

**Comments to draft recommendations with regard to
request for advice ACCC/A/2022/3 by Ukraine**

Point of the draft recommendations	Comments
<p>37. First, a request for access to information relevant to the decision-making under article 6 (6) of the Convention can be made by any member of the “public concerned”. Article 2 (5) of the Convention defines the “public concerned” as “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.” NGOs promoting environmental protection and meeting any requirements under national law are therefore entitled to request access to the information relevant to the decision-making in accordance with article 6 (6). The Committee points out, however, that the details presently required to be provided in the Ministry’s request and consent forms all concern the identity details of natural persons only. The Committee therefore recommends that suitable provision be made in the forms to enable requests for EIA documentation to be submitted by environmental NGOs and other legal persons also.</p>	<p>Article 1 of the Law of Ukraine "On environmental impact assessment" provides the term "society - one or more natural or legal persons, their association, organization or group". Consequently, there is no limitation of "interested public" in the national legislation, it can be natural persons, legal entities, and NGOs.</p> <p>Therefore, there are no restrictions on requests for documentation from the EIA, and the practice of using the forms during the period of their introduction has shown that public organizations and legal entities effectively implement the right to access information from the EIA, and if is necessary, we can provide examples.</p>
<p>39. Third, the form for requesting access to EIA documentation presently requires requesters to provide their IP address. However, requiring requesters to specify an IP address may operate as a barrier to members of the “public concerned” exercising their right to access the EIA documentation. First, many members of the “public concerned” may not be aware of what an IP address is nor how they find it. Second, requests for information can be submitted on paper, not only electronically, and the Committee cannot see how an IP address is of any relevance to requests for information submitted, and responded to, in paper form. In any event, even for information requests submitted electronically, since a Virtual Private Network (VPN) can be used to provide an artificial IP address, any utility of requiring members of the public concerned to provide their IP address would seem to be uncertain. Given that the Committee has not been provided with any specific justification, whether relating to “national defence” or “public security” under article 4 (4) (b) or</p>	<p>We consider it is inappropriate to remove the requirement to provide an IP address, because the work is currently underway to improve the functionality of the OVD Register, which will allow users with a permanent IP address (unchanged) to create a user account and familiarize themselves with OVD documentation without a request. Currently, in view of the security situation, the provision of documentation upon request from the aggressor country of the Russian Federation is not and will not be provided, specifying the IP address is a tool for identifying the location of a person.</p>

<p>under any other grounds, for requesting members of the public concerned to provide their IP address, the Committee recommends that the requirement to provide an IP address is removed from the request form.</p>	
<p>40. To conclude, in the light of the foregoing and on the basis of the information before it, the Committee recommends that, if the two prescribed forms for requesting access to EIA documentation during the war are to continue to be used, those forms are revised to address the matters set out in paragraphs 0 to 0 above.</p>	<p>We accept the corrections to the consent form for the processing of personal data in terms of replacing the passport data requirement with identity documents. Regarding points 37-39, the argumentation is given above, please take it into account.</p>
<p>49. Based on the information before the Committee, the time-frame for obtaining access to the EIA documentation upon request is at least five working days (see para. Error! Reference source not found. above). This means that, for members of the public concerned unable to access the EIA documentation in person, the effective time-frame to prepare their comments in pending EIA procedures will be approximately 20 working days while those who can access the documentation in person will have 25 working days. Recalling the requirement in article 3 (9) of the Convention that the public shall have, among other things, “the possibility to participate in decision-making” without discrimination as to “domicile”, the Committee recommends that the Party concerned endeavour to respond to requests for the documentation related to pending EIA procedures as soon as possible, so that members of the public concerned who are not able to view the EIA documentation in person are not at a disadvantage regarding the time they have to review and comment on the documentation compared to members of the public concerned who can access that documentation in person.</p>	<p>The Aarhus Convention does not define the specifics of ensuring public access to environmental information, public participation in the process of making environmentally responsible decisions during martial law or active hostilities. Therefore, we believe that Ukraine has made maximum efforts to provide full-fledged and non-discriminatory tools for the realization of the rights provided by the Convention. It is worth noting that the national procedure for assessing the impact on the environment provides for two public discussions, the first - at the stage of determining the scope of research which to be included in the report (which lasts 20 working days), and the second - during the discussion of the report of the EIA (25 working days) , which is sufficient for reading the documentation.</p>
<p>51. Pursuant to article 7 (6) of the Law “On Environmental Impact Assessment”, as in force prior to the war, the public had a minimum of 25 and a maximum of 35 business days to submit comments on the EIA report starting from the date the relevant documents were uploaded to the EIA register.¹ Bearing in mind the additional challenges and constraints the public concerned may face in seeking to participate in decision-making on proposed</p>	<p>We do not agree because: the national environmental impact assessment procedure provides for two public discussions, the first - at the stage of determining the scope of research, which to be included in the report (which lasts 20 working days), and the second - during the discussion of the report of the EIA (25 working days). Thus, the public, which is really interested in specific documentation of EIA, has enough time and opportunities to</p>

¹ Comments by observer Environment-People-Law, 22 July 2022, para. 11.

<p>activities in the midst of an ongoing war, the Committee recommends that, rather than applying a fixed time-frame of 25 working days in all pending EIA procedures, the Party concerned apply the maximum and minimum time-frames set out in article 7 (6) of its Law “On Environmental Impact Assessment” during the war also.</p> <p>52. Based on the foregoing, the Committee recommends that, for larger or more complex activities² or in cases where the opportunities for the public to prepare and to participate effectively will be affected by the time it will take to receive the EIA documentation upon request or will otherwise be negatively impacted by the ongoing war, the public has up to 35 working days to review the relevant documentation and to prepare its comments.</p>	<p>exercise their rights provided for by the Convention. In addition, the Convention does not define specific deadlines which is necessary for public participation. However, 25 working days is about 35-36 calendar days, according to the Law of Ukraine "On Access to Public Information", the response to the information request is provided no later than five working days from the date of receipt of the request, and public has about a month to review the Environmental Impact Assessment Report, which fully complies with the requirements of the Convention, upon request.</p>
<p>60. Based on the foregoing, the Committee concludes that, in the exceptional situation of an ongoing war, the Party concerned may, for reasons of national defence or public security under article 4 (4) (b) of the Convention, redact information that would enable the identification of the precise location of a proposed activity within the scope of article 6 of the Convention. However, given the Convention’s requirement that any exemptions from disclosure in article 4 (4) be interpreted in a restrictive way, the Committee recommends that, to the extent that it may be possible and appropriate, the general location of the activity, albeit not its precise location, be indicated.</p>	<p>The general location of the planned activity is indicated in the EIA documentation, but without specific addresses. We believe that specifying the exact location of critical infrastructure facilities, key industries, may cause unjustified security risks for the operation of such facilities.</p>
<p>67. In this regard, the Committee recommends that a consistent approach be adopted for the disclosure of documentation concerning both pending and concluded EIA procedures.</p>	<p>The register of EIA contains documentation from 2017. That is, the activity according to the completed EIA procedures is not planned anymore, but economic, that is, it is already possible to implement such objects and put them into operation. Thus, the approach chosen by Ukraine is consistent: closed information on objects that are functioning and for which EIA procedures have been completed, and open cases on planned activities, that is, which are not implemented and public participation can influence decision-making on such planned activities.</p> <p>This approach corresponds to Part 4 of Article 6 of the Convention "Each Party ensures public participation already at an early stage, when there are all opportunities to consider different</p>

² See the Committee’s findings on communication ACCC/C/2005/16 (Lithuania), para. 69.

	<p>options and when public participation can be most effective."</p> <p>At the same time, the dissemination of information about operational objects of critical infrastructure and key industries can be used against the national interest and security of Ukraine.</p> <p>At the same time, environmental information on such objects can be obtained in accordance with the Law of Ukraine "on access to public information"</p>
<p>77. The Committee makes it clear, however, that “restoration works to eliminate the consequences of armed aggression and hostilities” that are proposed activities within the scope of Annex I of the Convention, do not automatically qualify as serving “national defence purposes” under article 6 (1) (c) of the Convention. Rather, it is only those proposed activities that are urgently needed to support the war effort or to ensure public health and well-being during the war that will qualify. All other restoration works within the scope of Annex I of the Convention must still undergo public participation meeting the requirements of article 6 prior to being permitted. The Committee accordingly recommends that, for the duration of the war, the Party concerned establish a mechanism in its legal framework through which to determine (a) which proposed activities within the scope of Annex I of the Convention are urgently needed to support the war effort or to ensure public health and well-being; and (b) whether the carrying out of a public participation procedure meeting the requirements of article 6 with respect to those activities would, in fact, have an adverse effect on achieving that purpose.</p> <p>79. Based on the foregoing, the Committee concludes that it would not be consistent with the Convention if proposed activities within the scope of Annex I of the Convention were, either during the ongoing war or once it is over, to be exempted from the requirement to undergo public participation meeting the requirements of article 6 simply by virtue of their being “restoration works to eliminate the consequences of armed aggression and hostilities”. The Committee recommends that, while the war remains ongoing, the Party concerned puts in place a mechanism to determine: (a) which proposed reconstruction (or other) activities within the scope of Annex I</p>	<p>The Convention does not define a list of activities that may be necessary to support the military effort, and does not establish criteria for their determination. The determination of additional mechanisms will be subjective and lead to ambiguous enforcement.</p> <p>At the same time, since 2017, Ukraine has adopted the approach outlined in the Resolution of the Cabinet of Ministers of Ukraine dated December 13, 2017 No. 1010 "On approval of criteria for determining planned activities that are not subject to environmental impact assessment, and criteria for determining expansions and changes in activities and environment objects that are not subject to environmental impact assessment", which clearly defines the criteria under which the restoration of damaged and destroyed objects will not be subject to the EIA procedure for the period of the legal regime of martial law:</p> <ol style="list-style-type: none"> 1) construction of overhead power lines with a voltage of 220 kV or more and substations with a voltage of 330 kV or more during the period of martial law; 2) restoration with the aim of achieving operational condition of objects damaged or destroyed as a result of the military aggression of the Russian Federation against Ukraine and hostilities (from the beginning and during the period of the legal regime of martial law) intended for the life of the population (objects that provide: gas supply; supply of electric energy; transportation and supply of thermal energy; centralized water supply; centralized drainage), by means of their current or major repair, reconstruction (without increasing the class of the consequences of the responsibility of the object and within the boundaries of previously allocated land plots, without changing the geometric dimensions of the object object); 3) restoration of objects provided for in

<p>of the Convention are urgently needed to support the war effort or to ensure public health and well-being while the hostilities remain ongoing; and (b) whether the carrying out of a public participation procedure meeting the requirements of article 6 with respect to those activities would, in fact, have an adverse effect on achieving that purpose. Finally, the Committee makes it clear that, when the war is over, the ordinary, narrow meaning of “serving national defence purposes” (see para. Error! Reference source not found. above) will once again apply.</p>	<p>paragraphs three to seven of clause 7 of part two of article 3 of the Law of Ukraine "On environmental impact assessment" and other railway tracks and structures damaged or destroyed as a result of the military aggression of the Russian Federation against Ukraine from the beginning and during the legal regime of martial law, by carrying out work on the new construction of destroyed and reconstruction, capital repair of damaged objects and structures without increasing the class of consequences (liability) of construction objects.</p> <p>All other objects are subject to the EIA procedure, so we cannot agree with the specified recommendations.</p>
<p>84. Having reviewed the text of the “Environmental Security” (<i>Екологічна безпека</i>) chapter of the draft Recovery Plan of Ukraine³ in the light of the criteria set out in paragraph 127 of its findings on communication ACCC/C/2014/105 (Hungary), the Committee considers that the content of the chapter appears to have the character of a plan or programme relating to the environment (see criterion (d) in para. 127 cited above). The Committee has not, however, been provided with any information that would enable it to ascertain the legal nature of either the draft Recovery Plan of Ukraine (criteria (a) and (b)) nor of the National Council for the Restoration of Ukraine (criterion (c)). In the absence of this information, the Committee is not in a position to determine whether the “Environmental Security” chapter of the draft Recovery Plan of Ukraine is a plan or programme relating to the environment within the scope of article 7 of the Convention.</p> <p>85. In the light of the considerations in paragraph 84 above, the Committee is not in a position to conclude upon whether the “Environmental Security” chapter of the draft Recovery Plan of Ukraine is a plan or programme relating to the environment under article 7 and thus whether that chapter was required to undergo public participation meeting the requirements of article 7 during its preparation.</p>	<p>When the "Environmental Security" section was being formed for the Recovery Plan of Ukraine, The Ministry of Environment Protection and Natural Resources of Ukraine initiated the creation of working groups, which included representatives of the public. Therefore, there can be no violations of Article 7 of the Convention. The public will also be involved at all stages of the implementation of the strategies specified in the Plan.</p>