the spirit of Article 1(2) would also be necessary with view to this article. The rules and procedures on access to justice are yet to be determined.

Article 13 – Post-Project Analysis

Article 13 contains rules on the follow-up of environmental impact assessments after the project has been realised that are more stringent than the requirements of the EIA Directive and therefore there is a lack of legal basis to provide comments on them.

Suggestions: None.

Article 14 – Transboundary Environmental Impact Assessment

Article 14 is generally harmonised with the requirements of Article 7 of the EIA Directive. There is no reference, however, to involve a potentially affected foreign state in the environmental impact assessment based on the request of that state as required by Article 7(2) of the EIA Directive.

Suggestion: A separate paragraph on the inclusion of a foreign state in the environmental impact assessment based on its request could be considered.

Conclusions

In general, the draft Law could serve as an excellent basis for transposing the Environmental Impact Assessment Directive into national law. With its adoption, Ukraine could take a significant step in the right direction to transpose the EIA Directive into national law and to reach compliance with a centerpiece of the environmental *acquis* of the Energy Community. There are certain issues, however, that could be rectified during the adoption process as reflected in the above comments.

Furthermore, the adoption of secondary legislation referred to in the draft Law would be of prime importance in order to reach complete transposition of the EIA Directive into national law. In this respect, the adoption of the decision of the Cabinet of Ministers of Ukraine as mentioned in Article 2(1) of the draft Law is the most important as it should be ensured that this decision is in line with Annexes I and II of the EIA Directive (list of projects subject to mandatory environmental impact assessment or screening).

Finally, the rules on access to justice should be further developed either in the framework of the draft Law or via secondary legislation.