



**ENVIRONMENT
PEOPLE LAW**

The rule of law for the protection of the environment

ACCESS TO INFORMATION FOR THE NEEDS of public PARTICIPATION in THE EIA PROCEDURE UNDER MARTIAL LAW

Policy note



Access to information for the needs of public participation in the EIA procedure under martial law

Policy note with proposals for the central authorized body

RESUME

The introduction of martial law in Ukraine in connection with the armed aggression of the Russian Federation caused a number of restrictions on certain human and citizens' constitutional rights and freedoms. But how justified are the restrictions that the Ministry of Environment and Natural Resources of Ukraine has introduced in the environmental impact assessment procedure, and is there room for improvement in this area so that, on the one hand, the security situation in the state is properly taken into account, and on the other - guarantee the public their rights to participate in the environmental impact assessment procedure. The document contains conclusions on this issue and specific proposals to the central authorized body.

INTRODUCTION

On March 22, 2022, referring to the resolutions of the Cabinet of Ministers of Ukraine dated March 18, 2022 No. 314 "Some issues of ensuring implementation of economic activity under martial law" and dated March 12, 2022 No. 263 "Some issues of ensuring the functioning of information and communication systems, electronic communication systems, public electronic registers under martial law"¹, in order to ensure safety of the data contained in the Unified Environmental Impact Assessment Register (hereinafter - the Register) and to prevent any unauthorized actions with the Register's information by the aggressor country, the Ministry of Environment and Natural Resources of Ukraine (hereinafter - the Ministry of Environment) issued order No. 159 "On temporary restriction of access to the Environmental Impact Assessment Register".

Less than a month later, the Ministry of Environment realized the need to restore the Register, because it is impossible to carry out an environmental impact assessment procedure (hereinafter referred to as EIA) without the Register. The Ministry of Environment canceled the previous order and issued a new one - "On temporary restriction of access to the Unified Register of Environmental Impact Assessment" No. 177 dated 20.04.2022 on temporary restriction of external use of the Register. Access to the Register was restored for the authorized central and territorial bodies, as well as for business entities undergoing the EIA procedure, upon their application. Such a decision was fully justified, because despite the continuation of hostilities in the East and Southeast of the country, economic activity in Ukraine took place, industrial and infrastructure facilities were planned, expanded, repurposed, many enterprises moved to safer regions and thus there was a need to regulate the adverse environmental impact of such activity.

As early as June 15, 2022, realizing the impossibility of carrying out EIA without public participation, due to, in particular, the validity of the provisions of the Law of Ukraine "On Environmental Impact Assessment" in terms of public access to information and participation in the procedure, the Ministry of Environment by a new order² reopened the Register for external use, but with severe restrictions on public access. In particular, according to the order, the following information was kept closed for external use:

- 1) all EIA cases on which as of February 24, 2022, EIA conclusions were received;
- 2) EIA documentation submitted by the business entity, including EIA report;
- 3) Google maps, which in each EIA case show the approximate location of the planned activity.

According to the official notification³ by the Ministry of Environment, the public was promised the possibility to monitor the progress of EIA procedures in the Register, and to provide EIA documentation upon request after identification of the persons requesting it.

¹<https://www.kmu.gov.ua/npas/deyaki-pitannya-zabezpechennya-funcjonuvannya-informacijno-komunikacijnih-sistem-elektronnih-komunikacijnih-sistem-publicnih-elektronnih-reyestriv-v-umovah-voyennogo-stanu-263>

²Order of the Ministry of Environment and Natural Resources of Ukraine "On Partial Opening of Access to the Unified Register of Environmental Impact Assessment" dated June 15, 2022 No. 225, [https://mepr.gov.ua/files/Order%20225%20\(opening%20Register\)%20\(2\).pdf](https://mepr.gov.ua/files/Order%20225%20(opening%20Register)%20(2).pdf)

³ The Ministry of Environment has resumed the work of EIA Register but with certain restrictions <https://mepr.gov.ua/news/39302.html?fbclid=IwAR1wX1Mq75sellL7BSqgbwEpBAAtQhr4Z1ElhFA39zNGTaICKI7Fke7laou0>

We have analyzed in detail the provisions of the current legislation of Ukraine on the legal regime of martial law and related restrictions on human and citizen rights, the latest order of the Ministry of Environment on the work of the Register, reference information distributed by the Ministry of Environment on its website, as well as the practice of public access to EIA documentation in conditions of martial law. Based on this analysis, we offer the Ministry of the Environment a number of recommendations aimed at ensuring compliance with the minimum standards of public participation in conditions of martial law in accordance with the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (hereinafter – the Aarhus Convention) and the EU-Ukraine Association Agreement, particularly the Directive 2011/92/EC on the assessment of the effect of certain public and private projects on the environment (hereinafter – the EIA Directive).

1. Constitutional background: what public rights in the area of EIA can be limited during the period of martial law

The Constitution of Ukraine guarantees⁴, that constitutional rights and freedoms of a person and a citizen cannot be limited, except in cases provided for by the Constitution of Ukraine. One of these cases is the introduction of martial law in the state, during which certain restrictions can be established with an indication of their validity period.

Such restrictions may refer, in particular, to the rights provided for in Articles 34 and 50 of the Constitution of Ukraine, namely the right to freely collect, store, use and disseminate information and the right to freely access and disseminate information on the state of the environment. Article 34 of the Constitution of Ukraine provides that even in peacetime the rights guaranteed by it may be limited by law in the interests of national security or territorial integrity. Instead, the rights provided for in Article 40 of the Constitution of Ukraine, namely the right to send an appeal to the state authorities, which are obliged to consider the appeal and give a grounded answer within the period established by law, are absolute and cannot be limited even in the conditions of martial law.

Issues of access to information, including environmental information, and participation in the EIA procedure are regulated by the Law of Ukraine "On Access to Public Information" and the Law of Ukraine "On Environmental Impact Assessment". It is important to note that as of September 2022, these laws have not undergone any changes in the aspects we analyzed and all their provisions remain in force.

The Law of Ukraine "On the Legal Regime of Martial Law"⁵ in Article 8 lists the measures of martial law and it is this article that lays the legal basis for limiting constitutional rights and freedoms during wartime. Thus, Article 8, in particular, allows the introduction of compulsory labor for able-bodied persons, the forced alienation of private property, the establishment of a special entry and exit regime, restrictions on the freedom of movement of citizens, and much more. However, none of the martial law measures address additional restrictions on access to open public information or public participation in the process of making administrative decisions. Clause 11 of Part 1 of Article 8 allows to regulate at the level of the Cabinet of Ministers of Ukraine the transfer of information through computer networks, and Clause 22 - to take additional measures to strengthen the protection of state secrets.

By its Resolution No. 263 of March 12, 2022⁶, the Cabinet of Ministers of Ukraine allowed the ministries, other central and local bodies of executive power to stop and limit the operation of information, information and communication and electronic communication systems, as well as public electronic registers during the period of martial law in order to protect state information resources. All the orders of the Ministry of Environment, which relate to the functioning of EIA Register under martial law, were adopted in order to implement the mentioned government resolution.

⁴ Article 64 <https://zakon.rada.gov.ua/laws/show/254k/96-bp#Text>

⁵ <https://zakon.rada.gov.ua/laws/show/389-19#Text>

⁶ Some issues of ensuring the functioning of information and communication systems, electronic communication systems, public electronic registers in the conditions of martial law, <https://www.kmu.gov.ua/npas/deyaki-pitannya-zabezpechennya-funcjonuvannya-informacijno-komunikacijnih-sistem-elektronnih-komunikacijnih-sistem-publicnih-elektronnih-reyestriv-v-umovah-voyennogo-stanu-263>

It is important to emphasize that during the martial law the Law of Ukraine "On State Secrets"⁷ has not undergone changes regarding information that may or may not be classified as a state secret (information on the state of the environment, as well as other information, access to which in accordance with laws and international treaties, the binding nature of which is confirmed by the Verkhovna Rada of Ukraine, may not be limited - and in the future, according to the law, it cannot be classified as a state secret). A collection of information constituting a state secret⁸, although it was partially revised,⁹ still does not contain information that can be included in the EIA report or any other documents or data that are created in the course of EIA procedure.

Thus, based on the provisions of the Constitution of Ukraine and the current Law of Ukraine "On the Legal Regime of Martial Law", when speaking about access to information and public participation in the EIA procedure public authorities can legitimately limit exclusively the operation of information, communication and electronic systems, as well as public electronic registers. Thus, the restriction of EIA Register functioning is legal. At the same time, the regime of access to public information, including environmental information, the procedure of accessing (upon request, through personal access) the information that is important in the decision-making process and the procedure of public participation in EIA procedure, except for aspects of EIA register functioning, remain unchanged and regulated by the laws of Ukraine "On Access to Public Information", "On Information", "On Environmental Impact Assessment" and relevant by-laws.

⁷ <https://zakon.rada.gov.ua/laws/show/3855-12#Text>

⁸ <https://zakon.rada.gov.ua/laws/show/z0052-21#Text>

⁹ <https://zakon.rada.gov.ua/laws/show/z0529-22#n2>

2. Analysis of decisions of the Ministry of Environment and practices in the field of access to information for the needs of public participation in EIA procedure under martial law

ICO "Environment-People-Law" certainly welcomes resumed functioning of EIA Register, including partial public access to the EIA Register, resumed at the end of June 2022. At the same time, in our opinion, by limiting access to information in the area of EIA, the Ministry of Environment significantly went beyond the legitimate measures of martial law regulated by the relevant legislation. The introduced restrictions apply not only to the Register functioning, but also to the mode of access to information in general. For example, the Ministry of Environment has completely restricted public access to EIA documentation in cases where EIA conclusions were issued before the start of a full-scale invasion. The failure of the Ministry of Environment to provide EIA documentation upon a request for access to public information guaranteed by the laws of Ukraine "On Access to Public Information" and "On Environmental Impact Assessment" raises serious concern.

In addition, the new regime introduced by the Ministry of Environment for providing access to EIA documentation for the needs of participation in the procedure under martial law significantly limits the rights and opportunities of the public, and in our opinion, is in no way based on the requirements of martial law and violates a number of international obligations and provisions of national legislation. In our opinion, the model of access to information proposed by the Ministry of Environment in the current EIA procedures is not optimal and can be significantly improved in order to take into account the security situation in the state, on the one hand, and, on the other hand, to guarantee the rights of the public in the procedure at the level of the Law of Ukraine "On Environmental Impact Assessment" and the state's international obligations under the Aarhus Convention and the EU-Ukraine Association Agreement.

2.1. Limiting access to the materials of EIA cases on which EIA conclusions were released before 24.02.2022, is a step beyond the legitimate measures under martial law

On July 21, 2022, at the request of "Ukrainian Nature Conservation Group" NGO to provide EIA documentation on the case on which EIA conclusion was released on April 12, 2021, the Ministry of Environment reported that access to such a case is closed. In our opinion, such an answer is illegal.

As explained in section 1 of this document, according to the provisions of the Law of Ukraine "On the Legal Regime of Martial Law", public authorities can temporarily, during the period of martial law, limit the operation of information and electronic communication systems, as well as public electronic registers,. The Ministry took advantage of this right and by order No. 225 dated 15.06.2022, closed for external use of the Register regarding all EIA cases, on which EIA conclusions had already been received as of 24.02.2022, leaving in the Register only current EIA cases and even those in a limited form.

However, limiting the operation of the public register is not the same as limiting access to the document. A public registry is only one way to ensure access to public information. Another way is to submit a request for access to public information. Since neither the Law "On the Legal Regime of Martial Law" nor any other law changed the regime of access to EIA documents, they did not acquire the status of state or any other secret protected by law, the

status of official or confidential information and according to the current laws "On Access to Public Information" and "On Environmental Impact Assessment" such documents must be released upon request without any restrictions.

Proposal: to ensure the release of documents upon request in EIA cases regarding which EIA conclusions were issued before February 24, 2022.

2.2. Limitation of access to information about the place of planned activity in EIA documentation, which is provided for review as part of the public discussion in the EIA procedure

As explained in section 1 of this document, according to the provisions of the Law of Ukraine "On the Legal Regime of Martial Law", state authorities may temporarily limit the operation of information, communicational and electronic systems, as well as public electronic registers, during the period of martial law. By its order No. 225 dated 15.06.2022, the Ministry left closed Google maps, which in each EIA case show the approximate location of the planned activity. At the same time, such a restriction, which was supposed to be applied exclusively to the EIA Register, is in practice illegally extended by the authorized bodies in the area of EIA to other ways of ensuring access to information - providing information upon request under the law "On Access to Public Information", providing access to documents in order to get familiar with them in the premises of the authorized body in compliance with the law "On Environmental Impact Assessment".

Referring to the order No. 225 dated 15.06.2022, the authorized bodies remove from EIA reports any reference to location of the planned activity (addresses, names of settlements, names of neighboring settlements, geographic coordinates, survey maps, situational plans, aerial photographs, location on the public cadastral map, general plans for the location of pollutant emission sources, etc.).

At the same time, neither the Law "On the Legal Regime of Martial Law" nor any other law changed the regime of access to EIA documents, including information about the location of planned activities, it did not acquire the status of a state or any other secret protected by law, the status of official or confidential information. The only legitimate restriction on such information is the prohibition of its display in the EIA Register in the format of Google maps, which in each EIA case show the approximate location of the planned activity. In accordance with the current laws of Ukraine "On Access to Public Information" and "On Environmental Impact Assessment", such information must be provided upon request or upon request for review in the premises of the authorized body without any restrictions.

Moreover, because the public lack such information during EIA procedure, their participation in the procedure becomes impossible because it is impossible to assess the impact on the environment of the planned activity. The essence of EIA procedure is to assess the impact of specific planned activities on the relevant specific environment, in direct reference to local environmental conditions and restrictions.

Proposal: within EIA procedure provide the public with full access to EIA materials, including EIA reports, information on the location of the planned activity received upon request or on demand for viewing in the premises of the authorized body.

2.3. The lack of legal certainty regarding the newly introduced mechanism for obtaining documents within EIA procedure at the request of the public

2.3.1. *The scope of the innovation is unclear*

According to the order of the Ministry of Environment and Natural Resources of Ukraine "On Partial Opening of Access to the Unified Register of Environmental Impact Assessment" dated June 15, 2022 No. 225, in particular, EIA documentation submitted by a business entity including EIA report remained closed for external use.

The news published by the Ministry of Environment on June 28, 2022 about access to EIA documentation states that the documentation entered by a business entity into the Register can be provided to a person for perusal in each individual case on the basis of a corresponding request.

At the same time, the Ministry limited access to all documents in the Register, without exception, including documents submitted to it by an authorized body. In our opinion, such an action contravenes the relevant order of the Ministry of Environment, and even more so the requirements of the Law of Ukraine "On Environmental Impact Assessment". Moreover, it is not clear by what procedure the public can get acquainted with the following documents: the conditions regarding the scope of the study and the level of detail of the information to be included in EIA report, EIA conclusion, the report on public discussion - according to the general rules of the Law of Ukraine "On Access to Public Information" or according to the rules of access to EIA documentation announced by the Ministry of Environment in June.

Proposals: 1) ensure public access to documents uploaded into the Register by the authorized body, in particular, to the conditions regarding the scope of the study and the level of detail of information to be included in an EIA report, an EIA conclusion, a report on public discussion;

2) additionally explain to the public that the new access procedure applies only to the documentation uploaded into the Register by a business entity.

2.3.2. Lack of criteria for providing or refusing to provide documentation

According to the information from the Ministry of Environment, EIA documentation can be provided to a person for review in each individual case based on a corresponding request. Identification of persons is carried out after receiving an application following the attached template. After identification, ways to familiarize yourself with EIA documentation will be offered.

At the same time, the extent of discretion of the manager of information in the context of the decision to refuse its provision remains unclear. Should the refusal to provide information be based solely on one of the grounds for refusal provided for by the Law of Ukraine "On Access to Public Information" or does the newly proposed regime provide for the possibility of the body to refuse access to an EIA report on the grounds of "bad faith" of the identified person who submitted the request, or any other reasons.

Proposal: to clearly explain to the public on what grounds they can be denied access to EIA documentation under martial law.

2.3.2. Undefined methods of submitting an application for access to EIA documents and ways of obtaining them

The news disseminated by the Ministry of Environment says that the documentation can be provided to a person for review based on a corresponding request. At the same time, it is not specified how to submit the relevant request. The notification of the Ministry of Environment does not indicate the postal or electronic address to which such requests should be sent, and whether such a request can be submitted by means of the Register. The EIA Register itself (in its limited form) offers to apply to the relevant authorized territorial or central body to obtain access to documents, even providing the appropriate technical possibility. At the same time, the Register does not incorporate the request form proposed by the Ministry of the Environment, so the possibility of submitting such a request through the means of the EIA Register seems doubtful.

It is also worth noting that, taking into account the limited period of public discussion in the EIA procedure and the significant amount of EIA materials, a written request for access by means of postal communication and receiving documents in this way will be practically meaningless in this case, because performing analysis of several hundreds of pages of the documents and preparing comments will have to be done within days. Receiving EIA reports by e-mail is also unlikely to be an option, because all mail services have limits on the size of incoming messages (10, 15 or 20 MB), and EIA reports almost always exceed these parameters.

Proposals:

- to explain to the public that today under martial law the means of applying to the authorized bodies through the EIA Register is not an application to obtain EIA documentation, since the absence of such an explanation along with technical possibility to apply to the body through the Register is quite misleading for the public;*
- to accept requests for the provision of EIA documentation in electronic form, determine and publicly announce the email address to which such requests can be submitted;*
- to provide the public with the opportunity to apply for EIA documentation through the means of the EIA Register, i.e. integrate the relevant forms into the Register;*
- to provide the public with the opportunity to get acquainted with the documents in the premises of the authorized body;*
- to provide the public with the possibility of obtaining EIA documentation through the means of the EIA Register after identification of the requesting person.*

2.4. The inadmissibility of shortening the terms of public discussion

Meaningful public participation requires adequate time frames to access and analyze documentation relevant to the decision-making process, as well as to prepare relevant comments. According to the conclusions of the Aarhus Convention Compliance Committee, national legislation should provide for a minimum 30-day period of public discussion¹⁰, which can be extended if necessary, based, among other things, on the nature, complexity and scale of the planned activity.

¹⁰Findings and recommendations with regard to communication ACCC/C/2009/37 concerning compliance by Belarus, para. 89, https://unece.org/DAM/env/pp/compliance/C2009-37/Findings/ece_mp.pp_2011_11_eng_add2.pdf

The current version of the Law "On Environmental Impact Assessment" (Part 6 of Article 7) provides that the public discussion of the planned activity after the submission of the Environmental Impact Assessment Report begins on the day of the official publication of the announcement of the start of the public discussion of the Environmental Impact Assessment Report and the provision of public access to the Environmental Impact Assessment Report for familiarization lasts at least 25 working days and no more than 35 working days. In practice, business entities that determine the period of public discussion for the needs of a specific procedure always set the minimum legally permitted period for public discussion, which is actually the minimum international standard.

The model of accessing EIA reports proposed by the Ministry of Environment provides access to reports upon request. This means that preparation by the public of such a request for access to an EIA report, its consideration by the relevant body, identification of the person who submitted the request, provision of an answer is carried out within the interval of public discussion that is already very short and thus this is unacceptable.

Proposals:

1) to supplement the transitional provisions of the Law of Ukraine "On Environmental Impact Assessment" with a provision on extended periods of public discussion under martial law (at least 35 calendar days), in connection with the limitation of the work of the EIA Register, and thus limited public's ability to obtain quick access to relevant information;

2) to provide business entities with an explanation that until the above-mentioned provision is put into effect, they are recommended to set the maximum period of public discussion - 35 calendar days - so that the time spent by the public on obtaining access to an EIA report does not lead to the shortening of public discussion period, and the public is ensured at least a minimum period of time (at least 30 days) for processing and preparing comments within EIA procedure.

CONCLUSIONS

1. In accordance with the provisions of the Constitution of Ukraine and the Law of Ukraine "On the Legal Regime of Martial Law", state authorities when dealing with access to information and public participation in the EIA procedure can legitimately limit exclusively the operation of information, communicational and electronic systems, as well as public electronic registers, in particular, the EIA Register.
2. The mode of access to public information, including environmental information, the procedure for public access to information important in the decision-making process and the procedure for public participation in the EIA procedure remain unchanged and are regulated by the laws of Ukraine "On Access to Public Information", "On Information", "On Environmental Impact Assessment" and relevant by-laws;
3. By limiting access to information in the area of EIA, the Ministry of Environment significantly exceeded the legitimate measures of martial law. The introduced restrictions concern not only the work of the Register, but also the mode of access to information in general, which is illegal.
4. In particular, in our opinion it is illegal to limit public access to EIA documentation in cases where EIA conclusions were issued before the start of a full-scale invasion, as well as to information about the location of planned activities in EIA reports that are made available to the public for review to facilitate participation in current EIA cases.
5. The new regime of providing access to EIA documentation introduced by the Ministry of Environment for the purposes of participating in the procedure under martial law significantly limits the rights and opportunities of the public, and, in our opinion, is in no way based on the requirements of martial law and violates a number of international obligations and provisions of the national legislation.
6. The model of access to information proposed by the Ministry of Environment in the current EIA procedures is not optimal and can be significantly improved in order to, on the one hand, take into account the security situation in the state, and, on the other hand, guarantee the rights of the public in the procedure at the level of the Law of Ukraine "On Environmental Impact Assessment" and the state's international obligations under the Aarhus Convention and the EU-Ukraine Association Agreement.

RECOMMENDATIONS

1. Ensure the provision of EIA documents upon request in EIA cases, regarding which EIA conclusions were issued before February 24, 2022.
2. Provide the public during the EIA procedure with full access to EIA materials, including EIA reports, information on the location of the planned activity upon request or on demand for viewing in the premises of the authorized body.
3. Ensure public access to documents uploaded into the Register by the authorized body, in particular, to the conditions regarding the scope of the study and the level of detail of information to be included in an EIA report, EIA conclusion, public discussion report.
4. Additionally, clarify to the public that the new access procedure applies only to the documentation uploaded into the Register by a business entity.
5. Clearly explain to the public, on what grounds they can be denied access to EIA documentation under martial law.
6. Explain to the public that today under martial law the means of applying to the authorized bodies through the EIA Register are not meant to obtain EIA documentation, as the lack of such clarification with the parallel availability of the technical possibility to apply to the body through the Register misleads the public .
7. Accept requests for the provision of EIA documentation in electronic form, determine and publicly disclose the email address to which such requests can be submitted.
8. Provide the public with the opportunity to apply for EIA documentation through the means of the EIA Register, i.e. integrate the relevant templates into the Register.
9. Provide the public with the opportunity to get acquainted with documents in the premises of the authorized body.
10. Provide the public with the possibility of obtaining EIA documentation through the EIA Register after identifying the person requesting it.
11. To supplement the transitional provisions of the Law of Ukraine "On Environmental Impact Assessment" with a provision on extended periods of public discussion in martial law conditions (at least 35 calendar days), in connection with the limitation of the work of the EIA Register, and, therefore, the public's ability to obtain a quick access to relevant information.
12. Provide business entities with an explanation that until the above provision is put into effect, they are recommended to set the maximum period of public discussion - 35 calendar days - so that the time spent by the public on obtaining access to an EIA report does not lead to the shortening of public discussion period, and the public are ensured a minimum period of time (at least 30 days) for processing and preparing comments within EIA procedure.