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THE PROBLEMS OF REALIZATION OF RIGHT TO PARTICIPATE IN DECISION-MAKING IN ENVIRONMENTAL MATTERS

Kateryna KOZMULIAK[1]

Abstract

The right of citizens to participate in decision-making in environmental matters is provided by many international acts: the Rio Declaration on Environment and Development, the Aarhus Convention, the EU Directives (Directive 2001/42/EC, Directive 2003/35/EC, and Directive 2011/92/EU). A group of rights aimed at the realization of this general right are also defined in national legislation, in particular, in the Law of Ukraine "On Environmental Protection". To comply with requirements of Annex XXX (Environment) of the Ukraine-European Union Association Agreement, there were adopted the laws of Ukraine "On environmental impact assessment" (hereinafter – the EIA Act) and "On strategic environmental assessment" (hereinafter – the SEA Act). It has led to the formation of new mechanisms of interaction between the public, business entities and authorities.

However, in spite of certain achievements in ensuring the implementation of the right to participate in decision-making in environmental matters, there are a number of problems in its application in practice. They are the next: the different understanding of the concept of "public" both within national legislation and in comparison with international law; the imperfect mechanism of preventing the ignorance of the public's position. There is no legal regulation of the ways of pre-trial settlement of the dispute, in particular, through mediation. The organization and conduction of public discussion of plans, development strategies and specific planned activities requires an improvement.

The article analyzes the peculiarities of realization of the right to participate in decision-making in environmental matters, reveals the shortcomings of the current legislation, suggests ways to eliminate them.

Keywords:

Ecological rights, decision-making in environmental matters, environmental impact assessment, strategic environmental assessment, mediation.

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1. Introduction.

The right of public to participate in decision-making in environmental matters is provided by many international acts: the Rio Declaration on Environment and Development, the Aarhus Convention, the EU Directives (Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment; Directive 2003/35/EC providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC; Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment). A group of rights aimed at the realization of this general right are also defined in national legislation, in particular, in the Law of Ukraine "On Environmental Protection". To comply with requirements of the Aarhus Convention and of the Annex XXX (Environment) of the Ukraine-European Union Association Agreement, there were adopted the Law of Ukraine "On environmental impact assessment" (hereinafter – the EIA Act) and the Law of Ukraine "On strategic environmental assessment" (hereinafter – the SEA Act). It has led to the formation of new mechanisms of interaction between the public, business entities and authorities.

The Aarhus Convention sets, that each Party shall make appropriate practical and/or other provisions for the public to participate during the preparation of plans and programmes relating to the environment, within a transparent and fair framework, having provided the necessary information to the public. To the extent appropriate, each Party shall endeavour to provide opportunities for public participation in the preparation of policies relating to the environment.

Related provisions are also contained in the Convention on Environmental Impact Assessment in a Transboundary Context (hereinafter – the Espoo Convention) and Protocol on Strategic Environmental Assessment to the Convention on Environmental Impact Assessment in a Transboundary Context (hereinafter – the SEA Protocol).

2. Theoretical background.

In the 70-80-ies began the study, which included the participation of the public in decision-making on environmental issues in Ukraine. Vovk Yulian, Kolbasov Oleh, Muntian Vasyl, Razmietaiev Sergii, and Shemshuchenko Yurii were among the first who began to speak about ecological rights of the public and legal status of public environmental

organizations. Andreitsev Volodymyr, Andrusevych Andrii, Baliuk Halyna, Kobetska Nadiia, Krasnova Mariia, Malysheva Nataliia, Moroz Halyna, Pavlova Olha, Pozniak Elina and some others researched the separate aspects of ensuring the realization of right to participate in decision-making in environmental matters (the right to access environmental information, public environmental expertise, the meaning of right to participate in making environmentally significant decisions and guarantees of its implementation).

Because of the EIA Act and the SEA Act adoption in 2017-2018 a new need arose for a more detailed study of these procedures, opportunities for public participation and ways to guarantee its right to be heard when making appropriate decisions. Some works in this area have already been prepared by Vlasenko Yulia, Palekhov Dmytro, Tretyak Taras, Yevstigneyev Andrii. However, those works are fragmentary and do not contain a thorough comprehensive study of the mechanisms introduced by the named laws.

The aim of the research is to analyze the current state of legal regulation of public participation in decision-making on environmental issues in the context of the updated Ukrainian legislation, to study the mechanism of implementation of this right and to identify its possible shortcomings. The result of the study will become the conclusions and recommendations to improve the procedure for involving the public in the discussion of environmental issues.

3. Argument of the paper.

In recent years, Ukraine had undergone significant changes in the legal regulation of public access to participate in decision-making in environmental matters. The public during the strategic environmental assessment process (hereinafter – SEA) got the right to express its suggestions and remarks at the stage of discussion the SEA statement content, while discussing the plan of state planning document (hereinafter – SPD) and the SEA report. In the environmental impact assessment (hereinafter – EIA), the public may submit a suggestions and remarks for research amount and the information detailing level to be included in the report on environmental impact assessment, as well as participate in a public discussion of the planned activities after submission of the EIA report. At the same time, public opinion cannot be ignored. The SEA report and the EIA conclusion should reflect the consideration or rejection of the comments and suggestions received during the public discussion.

At the same time, some factors do not allow to properly realize the right of the public to participate in decision-making in environmental

matters:

• the public in most cases is inert and most of the SEA and EIA procedures are conducted without its participation;

• the procedure for conducting public discussion during the SEA and the EIA should be improved in part of informing the public;

• the mechanism of guaranteeing and protecting of right to participate in decision-making in environmental matters is imperfect and does not provide adequate protection in case of violation of this right.

4. Arguments to support the thesis.

Predicted by the Aarhus Convention right of the public to participate in decision-making in environmental matters in Ukraine realizes through the following rights, as defined in the Law of Ukraine "On Environmental Protection":

• to participate in the discussion and submission the proposals to legal acts' projects, materials about placement, building and reconstruction of objects that may negatively affect on the environment, making proposals to state authorities and to local self-government bodies, legal entities who participate in making decisions of these issues;

• to participate in public discussions on the impact of planned activities on the environment;

• to participate in the process of strategic environmental assessment.

At the same time, the public's right to participate in the SEA and the EIA process is by far the least investigated today. That is why it was chosen as the object of our study.

What is meant by the public in the context of SEA and EIA? It should be noted that the Aarhus Convention, the SEA Protocol, the EU Directives and Ukrainian legislation use two similar concepts of "public" and "interested public".

The Aarhus Convention and the Directive 2011/92/EU at the same time apply the concept of the public and the interested public, that means the public affected or likely to be affected by, or having an interest in, the environmental decision-making; for the purposes of this definition, non-governmental organizations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest. The SEA Protocol and Directive 2001/42/EC say only about public, without restricting it to the interested one. There is also no single approach in the Ukrainian legislation. The EIA Act operates the concept of the public in a broad sense, and the SEA Act restricts it to the interested public.

Herewith, in the case of the EIA, the experts appreciated the expansion of the Ukrainian legislator in comparison with Directive 2011/92/EU to the range of persons who could participate in the discussion of the project of the planned activity from the interested public to the public as a whole. Another situation has arisen with the SEA Act. The range of persons who can participate in the discussion has considerably narrowed. This law defines the public as one or more individual or legal persons, their associations, organizations or groups registered in the territory covered by the strategic planning document. The Ministry of Ecology and Natural Resources of Ukraine also paid attention to this shortcoming. In the Methodological Recommendations of Strategic Environmental Assessment of SPD it is emphasized that for SEA purposes, the definition of the public from the SEA Protocol should be used [1].

Appropriate information provision is important for involving the public in discussions during the SEA and the EIA. For it, it is necessary to identify the range of people who may be interested in participating in public discussions both in the SEA process and in the EIA.

The Methodological Recommendations of SEA of SPD offers the following initial list of concerned parties: 1) executive authority and local self-government bodies that may be interested in the SPD project realization; 2) the local population, which may be affected by the environmental and social consequences of the of the SPD project realization; 3) business organizations that are interested in the development of the territory or area that is affected by the SPD project; 4) public, scientific, cultural, educational, religious organizations and institutions, leaders and activists of various groups and movements that can contribute to the SPD project realization and are interested in discussion of its environmental and social aspects [1].

As such recommendations for EIA are not developed for the purpose of this procedure we can apply the above recommendations by analogy.

No less important is the process of involving the public to the discussion of decisions that may have an impact on the environment. It should be noted that the requirements for public informing during the conduct of EIA are prescribed in the Ukrainian legislation in sufficient details. In particular, notification of planned activities is to be made public on the official web site of the authorized body, as well as in at least two printed mass media, the territory of distribution of which covers the administrative-territorial units that may be affected by the planned activity. In addition, the relevant information should be placed on the information

boards of the local government or in other public places on the territory where the activities are planned, or they should be made public in another way, which guarantees the bringing of the information to the attention of the interested persons.

Instead, in the sphere related to information during SEA, the legislation contains only minimal requirements. In particular, the SEA customer (executive body or local government body responsible for the SPD development) is required to publish on its official website a statement on the determination of the amount of the SEA, the SPD project and the SEA report, and also to publish a notice about it in print media. In our opinion, such a list of mandatory measures is not fully capable of ensuring that the public is properly informed and involved in the discussion. In the literature and analytical reviews, attention is drawn to the fact that informing, which really aims at involving the general public in the discussion of the project, should go beyond the ways defined by the SEA Act. It should include a broad information campaign in social networks, involving journalists in coverage of the topic on radio and television. In small settlements, the announcement of the publication of the SPD project and the SEA report recommends the public discussion procedure should be carried out in public places (shops, stops, etc.). That is, the requirements for informing the public in the SEA should be closer to those defined by the EIA Act.

Based on the results of the analysis of the Register of Environmental Impact Assessment [2] and SEA reports, we can conclude that the public does not pay sufficient attention to the discussion of programs, plans or specific projects. This is a consequence of a number of circumstances. In particular, some members of the community may have a wish but they cannot be able to participate in the discussion (for example, groups with limited capacities: elderly people, people with disabilities, etc.). Others may have the opportunity but they have no desire to participate (for example, someone with negative experience, that has no time or those who believe that participation will not benefit them) [3].

In addition, members of the public may find it difficult to obtain information on whether a plan, program, or project affects their interests. Published information may be insufficient or publications in mass media that do not adequately cover the target group. The choice of place and time of public hearings is also important. This can also become a way of abuse from the customer and lead to a lack of presence or low attendance of the interested public.

The next thing that should be to take into account is the public opinion that participated in the discussion of the planned activity, plan or

program. Both the EIA Act and SEA Act contain the norm according to which comments and proposals that are received during public discussion should be taken into account, partially taken into account or reasonably rejected. Details of this are indicated in the conclusion of the EIA and the reference of public discussion in the SEA process. However, in both cases there are no criteria for inclusion, partial account or rejection of suggestions and comments from the public.

Taking into account the described features of legal regulation, we consider it expedient to analyse the guarantees of implementation and ways to protect the public's right to properly inform in the process of SEA and EIA. One of such guarantees is the inevitability of legal liability which is set by the Law of Ukraine "On Environmental Protection". Ukrainian legislation provides for the involvement to responsibility for the violation of the procedure for carrying out an environmental impact assessment (Articles 91-5 and 172-9-2 of the Code of Ukraine on Administrative Offenses (hereinafter – CoUAO)). At the same time, neither the SEA nor the Criminal Code and CoUAO contain any mention of the possibility of bringing legal responsibility for violations of the requirements of SEA legislation.

Along with bringing the perpetrators to legal responsibility, the procedure for appealing the decision adopted on the results of the SEA and the EIA in case of ignoring suggestions and comments of the public or when the public was not properly informed about the planned activity becomes important. The EIA Act provides only a judicial procedure for the settlement of such disputes. The SEA Act does not determine the procedure for appealing a decision, action or omission of the authorized body at all. We do not dispute the importance of the right to appeal against decisions, actions and inactivity of authorized entities. However, in our opinion, it is far less effective to challenge an already adopted decision than to agree on an acceptable option for all parties before making a decision. Therefore, we believe that the coordination of the planned activities with the suggestions and comments of the public should take place not later than at the stage of its public discussion. It seems that this is exactly what is said in Article 6 of the Aarhus Convention: each Party shall provide for early public participation, when all options are open and effective, public participation can take place.

It should be borne in mind that planning the placement of objects that may affect the environment or the development of individual state programs often leads to conflict situations. Almost any conflict in this area includes confrontation between private and public interests. As a rule, parties to such a conflict are representatives of the public, business entities,

as well as authorities or local self-government. Thus, obviously there is an apparent imbalance of forces. Moreover, the problem of so-called "ecological inequality" is often traced in such conflicts. It arises when more influential or richer subjects support the placement of objects that may have an impact on the environment in places where poorer people or representatives of national minorities live [4]. In addition, such conflicts are usually characterized by time length and complex interdependence, when solving one problem generates new challenges.

Science and practice have developed a number of ways and methods for resolving such conflicts. One of the most effective of them is mediation. This procedure has not yet been sufficiently disseminated in Ukraine, although a number of legal acts already provide the possibility of its application.

Mediation is understood as a non-formalized but clearly structured dispute resolution procedure with the participation of a neutral mediator that supports the parties in reaching a mutually beneficial solution. The main principles of mediation are: voluntary participation in the procedure (parties may, at their own will, initiate, terminate or extend the mediation), confidentiality (all that occurs during the mediation remains confidential), and equality of the parties.

The work of the mediator is aimed at encouraging the parties to move away from the positional negotiations, where they adopt a position from which they are very reluctant to budge, to principled negotiation (interested negotiation) [5]. The mediation process helps the parties to identify the strengths and weaknesses of both their position and the opponent's position; to assess potential risks, to identify common interests and goals, to formulate a mutually acceptable solution. At the same time, the mediator, while negotiating, must put the interests of all parties at one level. Such an expansion of the capabilities of "weak interested party" and the creation of a power balance, in our opinion it is an absolute plus of using mediation in resolving conflicts that arise in planning activities that may have an impact on the environment or the development of state planning documents [6: 113].

The imposition of mediation in SEA and EIA processes will let to achieve the following results: a) to increase the efficiency of environmental law enforcement through greater public participation not only in regulating environmental relations but also in resolving conflicts that arise in this area; b) to increase the role and opportunities of the public when making environmentally significant decisions; c) to weaken the tensions and the consequences of negative social manifestations that arise when deciding on

the design, construction, and the beginning of activities of objects that have a negative impact on the environment; d) to improve the protection efficiency of environmental rights of individuals and legal entities, including public associations, etc. [7].

At the same time, it should be noted that not every conflict can be settled through mediation. The following conditions for successful mediation in this field are determined: 1) the parties have come to a standstill in the negotiations or it is a clear understanding that this cannot be avoided; 2) the parties are interested and willing to participate in mediation; 3) the parties and their representatives are endowed with the necessary "flexibility" and authority in decision-making; 4) the parties possess the means, that are necessary for the implementing agreements [8: 277; 9].

5. Arguments to argue the thesis.

At the same time, some of the statements made in this article need additional attention from the point of view of possible risks and counterarguments. In particular, while protecting public rights we should also take into account the rights of customers of the SEA or EIA. Sometimes, public representatives may be interested not so much in the environment protection, but in their own interests. These may be lobby groups that are actively involved in public discussion and produce a significant number of comments and suggestions, that are not decisive for the decision, to carry out the planned activity. Perhaps their purpose is to prevent the transition of EIA to a particular subject as a form of struggle with competitors.

A recommendation on how to inform the public about SPD projects or planned activities may be considered as a controversial. First, such a provision could lead to unreasonable costs for the customer, for example, when it is known, that the use of printed media in this area is ineffective because locals do not read local newspapers. On the other hand, if, due to local community characteristics, print media are the most effective means of communicating information to the public, the expediency of using other ways to disclose data in the SEA and EIA process is uncertain. The same applies to informing the public, which goes beyond the framework defined by the current legislation (work with journalists, educational measures, dissemination of information through social networks). Due to the fact that informing the public about the planned activity or SPD is carried out at the expense of the customer, imposing unreasonable financial burdens upon him may negatively affect the investment climate.

Secondly, it is appropriate to remark Tretiak Taras [10: 157] that any unnecessary provisions concerning SEA and EIA have a negative effect on the stability of the final decision. For example, the information was properly communicated to the interested public, after the end of procedure a positive final decision was issued. Thereafter, an unconscientious person who wants simply to stop a competitor appears, and appeals to the court, citing formal violations of the rules on the public informing procedure.

There is also a controversy about the need for legislative consolidation of the possibility of applying for mediation in the process of SEA and EIA. In spite of obvious advantages, there are a number of difficulties in implementing this procedure in Ukrainian realities. In particular, Ukraine still lacks clear legal regulation in this area. There is only a draft law on mediation, around which there are numerous discussions. In addition for the proper legal regulation of mediation when planning potentially hazardous activities, we consider the following issues: 1) at what stage of EIA or SEA can and should be applied mediation; 2) whether mediation in certain cases may be mandatory; 3) what should be the timing of the mediation procedure; 4) what should be the distribution of costs in the mediation process?

6. Conclusions

Based on the results of this paper, we can formulate the following conclusions and recommendations for improving the Ukrainian legislation in the field of realization of the right to participate in decision-making in environmental matters.

1. The concept of the public that is used in the SEA Act should be harmonized with the SEA Protocol.

2. There is an ambiguous answer to the question regarding the limits of legal regulation of ways to notify to the public about SPD projects or planned activities. The SEA Act needs to be detailed in this area. After all, in our opinion, the announcement of a SPD project only on the site of the authorized body and in two media selected by the customer does not provide the adequate information to the general public. In addition, some of the SPD also requires conducting the educational and awareness-raising work among the population whose territory is affected by the plan or program under development. We believe it is expedient to duplicate similar provisions from the EIA Act in this act.

3. The provisions aimed at guaranteeing and protecting the rights of the public in the process of SEA and EIA should also be improved. In particular, this applies to bringing legal liability for violations of the SEA and

EIA procedures, as well as for inappropriate informing the public during these procedures. We consider it is necessary to supplement the CoUAO with offenses in the area of SEA.

4. The introduction of mediation in SEA and EIA processes will allow for positive results. In our opinion, mediation may be applied at any stage of the EIA and the SEA. If it is obvious that the conflict cannot be avoided, mediation should be applied as soon as possible. As practice shows, in order to maximally take into account the interests of all interested persons, involving the public in the dialogue should take place from the very beginning of the planning process (when ideas can be discussed, challenged and refined) and continue until decisions on the implementation of the activity.

Regarding to the compulsory mediation. We consider it is acceptable to provide a norm whereby the organizer of public hearings, in the case of a fundamental contradiction in the planned activities, has to offer the parties to resolve the dispute through mediation. And the parties will decide by themselves whether to use this procedure.

The timing of the mediation procedure is also important. It must be such as to allow for proper preparation, constructive negotiation and adoption of an agreed solution. At the same time, it should not be too long in order not to paralyze the work of the investor and not significantly inhibit the SPD development. In our opinion, in order to prevent abuse and delays of the EIA and the SEA, mediation should not exceed 60 days, with the possibility to extend, if necessary, up to 120 days.

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