To: Secretary to the Aarhus Convention Compliance Committee
United Nations Economic Commission for Europe
Environment Division
Palais des Nations
CH-1211 Geneva 10, Switzerland
aarhus.compliance@un.org
From: Non-governmental organisation "Ecoclub", Ukraine

Communication to the Aarhus Convention Compliance Committee on non-compliance by Ukraine

I. Information on correspondent submitting the communication

1. Communicant name: **Non-governmental organization "Ecoclub"**
Legal address: **Soborna str. 259, kv.84, Rivne, Ukraine, 33024**
Address for correspondence on this matter,
if different from permanent address:
S.Bandery str. 41, office 95, Rivne, Ukraine, 33014
Telephone: **+380673607158**
Email: **office@ecoclubrivne.org**

Contact person authorized to represent the organization in connection with this communication:

Name: Andriy Martynyuk
Title/Position: Executive Director
Telephone: +380673607158
Email: martynyuk@ecoclubrivne.org

II. Party concerned

2. Ukraine (for Ukraine the Convention entered into force on October 30, 2001).

III. Facts of the communication

3. This communication is based on the facts related to a particular project – Kronospan wood processing plant, which is being implemented in Ukraine. Kronospan wood processing plant project represents a typical investment process for a project involving construction in Ukraine. For the purpose of this communication we use these facts to illustrate systemic failures of the key legislative frameworks in Ukraine, which intend to ensure public participation as required by the Articles 6 and 7 of the Aarhus Convention.

4. Implementation of an investment project involving construction is subject to a number of civil,

administrative and permitting procedures. For the purpose of this communication we grouped these procedures (and respective legislative frameworks) into four groups: land-use decision-making (including sale of the land, developing and approving land use plan), strategic environmental assessment (SEA) during land use planning, environmental impact assessment (EIA) for the project itself, and related construction permitting. Each of these and altogether they represent key legislative frameworks to ensure public participation in relation to specific projects and in relation to plans and programs in Ukraine.

5. The overall timeline of these administrative and permitting procedures, as applied to the project in question, is represented in Annex I to this Communication.

3.1 Kronospan wood processing project

6. Kronospan wood processing plant is a private investment project comprising two major installations for production of (a) particle board (chipboard) and (b) oriented strand board (OSB). In addition, the project includes various other elements, including demolishing works, construction of storage facilities, heat generation, electrical overhead transmission lines and electrical transmission station, etc (altogether formally comprising a "reconstruction" project). Due to this features the project simultaneously falls under several items of the national EIA list of obligatory activities (i.e, construction of wood processing installations, electrical overhead lines, etc.). Therefore, the project falls under para.20 of Annex I to the Aarhus Convention and, therefore, is subject to Article 6.

7. The project location is Horodok village, near Rivne city (an administrative center), Ukraine. The estimated needs in commercial roundwood supplies is estimated by the developer of 3,277 thsd. m^3 annually (1,392 thsd. m^3 for chipboard production and 1,885 thsd. m^3 for OSB production, EIA report, 2020). This equals approximately to 36% of the total commercial roundwood logging in Ukraine (Statistical Service of Ukraine, 2020).

3.2 Land use

3.2.1. The facts

8. The developer (Technopryvid Invest Group, later renamed into "Kronospan Rivne") started buying several adjacent to each other land plots to implement the project as early as in April 2019.

9. On April 26, June 03, June 25, July 15, 2019, the Head of the regional (oblast) administration of Rivne region signed a series of orders to sell land plots to the developer "upon the request by the [developer]"; by these decisions Rivne sub-regional (rayon) administration was under obligation to conclude land sale contracts with the developer (Annex II to this communication, page 1, recital 1 and para.1; other decisions have similar wording and structure).

10. On August 9, 2019, the Head of the sub-regional (oblast) administration of Rivne region signed a decision to develop, upon request by the developer, the detailed land plan (hereinafter "DLP") for reconstructing existing facilities "into a wood processing plant in territory of Horodok village" (para. 1, Annex III to this Communication).

11. Developing DLP is a time-consuming formalized procedure, which for the lands in question ended on July 20, 2020 with a decision No. 223 by sub-regional (rayon) head of administration approving the DLP. The DLP (366 pages document) covered six adjacent land plots owned/used by the developer (total area of 67 ha) and was titled "Detailed territorial plan for reconstruction of the industrial complex into a wood processing enterprise on the territory of the Horodok village council". The DLP explicitly refers to the all main elements and technology processes of the wood processing project, such as location of chipboard production facilities, OSB board production facilities etc.

3.2.2 The legislative framework

12. Land planning and construction activities are subject to a framework 2011 Law of Ukraine on Regulating Urban Development Activities (hereinafter "the Law No.3038"). This law regulates all land planning (from nation-level to very local level) and construction issues (including construction permitting).

13. Article 26 of the Law No.3038 clearly states the main stages of so called "land build-up" (**highlighting** by Communicant):

> "Article 26. Build-up of territories
>
> 1. Build-up of territories is carried out by placing construction objects.
> 2. Entities of urban planning are obliged to comply with urban conditions and restrictions during the design and construction of facilities.
> 3. The executive body of the village, settlement, city council shall take **measures to organize complex build-up of territories** in accordance with the requirements of this Law.
> 4. The right to build up **a land plot** is realized by its **owner or user** under the condition of using the land plot in accordance with the requirements of the town-planning documentation.
> 5. **Technical design and construction of facilities is carried out by owners or users of land plots** in the following order:
> 1) receipt of initial data by the developer or designer;
> 2) development of project documentation and examination in the cases provided for in Article 31 of this Law;
> 3) approval of project documentation;
> 4) performance of preparatory and construction works;
> 4-1) carrying out of control geodetic survey of the objects completed by construction (except for objects which on a class of consequences (responsibility) belong to objects with insignificant consequences (SS1)) and realization of their technical inventory (except for objects, the list which is determined by the central body of executive power, which ensures the formation and implementation of state policy in the field of construction, architecture, urban planning);
> 5) commissioning of completed facilities;
> 6) registration of ownership of the object of urban planning."

14. Under this scheme, two major stages can be identified:
   (a) Planning of land build-up by local authorities (para.3 of Article 26 above and related special provisions of the Law NO.3038);
   (b) Build-up of specific land plots by owners/users (paras.4-5 of the Article 26 above) (this is discussed in section 3.5 of this Communication).

15. Under land use procedures in question, the next step after buying the land is to develop a detailed land plan: a procedure implemented by local or regional authority. DLPs usually are developed on the basis of city master/complex plans, with a purpose of "determining the planning organization, spatial composition and parameters of building and landscape organization of the quarter, neighborhood, other part of the territory intended for integrated construction or reconstruction", and is subject to strategic environmental assessment (Article 19 of the Law No.3038).

16. The Law No.3038 (and related secondary legislation) has detailed provisions on organizing

public consultations on draft local land use plans (Art.21 of the Law No.3038). However, in practice (including the project in question) public participation is carried out in a combined way together with SEA related public participation. For this reason, public participation elements are discussed in section 3.3 of this Communication.

3.2.3 Analysis

17. In the project subject to this communication, the specific land planning was initiated by the developer, also being the owner of land plots (see Annex III, recital 1) and carried out by local authority (in the form of detailed land plan, the DLP) with a clear and explicit purpose to build a wood processing plant. For the wood processing plant project, the DLP, as approved, represents essentially a siting decision specifying location for each element of the future project: wood processing facilities, storage facilities, administrative buildings, approach roads, etc. From this perspective, DLPs to some extent fall under Article 6 of the Aarhus Convention. However, formally speaking detailed land plans and other types of land use planning (such as city master or complex plans) are subject to SEA procedure in Ukraine and clearly fall under Article 7 of the Aarhus Convention.

18. It is obvious that at the stage of land planning there was clear intention and investment made by the developer to build a wood processing plant in a specific location. This intention was explicitly supported by regional authority by selling additional land plots to developer and, later, starting the development of DLP for project construction before any public participation could take place under land planning, SEA, EIA or construction permitting procedures.

19. DLP was the last planning document approved in the course of project implementation (see Annex I), after the EIA and construction permitting were completed.

20. In summary, having a land plot in possession gives the right to build-up a land plot and is a pre-requisite for several future stages of any investment project involving construction in Ukraine, as well as entitles the owner/user to initiate land planning at respective level (DLPs). For this reason, to our knowledge, all private investment projects in Ukraine start with land plot acquisition, as in the case of the wood processing plant project in question. In practice, all other procedures, including SEA and EIA where public participation is provided, are initiated after the developer acquired the right to a land plot. From this perspective, future public participation procedures ensured under land use planning are meaningless since they take place after the all project details, including its design and location, are set by the preceding EIA and construction permits.

3.3 SEA for land use plan

3.3.1 The facts

21. In Ukraine, development of DLPs requires carrying out SEA under the Law of Ukraine on SEA. It is unknown when exactly the SEA procedure started, but SEA scoping notification was sent to other authorities by sub-regional (rayon) administration on March 06, 2020 (page 83 of the SEA report).

22. On April 13, 2020, the sub-regional (rayon) administration published SEA notice and made public (online and at its office) SEA report and draft DLP. This triggered a combined (land use and SEA) public consultations process. The public was invited to provide comments on draft DLP and the SEA report until May 13, 2020 (SEA notice, Annex IV).

23. As noted above, the DLP was approved on July 20, 2020, which also means the end of SEA procedure. The detailed land plan (DLP) as approved does not include any section on the environmental protection, or SEA report itself, or any reference to the SEA report.

3.3.2 The legislative framework

24. Strategic environmental assessment (SEA) framework is the main mechanism to ensure public participation in plans and programs development in Ukraine.

25. SEA legal framework in Ukraine is governed by a special 2018 Law of Ukraine on Strategic Environmental Assessment (hereinafter – the SEA Law).

26. In Ukraine, SEA must be carried out for a variety of plans, programs and strategies ("state planning documents") related to the environment. Two main categories of such state planning documents can be distinguished: land use/planning plans and other (sectoral or complex) plans, programs and strategies.

27. The SEA Law is based on the provisions of respective Directive 2001/41/EC, therefore includes such elements (stages) as scoping, preparation of environmental report, consultations, public participation, taking SEA outcomes into account, informing of final decision, monitoring and, where relevant, may include transboundary consultations.

28. The public participation during SEA is ensured for the "public", which is defined in subparagraph 1 of the paragraph 1 of the Article 1 of the SEA Law:

> "*public* means one or more physical or legal persons, their associations, organizations or groups **registered** on the territory covered by the implementation of the **strategic planning document**".

29. In this context of definition of the "public" under the SEA law two general explanations are relevant for the purpose of the Aarhus Convention and its Article 7: the issue of "registration" and notion of "strategic planning document".

30. The definition restricts the "public" only to persons/organizations *registered* on the territory covered by the state strategic planning document. From legal perspective it precludes any physical person (everyone must have a "registration" in Ukraine, i.e. legal place of living) or organization registered outside the geographical scope of application of a plan/program from public participation.

31. The term "*strategic planning document*" has no explanation or any further use in the SEA law at all. We do not allege, however, that this ambiguity (or legislative mistake) has practical implications for the implementation of the SEA law in Ukraine but it is likely to be of critical importance for judicial challenges should they take place in the future.

32. For this purpose of land use planning, the SEA law provides for some peculiarities (exemptions):

- the SEA report is prepared as a section of the land use plan as such (Article 11 (3) of the SEA law);
- public consultations in the process of SEA for land use planning is carried out on the basis of the relevant provisions of the Law No.3038 for public consultations on draft land use planning documents (Article 13 (10) of the SEA law).

33. As mentioned, the Law No.3038 (and related secondary legislation) has detailed provisions on organizing public consultations on draft local land use plans (Art.21 of the Law No.3038).

3.3.3 Analysis

34. For the case in question, public consultations were carried out simultaneously under the Law No.3038 and the SEA law, which is a common practice in Ukraine.

35. The SEA scoping notification (published on March 06, 2020), SEA report and draft DLP

(published on April 13, 2020) all were subject to public participation long after the EIA decision was taken (February 20, 2020) and preparatory construction works continued for several months.

36. On substance, the SEA report for DLP contains impact assessment of the wood processing plant operations, including detailed analysis and pictures of its specific installations, such as dust filters, UWTS system, etc. The non-technical summary (page 63 of the SEA report) is fully focused on wood processing plant key operations and related emissions, discharges and natural resources use: particle board (chipboard) and oriented strand board (OSB) production.

37. The DLP was approved (and SEA finalized as a consequence) on July 20, 2020, one month after the main construction permit was issued (June 16, 2020) and with no references to the SEA or related public participation outcomes.

38. In summary, the SEA in relation to local land use planning in Ukraine, in particular at the level of DLPs, does not necessarily precede construction permitting or EIA and, in essence, covers siting details for a specific proposed activity (in the present case – wood processing plant). Final detailed land plans have no formal relation to the SEA outcomes (SEA report in particular), including public participation results. This results in SEA, including public consultations, being a token procedure with no real impact on land use planning, carried out in parallel with or after EIA and construction permitting procedures.

3.4 EIA for wood processing plant

3.4.1 The facts

39. In parallel to the land use planning procedures, the developer started EIA procedure by filing and publishing an EIA project notice on August 18, 2019. The EIA was completed with EIA conclusions (decision) on February 20, 2020.

40. Public participation in EIA was carried out twice: at the scoping stage and at the EIA report stage.

41. On October 22, 2019, in the middle of EIA procedure, the Rivne regional administration concluded a memorandum of cooperation with the developer for the construction of wood processing plant.

42. Detailed timeline of the public participation procedure in and the EIA procedure itself for Kronospan wood processing project is represented in Annex V to this Communication.

43. EIA procedure, including its public participation stage, triggered a number of lawsuits, including by and against the communicant. Key information about those lawsuits is presented in Section VI of this Communication.

3.4.2 The legislative framework

44. Like most parties to the Convention, Ukraine relies on its environmental impact assessment (EIA) framework to ensure public participation in decision-making in relation to specific activities subject to Article 6 of the Convention.

45. Ukraine's EIA legal framework is based on a framework 2017 Law of Ukraine on Environmental Impact Assessment No.2059-VIII (hereinafter – The EIA Law). The law intends to replicate the approach envisaged by the respective EU Directive 2011/92, including robust public participation provisions.

46. EIA is a permitting procedure in Ukraine, requiring explicit EIA decision (so called EIA conclusions).

47. The central element of the EIA Law is the notion of "planned activity"(Art.3, para.1, sub-para.

3) of the EIA Law):

> "*planned activity* means planned economic activities, including construction, reconstruction, technical re-equipment, expansion, redevelopment, liquidation (demolishing) of facilities, other interference in the natural environment; planned activities do not include reconstruction, technical re-equipment, overhaul, expansion, redevelopment of facilities, other interventions in the natural environment that do not have a significant impact on the environment in accordance with the criteria approved by the Cabinet of Ministers of Ukraine".

48. This term (or legal concept) is not used in the land use, SEA or construction-related legal frameworks or any other law of Ukraine to our knowledge. This is one of the key reasons for further inconsistencies and contradictions in application of the land use and construction permitting procedures in practice.

49. The law does not provide for a case-by-case screening of proposed activities, instead covers a wide range of activities grouped into two lists (paragraphs (2) and (3) of the Article 3 of the EIA LAW), which together significantly over-scope respective annexes to the EIA Directive (the second list - with minimum or no thresholds). The first list of activities (Art.3 (2) of the EIA Law) includes activities covered by Annex I to the Convention.

50. The proposed wood processing plant in question falls under the second list under several types of activities simultaneously due its features (see para.6 of this Communication) and was subject to a single EIA procedure, which includes public participation requirements. For this reason, the proposed project falls under para.20 of Annex I to the Aarhus Convention and, therefore, under Article 6 (1) (a) of the Convention.

3.4.3 Analysis

51. The EIA procedure for the wood processing plant in question was initiated by the developer on August 16, 2019 and completed on February 20, 2020 by "EIA conclusions" (EIA decision) by regional administration.

52. There were numerous deficiencies in relation to public participation, which were subject to a respective lawsuit(-s), as described in Section VI below. However, in this communication we would like to focus on three issues:

(a) lack of any, even theoretical, possibility for geographical alternatives at the stage of public consultations;
(b) insufficient coordination between EIA procedures and other related procedures (land use, SEA and construction permitting);
(c) impartiality of regional public authority.

53. The EIA law has two direct provisions in relation to geographical alternatives:

- project notice (the first notification filed and published under the EIA procedure) must include information on siting ("territorial alternatives") of the proposed activity (sub-para.3) of para.2 of Article 5 of the EIA Law);
- EIA report must include "description of justified alternative, for example, geographical and / or technological nature" (sub-para 2) of para.2 of Article 6 of the EIA Law).

54. In practice, no geographical alternative is discussed in the EIA report "because planned activity will be implemented…on the territory of land plot formerly used by tractor building plant and now owned by [developer]" (page189 of the EIA report). This is true for a vast majority of EIAs in Ukraine.

55. In light of our arguments (see paragraphs 20 above and 78 below) on the legal and practical implications/importance of the land plot ownership/use, no proposed activity subject to EIA in Ukraine can have "justified" or any other realistic geographical alternatives, unless the developer buys several

land plots in different locations:

- to subcontract EIA report, the developer needs to have a technically sufficient detailed description of the "planned activity";
- "planned activity" concept is not used in any other, most importantly engineering, regulations or practices in Ukraine;
- the only formal process to subcontract such description is to subcontract a project documentation (technical design) for a "construction object" under the Law No.3038;
- the law does not allow contracting/developing project documentation without having a land plot in ownership/use;
- the developer is forced to first buy the land, then subcontract project documentation development and then (or in parallel) subcontract the EIA report.

56. As clearly seen from the timeline in Annex I to this Communication, the EIA procedure starts and ends (a) after the land plot for proposed activity was bought, (b) in parallel to land use planning, (c) before the SEA is carried out in the land use planning and (d) in the middle of various construction permits granted for "preparatory works", including demolishing. This clearly indicates insufficient legal coordination between EIA procedures and other related procedures (land use, SEA and construction permitting). The main practical outcomes is that public participation in relation to specific projects in Ukraine relies on EIA, while EIA legislative framework cannot ensure that EIA takes place before many substantive elements of the project are decided, in fact only after they are decided.

57. Lastly, in the present case the EIA decision was taken by the Department of Ecology and Natural Resources of Rivne Regional Administration (which is in line with the EIA Law). This Department is under full and direct subordination to, and its director appointed by, the Head of Regional Administration. In light of the fact the Head of Regional Administration was directly supporting the developer by ordering the sale of the land plot for the project and concluding the memorandum of cooperation, there is a clear conflict of interest: the administration works to attract foreign investments in hard economic and competitive environment in Ukraine, while at the same time is entitled to carry out EIA for the same project, including taking into account public comments.

58. In summary, there are systemic inconsistencies between Ukraine's EIA framework and other related legal frameworks applicable to a construction project (land use, SEA and construction permitting) encouraging for a proposed activity to be sited and allowing construction works to start well before the EIA is carried out and public participation takes place. At the regional level, public participation is provided by regional administrations which normally have a clear conflict of interest, in particular by acting as land authorities and selling land plots in advance for the planned activity.

3.5 Construction permits

3.5.1 Facts

59. Implementation of the wood processing plant project involved several preparatory construction works permits (para.59-60 below) and main construction permits (para.61-62 below).

60. On November 11, 2019, the developer filed a declaration (PB 061193110352) for preparatory construction works (on the territory of one of the land plots covered by DLP, which was being developed at that time) to build storage facilities at the site.

61. On February 14, 2020, the developer filed another declaration (PB 010200451268) for preparatory works on reconstruction of the industrial facilities complex into a "wood processing plant", which allowed the developer to demolish existing facilities.

62. On April 29, 2020, the developer was granted a construction works permit (IУ 112201201468)

to reconstruct high voltage transforming station on the territory of future plant.

63. On June 16, 2020, the developer was granted the main construction works permit (IV 113201681914) for reconstruction of the complex into a wood processing plant.

Legislative framework

64. The right to build-up a specific land plot by owner/user is granted by Article 26 of the Law No.3038 and may additionally require EIA and construction permits (as discussed further below).

65. The Law No.3038 establishes the legal requirements for any "construction object" to be constructed. The notion of "construction object" is the central element of regulating construction in Ukraine, including technical design requirements and procedures, design approval, permitting, carrying out construction works and commissioning.

66. The "construction object" is defined as "houses, buildings of any purpose and their complexes and parts, linear objects of engineering-transport infrastructure" (Article 4 of the Law No.3038). In practical terms, any industrial or residential construction is considered as "construction object", which is subject to obligatory technical design (so called "project documentation"), independent examination ("expertiza"), permitting.

67. Any construction starts with technical design (project documentation) development. It can only be developed by land plot owner/user (see para.5 of Article 26 of the Law No.3038 cited in para.12 of this Communication). In other words, there is no possibility to contract development of a technical description (design) of the planned activity (construction object for the purpose of construction legal framework) unless developer has land plot in ownership/use.

68. The Law No.3038 provides for several regimes depending on complexity of a construction object, in most cases on the basis of possible consequences (basically risk categories) (art.32 of the Law No.3038).

69. For industrial projects classified as SS2 or SS3 construction objects (out of three possible categories) or requiring EIA, the developer needs an explicit construction permit (the permit to carry out construction works, Article 37 of the Law No.3038). These would normally include most activities listed in Annex I to the Aarhus Convention, which require construction (except for oil and gas drillings).

70. "Construction" under Ukrainian regulations means four types of works (new construction, reconstruction, technical overhaul and technical re-equipment of construction objects) and requires explicit construction works permit. Preparatory works include demolishing, fencing, preparing access roads, building storage facilities, etc. and require silent consent permit (a self-declaration filed by developer).

71. The explicit construction permit cannot be issued without first completing the EIA procedure (Article 37 (3) (7) of the Law No.3038).

72. However, the Law No.3038 allows to carry out "preparatory construction works" on the basis of self-declaration (notification) by the developer, as already indicated above (Article 26 of the Law No.3038). Article 35 of the Law No.3038 provides for further details:

> "Article 35. Notification of start of preparatory construction works
>
> 1. After acquiring the right to land and in accordance with its intended purpose, the developer may perform preparatory work specified in building codes and regulations, with the notification of the state architectural and construction control. The Cabinet of Ministers of Ukraine shall determine the form of the notification on the commencement of preparatory works, the procedure for its submission, and the form of the notification on the change of data in the submitted notification.
>
> [...]"

73. Construction permitting procedures in Ukraine do not provide for public participation, relying

in this regard on EIA procedures.

Analysis

74. For the project in question, the developer actively used its right to start preparatory construction works long before applying for main (explicit) construction permits and before any related procedures, including DLP, SEA or EIA completed. The developer started the preparatory construction works as early as in November 2019 (including demolishing on February 14, 2020, explicitly for the purpose of building a wood processing plant). These took place before the DLP was approved (July 20, 2020), SEA completed (July 20, 2020) and even before EIA was completed (February 20, 2020).

75. The main construction permit (permit to carry out construction works) was issued to the developer on June 16, 2020, which allowed the main construction of the wood processing plant to proceed several weeks before the SEA was completed or DLP approved. The earlier main construction permit for high voltage station (also part of the project) was granted in the midst of SEA and related public consultations for the land use plan.

76. In summary, the construction of any planned activity covered by Annex I of the Aarhus Convention (including the project in question) requires an explicit construction permit, which can be issued upon completion of EIA and EIA-related public participation procedures. However, such permit can only be obtained on the basis of a project documentation (project technical design), which in turn requires ownership of the land plot. Current legal framework in the area of construction allows to start preparatory construction works, including demolishing, as soon as the developer acquires the land plot and before land planning, SEA or EIA are completed. Finally, main construction related permitting (explicit permitting for construction works) is carried out in parallel with land use planning for project site and SEA and is completed before land use planning and SEA procedures are finalized, including related public consultations.

IV. Provisions of the Convention with which non-compliance is alleged

77. We allege that the current legal frameworks on detailed land use planning, construction, EIA and SEA in Ukraine are inconsistent and contradictory, which leads to ineffective public participation in practice in relation to specific projects and land use plans. Therefore, as argued below, Ukraine failed to ensure public participation as required by the following provisions of the Aarhus Convention:

- Paragraphs 4, 6 (e) and 8 of the Article 6 and, in conjunction with this, paragraph 1 of Article 3;
- Sentences 1 and 2 of the Article 7 and, in conjunction with this, paragraph 1 of Article 3.

Paragraphs 4 and 6 (e) of the Article 6

78. Paragraphs 4 of the Article 6 requires that "each Party shall provide for early public participation, when all options are open and effective public participation can take place" (emphasis added). Paragraph 6 (e) of the Article 6 requires that the relevant information, to which public concerned must have access, must include "an outline of the main alternatives studied by the applicant".

79. As argued in paragraphs 20 and 75 of this Communication, current legal framework and practice in relation land use planning and construction encourages and, to some extent, requires the developer to first buy the land plot in order to initiate land use planning, EIA, SEA and construction procedures for a proposed activity subject to Artice 6 of the Convention. First, this establishes a practice

that excludes any possibility for geographical alternatives to be discussed in the future public participation procedures under EIA, SEA and land use planning. Second, similarly to the findings of the Compliance Committee in *Lithuania ACCC/2006/16* (para.74) and *European Community ACCC/C/2006/17* cases, once a land plot for the installation has been purchased, political and commercial pressures effectively foreclose certain options, including zero alternative, during public consultations under land use planning, EIA and SEA in the future, making public participation ineffective and token.

80. We conclude therefore such legal framework and practice is not line with the requirement to ensure public participation "early" and "when all options are open", excludes, in practical terms, a possibility to provide the public concerned with locational alternatives of a proposed activity, which are part of the "main alternatives" in the meaning of paragraph 6 (e) of the Article of the Convention.

Sentences 1 and 2 of the Article 7 of the Convention

81. Article 7 requires that public is able to participate in preparation of plans "within a transparent and fair framework", and requirements pf several provisions of Article 6 must be met, including "when all options are open" (para.4 of Article 6) and "due account" to be taken of outcomes (para.8 of Article 6).

82. As summarized in paragraphs 20 and 38 of this Communication, Ukraine's legal framework on SEA and detailed land use planning essentially represents a siting decision-making for a specific activity, are carried out and ensure public participation only after EIA decision and main construction permits are granted for a proposed activity. Having public consultations on a draft detailed land plan and related SEA report within a decision-making procedure which ends after the location and main characteristics of the project have been already set by preceding EIA conclusions and construction permits is meaningless and, therefore, cannot ensure public participation "when all options are open" and no "due account" can be taken of the outcome of public participation, as required paragraphs 4 and 8 of the Article 6. In light of this, current public participation procedures under land use and SEA procedures do not represent a "fair" and "transparent" framework and are not line with the provisions of sentences 1 and 2 of the Article 7 of the Convention.

Paragraphs 4 and 8 of the Article 6

83. As argued in paragraph 75 of this Communication, Ukraine's legal framework and practice in relation to construction activities allows preparatory, including demolishing, construction works for a proposed activity subject to Article 6 of the Convention to start before public participation take place under SEA or EIA procedures and in the absence of any other public participation procedures available under construction permitting framework.

84. Providing public participation only after the start of preparatory, including demolishing, construction works for a proposed activity, subject to Article 6 of the Convention, cannot ensure the public can participate "when all options are open" and no "due account" can be taken of such public participation, which is contrary to the provisions of the paragraphs 4 and 8 of Article 6 of the Convention.

Paragraphs 4 and 8 of the Article 6

85. As argued in paragraph 57 of this Communication, Ukraine's EIA legal framework features systemic inconsistencies with legal frameworks in other related areas (land use, SEA and construction permitting) while it is the only legal framework in Ukraine meant to ensure public participation in

project-related decision-making subject to Article 6 of the Convention. In particular it encourages and allows a proposed activity to be sited and some construction works to start well before the EIA is carried out and related public participation procedures take place.

86. Ukraine's EIA legal framework, in the absence of other project-related public participation procedures in place, which provides for public participation in decision-making in relation proposed activities subject to Article 6 after the main decisions on siting are effectively taken and some construction works started, is far from ensuring that the public can participate "when all options are open" and no "due account" can be taken of the outcomes of public participation in such circumstances. This results in violation of the requirements of paragraphs 4 and 8 of the Article 6 of the Convention.

Paragraph 1 of Article 3

87. By establishing and maintaining contradictory and not mutually coordinated legal frameworks for public participation under land use planning, SEA, EIA and construction permitting, as supported by the allegations in paras.77-85 above, Ukraine failed to establish a "clear" and "consistent" framework and, therefore, is not in compliance with paragraph 1 of the Article 3 of the Convention.

V. Nature of alleged non-compliance

88. This communication relates to a general failure of the Party concerned to implement provisions of the Aarhus Convention, as referred to in Section IV above.

VI. Use of domestic remedies

89. The systemic (in-)consistencies between EIA, SEA, land use and construction legislative provisions are not *per se* subject to a court review in Ukraine, neither is their systemic (in-)consistency with the Aarhus Convention provisions. Therefore, the communicant has no possibility to use domestic remedies to address allegations of general non-compliance with the provisions of the Aarhus Convention.

90. The Kronospan wood processing plant project triggered a number of court proceedings, briefly described below:

- Defamation (libel) lawsuit by the developer against the communicant;
- Judicial challenge of EIA conclusions by the communicant;
- Other related lawsuits by local residents.

91. The defamation lawsuit (case 918/132/20) was brought by the developer against the communicant for reputation damages resulting from public comments by the communicant on the proposed activity. First instance court supported the plaintiff (developer) in its decision of September 28, 2020, ordered refutation of information and related court fees to be paid by the respondent. The respondent (the communicant) appealed that decision, but the appeal court upheld the initial decision on January 20, 2021. The communicant filed second appeal to the Supreme Court of Ukraine, in particular relying on the Aarhus Convention provisions. The Supreme Court of Ukraine issued a new (final) decision in support of the communicant on May 26, 2021.

92. On December 4, 2020, the communicant filed a lawsuit against the Department of Ecology and Natural Resources of Rivne Administration challenging the EIA decision for the wood processing plant (case 460/8998/20). However, first and second instances courts refused to start the proceedings based on laches term (undue delay). The Supreme Court of Ukraine issued its decision on August 26, 2021,

requesting the first instance court to start the proceedings. The case is still pending, therefore, with no hearings on substance held yet.

93. Local residents and organizations also filed lawsuits in relation to the project in question challenging EIA conclusions on various grounds, in particular public participation, including cases 460/6239/20, 460/60670/20. In particular, case 460/6239/20 was filed by a physical person (local resident) and at this stage is in the Supreme Court of Ukraine under second appeal proceedings (the plaintiff lost the case in both first and appeal instances, which means the latter came into force already).

VII. Use of other international procedures

94. No international procedures besides the Aarhus Convention Compliance Committee have been invoked to address the issue of non-compliance which is the subject of the communication.

VIII. Confidentiality

95. We do not request confidentiality under this communication.

IX. Supporting documentation (copies, not originals)

96. We can translate, if necessary and requested by the Committee, additional relevant parts of the annexes II, III and IV, which are provided in Ukrainian, or relevant national legislation. The other two annexes (I and V) are provided in English in full. Should the Committee require any other document (such as SEA report or DLP) referred to in this Communication, the communicant will be ready to provide a copy with translation of relevant parts. However, some of these documents are large (several hundred pages).

97. List of annexes to this Communication:

Annex I. Timeline of wood processing plant related land use, SEA, EIA and construction permitting procedures.

Annex II. Decisions to sell land plot to the developer.

Annex III. Decision to develop Detailed Land Plan.

Annex IV. SEA public notice.

Annex V. Timeline of public participation in EIA procedure for the wood processing plant.

X. Signature

98. Duly signed by:

Andriy Martynyuk
Executive Director

December 24, 2021