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A critical analysis of how Ukraine's draft Law on State Environmental Control corresponds to the OECD Recommendation on Environmental Compliance Assurance

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Foreword

Ukraine has developed draft Law No. 3091 on State Environmental Control, which has undergone the first reading in the Parliament of Ukraine and is being revised following feedback from international experts. The law defines the legal and organisational principles; basic principles and procedures for the implementation of state environmental control in Ukraine; and the powers of state environmental control stakeholders.

Upon request from Ukraine's State Environmental Inspectorate (SEI) and the Parliamentary Committee on Environmental Policy and Nature Management of Ukraine, the OECD prepared this report to support the Ukrainian Government to implement environmental compliance assurance objectives by analysing how the draft Law on State Environmental Control corresponds to the OECD Recommendation on Environmental Compliance Assurance. The OECD Recommendation, adopted by the OECD Council on 8 June 2023, aims to help Adherents in designing an effective and efficient package of tools for promoting, monitoring and enforcing compliance with environmental law. While Ukraine is not yet an Adherent to this Recommendation, the OECD Council recognised Ukraine as a prospective Member of the Organisation in October 2022 and opened an initial accession dialogue.

The report describes aspects of the draft Law of Ukraine on State Environmental Control which are relevant to compliance assurance, compares the draft law with the OECD Recommendation on Environmental Compliance Assurance to identify convergences, divergences and gaps between the documents, and provides options to remove divergences. An excerpt of the technical parts of the OECD Recommendation can be found in Annex 1.

It should be noted that while the OECD Recommendation covers various aspects of the environmental compliance assurance system, this report focuses only on the draft Law on State Environmental Control and does not analyse all other relevant laws in Ukraine which can have an impact on environmental compliance assurance. Therefore, any identified divergences and gaps identified need to be examined further to see if they are addressed by other legislation in Ukraine. In addition, the report was based on analysis of a machine-translated (google) version of the draft law. No responsibility can be taken by the author for errors or difficulties arising from the limitation of interpreting this translation.

This report was prepared in the framework of the EU4Environment: Green Economy Programme, of which Ukraine has been an active participant since 2019. It addresses component 3.2 on Environmental Compliance Assurance and Liability Regimes, subcomponent 3.2.1 on "Strengthening of Compliance Assurance Systems, Instruments and Tools" and subcomponent 3.2.2 on "Reform of High Impact Enforcement and Compliance Instruments, including Environmental Liability".

EU4Environment aims to help the Eastern Partnership countries to preserve their natural capital and increase people's environmental well-being. To that end, it supports environment-related action; demonstrates and unlocks opportunities for greener growth; and sets mechanisms to better manage environmental risks and impacts. The Action is funded by the European Union and implemented by five Partner organisations: OECD, United Nations Economic Commission for Europe, United Nations Environment Programme, United Nations Industrial Development Organization and the World Bank based on a budget of some EUR 20 million. The Action implementation period is 2019-24.

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Table of Contents

1. Executive Summary

A large number of convergences have been identified between Ukraine's draft Law on State Environmental Control and the OECD Recommendation on Environmental Compliance Assurance, including the clear statement of high-level intent towards compliance assurance and the focus on transparency and compliance promotion. The table below (Table 1) lists convergences identified as part of this work.

Table 1. Convergences between the draft Law and OECD Recommendation

OECD Recommendation	Convergence (Article Number, Clause & Point of the draft Law where relevant)
II - Compliance Promotion	1.1; 5.4; 5.6
II, 2	6.6; 16.1.11
II, 5	5.3; 10.5; 12.3; 13.2.3; 13.3; 14; 16.2.7; 19.19; 19.20; 26.2; 26.5; 26.8
III - Compliance Monitoring	1.1
III, 1	1.6; 17.4; 19.9; 19.20; 26.2
III, 2	1.2; 5.5; 6.6; 7; 17.4
III, 3	15.2
IV - Enforcement	1.1; 5.6
IV, 1	23.16
IV, 3	17.6
IV, 4	23.15; 23.16; 24.18
V – Institutional Aspects	
V, 1	23.11
V, 2	19.9; 26.2; 26.5; 26.8
V, 3	17.4

As the draft Law was not explicitly drafted to deliver legislation on wider compliance assurance, there was unlikely to be complete convergence with the OECD Recommendation, and this has been found to be the case. It should be noted that it is possible to have convergences and divergences within the same OECD Recommendation and within the same Article of the draft Law due to the multi-faceted nature of both. Compliance assurance is usually delivered through a combination of statutory and non-statutory mechanisms and by a variety of bodies. Indeed, it is unlikely that a public institution would need legislative direction to undertake some of these compliance assurance tasks.

Three divergences were identified:

- Between Article 14 of the draft Law, on "Planned measures of state environmental control in relation to subjects", and the OECD Recommendation III, 2 on risk-based monitoring. The way the legislation has been drafted, it is likely that more resource is placed into low-risk activities and that there potentially may be insufficient resource to deliver the intention of the Law.

- Between Article 15 of the draft Law, on "Unscheduled measures of state environmental control in relation to subjects management", and the OECD Recommendation III, 4 on "implement adequate procedures to respond to citizens' complaints…". The Law states that "*only those issues that became the basis of implementation are checked*" which has the potential to miss the root cause of the problem.

- Between Article 13 of the draft Law on "General requirements for implementation of state environmental measures control over business entities" and the OECD Recommendation III, 4 on "implement adequate procedures to respond to citizens' complaints…" which has the potential to allow significant pollution to continue.

These divergences are all easily fixable through changes to the draft Law. Potential options are given in this report.

Several gaps (or potential divergences if not covered elsewhere) are also identified (Table 2).

Table 2. Gaps or potential divergences between draft Law and OECD Recommendation

OECD Recommendation	Gap (or potential divergence if not covered elsewhere e.g. other laws, procedures etc)
II, 1	Economic sectors not mentioned
II, 3	Information dissemination pathways not specified
II, 4	No relevant article covering Environmental Management Systems (EMS) in risk-criteria
IV, 2	No mechanism to correct violation before sanction
IV, 5	No mechanism to enforce payment of penalties
V, 4	Capacity Building not mentioned
V, 5	Performance assessments of environmental enforcement authorities not mentioned

It is possible, however, that these gaps or potential divergences are addressed elsewhere in Ukrainian legislation or through other mechanisms which do not require legislation. It is recommended that consideration is given to whether these gaps are or will be adequately filled elsewhere in the state systems. It is considered that IV, 2 and IV, 5 are the most significant and will require legislative intervention to close the gap if not already covered in other legislation. The others can easily be closed by embedding requirements in process and procedure at an institutional level.

In addition, a potential conflict with the EU Industrial Emissions Directive (IED) has been identified due to the draft Law giving the ability to reduce the frequency of high-risk inspections for compliant sites and the fact that low-risk sites are only to be inspected every 5 years while the IED requires a minimum inspection of once every 3 years. This again can be overcome by relatively minor changes to the draft Law.

It is advised that the divergences and gaps as well as the potential solutions identified in this report should be reviewed and changes made to the draft Law if appropriate, and that the draft Law should be amended to ensure compliance with the EU IED.

2. Introduction

This report aims to support the Ukrainian Government with implementing environmental compliance assurance objectives. This report describes aspects of the draft Law of Ukraine No. 3091 on State Environmental Control relevant to compliance assurance and international good practice (Section 3) and compares the draft Law with the OECD Recommendation of the Council on Environmental Compliance Assurance to identify convergences, divergences and gaps between the documents, as well as proposing how the divergences can be removed.

2.1 Objectives

This report has two primary objectives:

1. To identify areas of convergence and divergence of Ukraine's draft Law on State Environmental Control with the OECD Recommendation of the Council on Environmental Compliance Assurance.

2. To provide recommendations on how identified divergences can be removed.

2.2 Scope

This report is based upon the English, machine-translated version of the first reading of the draft Law of Ukraine on State Environmental Control*,* adopted by the Ukrainian Parliament in 2021.

The report discusses instances where the draft Law may make compliance with environmental compliance assurance objectives in wider EU Directives difficult.

Changes to other Ukrainian legislation are outside the scope of this report. Therefore, it does not attempt to establish the interaction between this draft Law and other Ukrainian state laws, and does not comment on Chapter 6 of the draft Law on the final and transitional provisions.

This report does not seek to critique the enforceability or drafting of the Law itself. It focusses on the technical aspects of compliance assurance as documented in the OECD Recommendation of the Council on Environmental Compliance Assurance (Annex 1). Hereafter, this is referred to as the OECD Recommendation.

2.3 Background Information

2.3.1 International Norms

Internationally, there is no fixed model of implementing regulatory structures for environmental law. It is important to note that it is unlikely that any single institution of an OECD Member would have sole responsibility for delivering compliance assurance in its totality. For instance, operational delivery can occur at ministerial level; through specialist agencies; national, regional or local governments; permitting authorities and inspectorates; NGOs or a combination of these bodies. Compliance assurance could therefore potentially be simultaneously delivered from multiple public organisations at a national, regional or local level. In most EU countries and more broadly internationally, it is unlikely that a public institution would need legislative direction to undertake some of these compliance assurance tasks. There may, however, be some instances where it could aid clarity, for example, where activities are unlikely to happen without this legislative direction.

2.3.2 OECD Recommendation

This seven-page document is relatively new, having only been adopted by the OECD Council meeting at Ministerial level on 8th June 2023. It builds on over two decades of work by the OECD on the topic of environmental compliance assurance with both OECD Member and non-Member countries.

The OECD Recommendation was developed by the Working Party on Environmental Performance (WPEP), a group primarily made up of Member countries' and Partner countries' senior representatives from Environment Ministries and representatives from permanent delegations to the OECD.[1] This ensured that a range of technical best practices from around the globe were fed into the Recommendation.

Adoption of the OECD Recommendation was based on the strategic orientations of the Environment Policy Committee (EPOC) of the OECD, which consists of senior-level delegates from Member countries that meet on a regular basis. The Ministerial level adoption signifies significant, global, high-level support.

The scope of the Recommendation is to provide an essential reference point for Adherents in the area of environmental policy implementation and identifies measures they could take to further strengthen their environmental rule of law. "Adherents" in this context refers to OECD Members and non-Members that have agreed to adhere to this Recommendation in designing an effective and efficient package of tools for promoting, monitoring and enforcing environmental compliance. At the time of writing this analysis, Ukraine is not yet an Adherent to the Recommendation.

The OECD Recommendation covers the classically described three pillars of environmental compliance assurance, namely: compliance promotion; monitoring; and enforcement. It also has a fourth section, on the institutional aspects of compliance assurance. These four sections form the body of the OECD Recommendation and provide the focus for this analysis (Annex 1). These sections can be used to compare against the draft Law to look for convergences, divergences or identify where this is unclear.

There is no guidance in the OECD Recommendation as to how OECD Member and non-Member Adherents should implement the Recommendation. However, EPOC will support and facilitate Adherents' efforts to implement this Recommendation in co-operation with other relevant international organisations and stakeholders, including through OECD environmental performance reviews. EPOC will report to the OECD Council on implementation, dissemination and continued relevance of the Recommendation in 2028.

Compliance Promotion

Section II deals with compliance promotion, the first of the three compliance assurance pillars. This pillar is often referred to as the preventative part of compliance assurance. Section II recommends that Adherents:

"provide advice, guidance, training and engage in other forms of outreach to help regulated entities, particularly small and medium-sized enterprises, understand and meet its obligations, as well as promote proactive compliance."

Under Section II, there are 5 components (II, 1 to II, 5) which should be carried out by the Adherents (Annex 1).

Compliance Monitoring

Section III deals with compliance monitoring, the second of the three compliance assurance pillars. This pillar is often referred to as the diagnostic or assessment part of compliance assurance. Section III recommends that Adherents:

[1] The OECD has 38 Members.

"ensure effective and efficient compliance monitoring, adapting it to regulatory priorities and the profile of the regulated community while reducing unnecessary administrative burden on regulated entities."

Under Section III, there are 4 components (III, 1 to III, 4) which should be carried out by the Adherents (Annex 1).

Enforcement

Section IV deals with enforcement, the final compliance assurance pillar. This pillar is often referred to as the corrective or punitive part of compliance assurance. Section IV recommends that Adherents:

"use appropriate administrative, civil and criminal enforcement tools in a timely manner to restore compliance, punish the offender proportionately to the severity of non-compliance and provide deterrence against future violations."

Under Section IV, there are 5 components (IV, 1 to IV, 5) which should be carried out by the Adherents (Annex 1).

Institutional aspects of compliance assurance

Section V deals with institutional aspects of compliance assurance. This section, instead of relating to one of the three classical pillars of compliance assurance, relates to the effective and consistent operationalisation of compliance assurance elements; and co-operation across the bodies and institutions responsible for its delivery. Section V recommends that Adherents:

"take measures to address the challenges of multi-level governance, engage all stakeholders having compliance-related competencies, build institutional capacity and measure performance of environmental enforcement authorities."

Under Section V, there are 5 components (V, 1 to V, 5) which should be carried out by the Adherents (Annex 1).

3. Observations on the draft Law of Ukraine on State Environmental Control

This draft Law received its first reading by the Ukrainian Parliament in 2021. At the time of writing it is awaiting its second reading.

The draft Law outlines the rules, structure, and processes for conducting oversight by the state. It covers how this control applies to government bodies, businesses, individuals, and the powers and responsibilities of the state regulatory organisations. It sets out the rights and obligations of those to whom the Law applies, and sets out the consequences for not complying with the Law.

The draft Law comprises 6 chapters. An overview is given of the draft Law where it is relevant to compliance assurance, but the whole text has not been systematically described. Comments have been made on specific Chapters, Articles, Clauses or Points where they can be linked to the OECD Recommendation.

3.1. Chapter 1. General Provisions

The chapter contains 5 articles, the first of which deals with the definition of terms. From a compliance assurance perspective, Clause 1 of Article 1 is extremely important.

Article 1. Definition of basic terms
Clause 1 explicitly says that the state environmental control bodies are responsible for monitoring and ensuring that other central and local government entities comply with the Law. This sets out a clear message of transparency, that this Law applies to all, and this is further emphasised in later articles.

1) *"State environmental control – the activity of state environmental control bodies to ensure compliance with the requirements of environmental protection legislation by central executive bodies and their territorial bodies, local executive bodies authorities, local self-government bodies, business entities, as well as individuals, which is carried out by preventing and detecting violations of environmental protection legislation, as well as bring offenders to justice."*

This first clause also states a very clear intent that state environmental control bodies will use prevention and detection of violations of the Law and will take appropriate legal action against those that break them. These are effectively the three pillars of compliance assurance described in the OECD Recommendation.

Article 1, Clause 1 effectively gives the state environmental control bodies the mandate to carry out a wide range of activities which underpin the three pillars of compliance assurance. For example, this would effectively give any inspectorate the explicit mandate to provide advice on compliance, which is often absent in international systems. This converges generally with the high-level compliance of the OECD Recommendation's sections II (promotion), III (compliance monitoring) and IV (enforcement).

Clause 2 describes how state control measures can consist of both planned and unplanned measures. Wider 'government' bodies and business entities are inspected whilst natural persons are subject to either patrolling (not targeted at a specific individual), response to a call (notification of a violation from outside the control body) or a raid inspection. This is in general convergence with OECD Recommendation III, 2.

Interestingly, the draft Law does not define "inspection". Perhaps, this is defined elsewhere such as in the Law of Ukraine "On the Basic Principles of State Supervision (Control) in the Field of Economic Activity".

Article 1, Clause 6 covers response to a call (notification), which is limited to apply only to natural persons. While this aligns with aspects of the OECD Recommendation (III, 3) which suggests that Adherents should "implement adequate procedures to respond to citizens' complaints and facilitate citizen participation in compliance assurance efforts through various information technology tools", it seems slightly strange that this tool can only be applied to a natural person rather than a 'body' or 'entity' as it would seem particularly suited for use in the widest context possible. This limits the extent of the convergence.

Article 1, Clause 8 defines information and telecommunications system of state environmental control measures as "a single automated system…". This approach is identified as good practice, convergent with OECD Recommendation III, 1 which refers to the need to "collect, maintain and analyse information on the regulated community and share it with all relevant regulatory bodies". It is hoped that the system would also link directly to all permitters and, if so, would be best practice.

Article 2. Legislation on state environmental control
Clause 2 of this article states that *"if an international treaty of Ukraine, whose binding consent has been given by the Verkhovna Rada of Ukraine, establishes other rules than those provided for by this Law, the rules of the international treaty shall be applied."*. This is useful and stops repeated changes of this overarching Law.

Article 4. The purpose and tasks of state environmental control
Clause 1 of this article is very clear that *"The purpose of state environmental control is to preserve the environment safe for the existence of living and non-living nature, ensure the right to an environment safe for human life and health, ensure environmental safety and maintain ecological balance on the territory of Ukraine and preservation of natural territories and objects subject to special state protection."*

This clear aim to protect the environment is necessary in any compliance assurance scheme to set the bar for which compliance assurance is required. It is noted that there is no provision to include a balance between the environment and sustainable economic development. This absence of any requirement to consider economic development but rather to put the environment first is further strengthened in Article 5, Clause 1. While liberating to be able to focus solely on the environment and human health, it may potentially put state environmental control bodies in conflict with other government agencies and Ministries in the future.

Article 5. Basic principles of state environmental control
Article 5 comprises 7 clauses, each containing principles according to which state environmental control is carried out.

Clause 1 on "*prioritization of environmental safety in matters of human life and health, functioning and development of society, living environment and life activities before any other interests and goals in the field of economic activity"* reinforces Article 4 discussed above.

Article 5, Clause 2 describes *"legality, objectivity and impartiality of state environmental control",* and Clause 3 "*openness, transparency, planning and systematicness of the state environmental control".* These are useful to have as principles as they will help deliver wider compliance objectives. Article 5 Clause 3 in particular provides strong convergence with OECD Recommendation II, 5 on the promotion of transparency.

Clauses 4, 5 and 6 of Article 5 all relate directly to the compliance assurance pillars. Clause 4 details the principle of "*orientation of state environmental control on prevention of violations of legislation on environmental protection"*. Clause 4 is important because it puts the emphasis clearly on prevention rather than enforcement against the non-compliant entity. This is in convergence with the OECD

Recommendation, section II. This again speaks to putting the environment first (following Article 4 and Article 5.1) and will require all bodies of the Ministry to work in a planned manner to deliver this aim.

Clause 5 introduces the need for risk-based environmental control, the importance of risk assessment being recognised by the OECD Recommendation III, 2. Clause 6 introduces the need to blend compliance promotion and enforcement tools and techniques to drive compliance assurance, using a "carrot and stick" approach. Clause 6 is in line with OECD Recommendation sections II and IV.

3.2. Chapter 2. Authorities of State Authorities in the Sphere of State Environmental Control, General Requirements for Performing State Environmental Control and Public Control

This chapter contains 5 articles, most of which deal with the various levels of institutions and their powers.

Article 6. Powers of the Cabinet of Ministers of Ukraine…
Point 4 gives the Cabinet of Ministers the power of approving how state environmental control bodies interact with various other government entities. The output of this could potentially be either a convergence or divergence with OECD Recommendation III, 1 depending on the decision(s) of the Cabinet of Ministers.

Article 6, Point 6 gives the Cabinet of Ministers the powers to approve the choice of the criteria by which the degree of environmental risk from installations is assessed. Although this degree of top-down control is reasonably common in the Eastern Partnership region, it is much less common (if it exists at all) in OECD countries. The choice of criteria is usually dictated by the 'inspectorate' and allows for flexibility as priorities, resources and the environment change. Risk based compliance monitoring aligns with the OECD Recommendation III, 2, but the top-down approach may limit the extent of convergence because it reduces flexibility to adapt.

Article 6, Point 10 of the draft Law states that site-based inspections can only take place during working hours and is unusual. By restricting compliance monitoring on site to working hours, this limits the times at which some of the compliance assurance tools can be used. This could hamper the ability to converge fully with OECD Recommendation III, 2.

Article 6, Point 11 describes creating an approved list of enterprises who, for technical reasons, run a continuous process which, if stopped, could potentially lead to negative environmental or technological consequences. Shutting a continuous process down always requires thorough consideration and a balance of benefits versus potential consequences. By building a register in advance, however, this may inadvertently give installations a degree of protection or lead them to believe they have some protection from the Law, reducing the ability to effectively take enforcement action (OECD Recommendation, IV, 1). In addition, it may conflict with Article 4, Clause 1 of the draft Law.

Article 7. Powers of the central body of executive power…
The central body of executive power is a separate body within the Environment Ministry rather than a central control body such as the State Environmental Inspectorate. Similar to Article 6, there appear to be quite a few powers which would usually be delegated to an environment agency or control bodies rather than remain at a senior central ministry level. These, for example, include powers governing risk criteria, forms, procedures etc. While there is a general convergence with the concept of risk-based compliance assurance, in line with the OECD Recommendation III, 2, the top-down approach may restrict flexibility and responsiveness and limit the extent of the convergence.

Article 10. General requirements for the implementation of state environmental control

This article establishes the procedures and powers of those involved in the implementation of state environmental control with the aim of ensuring that it is conducted efficiently and transparently. Clause 5 on technical devices shows strong convergence with OECD Recommendation II, 5.

3.3 Chapter 3. State Environmental Control Measures

Chapter 3 outlines the three primary areas in which state environmental control measures are applied, covering government bodies (Article 12), businesses (Articles 13-14) and individuals (Article 17).

Article 12. Measures of state environmental control over central bodies of executive power and their territorial bodies, local bodies of executive power, local self-government bodies.

Article 12 establishes the process for conducting both planned and unplanned environmental control inspections on various government bodies. It also sets out how unscheduled inspections of government bodies can be initiated. This level of meta control over other government bodies, although not unprecedented, is relatively uncommon. Depending on how this is operationalised, there is potential for this to be a convergence with OECD Recommendation V, 5.

Additionally, the article sets out the need for an annual inspection plan of government bodies (Clause 3 - with a minimum frequency of every 3 years and for a maximum duration of 10 days) and that this plan should be published. It helps demonstrate that everyone must apply and comply with the Law in a transparent and open way, converging with OECD Recommendation II, 5.

Article 13. General requirements for implementation of state environmental measures control over business entities.

Clause 1 states that measures of control are carried out in accordance with the Law of Ukraine "On the basic principles of state supervision (control) in the sphere of economic activity" considering the features established by this Law. The Law "On the basic principles…" is out-of-scope of this work and as such no attempt has been made to establish the interaction between the two.

Clause 2, Point 3 states that all inspections of business entities will have mandatory audio, video and photo recording of the inspection. This will have multiple benefits, including better protection of the workforce from violence and aggression, a clear undeniable record of findings, and act as an anti-corruption measure, converging with the OECD Recommendation II, 5. It is highlighted, however, that this may bring with it issues pertaining to commercial confidentiality and/or national security.

Clause 3 gives the right to the head of the business entity or representative thereof to be present during the implementation of a state control measure. If they do not appear within 4 hours, the measure may proceed without them. This may potentially seem appropriate for a planned inspection and in accordance with the Recommendation II, 5 (although 4 hours may be excessive). However, for an unplanned measure responding to ongoing significant harm to human health or the environment, prompt intervention may seem more prudent. This would appear to be in possible divergence with OECD Recommendation III, 3 which states that "adequate procedures" should be implemented.

Article 14. Planned measures of state environmental control in relation to subjects management.

This article continues to deal with business entities and gives details about planned inspections and the supporting information in an inspection plan. It contains factors to be considered in the planning process, the fact that there is an annual plan, the approval mechanism for the plan, publication details of the plan, levels of environmental risk and associated inspection frequencies. It states that the plan should give a start date for the inspection and expected duration. This article sets out the maximum duration of inspection of each of the three risk bands. It includes other important elements including

pre-notification, that planned inspections should happen within the working hours of the entity, and sets outs the basis on which inspections can be suspended and resumed.

Compared to international practice, this system design for planned inspection is very rigid and will direct effort away from the high-risk sites in a divergence from the OECD Recommendation III, 2. It could be argued that the system is transparent and uses a risk-based approach, with elements of convergence with Recommendations II, 5 and III, 2, but by setting inspection frequency and durations in law, it takes control out of inspectorates' hands and reduces their ability to be flexible and respond effectively to emerging issues. A plan setting out proposed inspection dates and frequencies can still be approved by a ministerial oversight body, without having it fixed in law. This way, flexibility can be maintained should workforce restrictions or emerging issues change priorities. This maintains a balance between transparency and effectiveness.

As the system is proposed, it is important to understand the number of sites and the likely risk bands in order to calculate the resources required to meet these levels of planned inspection frequency and duration. It is likely that unscheduled inspections will take at least 40% of the effort and, in some states, this can be as high as 70%, and this, too, needs to be factored into workload calculations. Unscheduled inspections may be high as there will have been little or no control over the past few years because of the full-scale Russian war of aggression against Ukraine.

Making detail of sites and dates of inspections public in advance could be counter-productive as operators know they are unlikely to be visited, unless there is a complaint, potentially for several years. It is suggested that only a higher-level inspection programme (containing objectives, scope, resources and methodology) is published in advance, but without the detail of which operator will be visited and when. This information should remain with the regulator although there could be ministerial oversight for approval if deemed necessary.

Specifying the durations of inspections in advance could cause resources to be poorly directed. Predicting how many days are needed at each inspection in advance will be difficult. At some sites, the programmed durations will be insufficient to identify and deal with root cause issues. At others, this long duration will be unnecessary. Giving a fixed finish date is probably therefore unhelpful.

Rather than inspecting every low-risk site every 5 years, sites which are categorised in the system as having insignificant risk, it is suggested that sampling a proportion of these sites annually would give an indication of whether the sector was causing a problem. If so, a campaign to target specific activities or sectors could be realised. This allows resources to be directed at high- or medium-risk activities.

This divergence and possible solutions are discussed fully in Section 4.3 of the report.

It should be noted that the terminology describing risk categories in the draft Law and its associated inspection frequency may be in conflict with the EU Industrial Emissions Directive (IED). In addition, the reduction in regulatory effort for compliant high-risk sites is also in conflict with this Directive. This is discussed further along with the divergence identified above in Section 4.3 of this report.

Article 15. Unscheduled measures of state environmental control in relation to subjects management.

This article deals with unplanned or unscheduled inspections. Clause 2 sets out eleven criteria which justify an unplanned inspection. This is a comprehensive list, which includes reasons that could be categorised as follow-ups from previous inspections or data submissions and more externally driven motives such as reports of non-compliance.

The draft Law clearly aims to strike a balance between giving the authorities the ability to inspect while ensuring that business entities are not unduly burdened by attempting to keep the inspection focussed. Clause 3 includes detail of when an unscheduled inspection can be carried out, and its duration (maximum 10 days) is specified in Clause 4. Only the issues that prompted the need for an unscheduled

inspection can be examined (Clause 5). This may have an unintended consequence of missing the root cause of the non-compliance. This could also be a potential divergence from OECD Recommendation III, 3 "…implement adequate procedures to respond to citizens' complaints..." as the inability to identify the root cause would not meet the term adequate. Having a fixed term of 10 days for pre-trial investigation where there is limited or no ability to stop and restart the 10-day clock may make it difficult to conclude that enough evidence exists to go to trial.

Article 16. Rights and obligations of the central bodies of executive power and their territorial bodies, local bodies of executive power, bodies of local-government, economic entities regarding the implementation of state environmental control measures.

As stated in the title, this sets outs various rights and obligations of those covered by Articles 13, 14 and 15. From a compliance assurance perspective, the most significant aspect is contained within Article 16, Clause 1, Point 11, notably that the above bodies and entities have a right to receive advisory assistance from the state environmental control body in order to prevent violations during the implementation of state environmental control measures. This is very helpful as there is no ambiguity in the role of the state environmental control bodies. It also is in line with the OECD Recommendation II, 2, which states that Adherent countries should "provide compliance assistance through direct contact with businesses where feasible, including interactions during site inspections, other face-to-face meetings, phone help lines and outreach events". It is unclear, however, in Ukraine's draft Law if the bodies and entities can also call on this assistance outside control measures. This would be considered best practice by many if it is interpreted in its widest extent.

It is noted elsewhere in the article (Clause 2, Point 7) that the inspection report has to be submitted within the time allocated for the inspection. This is in line with the OECD Recommendation II, 5.

Article 17. Measures of state environmental control over natural persons.

Probably the most notable points for compliance assurance are found in Clause 4 on responding to a call. Here, it states that controls can be carried out in collaboration with law enforcement or other authorities. It gives a wide range of contact mechanisms to report a violation including official telephone numbers (presumably offices), hotlines, postal or electronic addresses of state environmental control bodies or through the state information and telecommunication system. This is best practice provided all conduits are monitored and that messages are timeously passed on. It is in convergence with OECD Recommendation III, 2.

Clause 6 states that if individuals are identified as committing violations, they face prosecution according to the procedure outlined in the Code of Ukraine on Administrative Offences. It is outside the scope of this work to understand the level of fines and the potential deterrent effect of this code but this would appear to be in convergence with the OECD Recommendation IV, 1.

Article 19. Documents regarding state environment control.

This is one of the largest articles in the draft Law and is primarily about the technical details required in various documents. The last two clauses provide points of note.

Clause 19 requires the submission of a monthly report on the implementation of state environmental control by the heads of the territorial bodies of the central executive body. This is in convergence with the OECD Recommendation V, 2. The clause in the draft Law details a list of requirements to place in the report; these are primarily what would be best described as a list of input and output indicators. This will certainly be useful, however, a focus on outcomes may be of greater value. This could be, for example, an improvement of water quality for x kilometres or a reduction in PM2.5 by x%.

By making the Law explicit on what should be in the reports, it is unlikely that discretionary elements which may be helpful for compliance assurance could be added. This could be, for example, a summary of the type of advice given or the use of other compliance assurance tools to solve regulatory problems.

Clause 20 is highly relevant to this report as it describes how the reports of all inspections (planned and unplanned) should be placed into the information and telecommunications system of measures of state environmental control. When linked with Article 26, Clause 5, this creates an accessible data set on environmental compliance. This is in convergence with the OECD Recommendation II,5.

3.4. Chapter 4. Responsibility for violation of the requirements of this Law and the legislation on Environmental Protection

Article 23. Administrative and economic fines for violation of the requirements of this Law and legislation on environmental protection by business entities.

Clause 1 identifies particular violations, associated fines and mechanisms to increase the fines. This has been carried out using a clever system to ensure the fine remains current and largely follows inflation as the penalties are based on increments of the minimum wage. The draft Law does not specify if this is hourly or monthly additives of minimum wage. It would appear that this is an omission in the original text, which means that the size of the penalty is unclear. From a deterrence perspective the larger level 'monthly' would have a greater impact but would need to be balanced with whether the likely wrong-doers could ever pay it. If the minimum wage follows inflation, this would seem a clever way to maintain relevance. Rates go from 5 to 300 times the minimum wage in a risk-based approach.

Point 15 allows the value of the fine to be doubled for a repeat violation which occurs in the following 3 years, with a tripling for three or more violations specified in Point 16. This ratcheting effect can help provide a good deterrent effect.

These would both be in convergence with the OECD Recommendation IV, 4.

Article 23, Clause 1, point 7 refers to penalties applied for a breach of conditions, but it does not stipulate whether this applies to a single breach of conditions or for multiple breaches. This means that one breach of low severity will incur a fine, but having multiple breaches with a higher degree of severity could result in the same punishment. It is also likely that the vast majority of sites will have a minor non-compliance in terms of a breach of a condition at inspection. This may mean that a high number of fines are issued (with an associated high use of resource) for minor breaches rather than focussing on more serious breaches. It is understood that the Criminal Code of Ukraine and the Code of Administrative Offences presume higher liability for repeated breaches. There could be merit in including a ratchet effect for multiple breaches as in Clause 1, Point 15 and 16.

Article 24. Proceedings in cases of violations by economic entities of the requirements of this Law and legislation on environmental protection.

Relevant to this analysis is Clause 18. Clause 18 specifies that if the fine is not paid after 15 days, the 'costs of accounting' are added on to the total. This is likely to provide additional incentive to pay on time should the recipient be able and willing to pay, which would be in convergence with OCED Recommendation IV, 4.

3.5 Chapter 5. Information and telecommunication systems and other information systems of state environmental control bodies

Article 26. Information and telecommunication system of state environment control.

Clause 2 provides the high-level information on the "what, who and why" pertaining to the system. It applies to all entities from central executive bodies to business entities and individuals.

There are many positives about the intention to develop such a system. It is, however, advisable that the system excludes potential national security, commercial confidentiality and personal information that would likely fall under the European General Data Protection Regulation (GDPR). There may be merit in stating this in the draft Law to prevent potential legal challenge on accessibility of all information.

Clause 5 states that information entered into the information and telecommunication system of state environmental control measures is open, and the public can access the information through the system's web portal on the internet. As stated in Article 19, Clause 20, this includes information on planned and unplanned inspections.

Clause 8 states that annual reports on results of the activities of state control bodies will also be made public as above.

These are all convergent with the OECD Recommendation II, 5 and V, 2.

3.6. Chapter 6. Final and transitional provisions.

This chapter is not relevant to this report.

4. Discussion of the comparative analysis of the draft Law and the OECD Recommendation.

4.1 Introduction

Chapter 3 compares the individual articles of the draft Law of Ukraine on State Environmental Control against the OECD Recommendation with respect to compliance assurance. This chapter distils these findings into convergences, divergences, gaps or potential divergences, and provides recommendations. The summary of the convergences, divergences and gaps is presented in Table 3.

Table 3. Comparative Analysis of Ukraine's Draft Law on State Environmental Control and the OECD Recommendation on Environmental Compliance Assurance

OECD Recommendation	Ukraine's Draft Law on State Environmental Control		
	Convergent: Article Number, Clause & Point where relevant.	**Divergent: Article Number, Clause & Point where relevant.**	**Gap (or potential divergence if not covered elsewhere e.g. other laws, procedures etc)**
II - Compliance Promotion	1.1 5.4; 5.6		
II,1			Economic sectors not mentioned
II,2	6.6 16.1.11		
II,3			Information dissemination pathways not specified
II,4			No relevant article covering EMS in risk-criteria
II,5	5.3 10.5 12.3 13.2.3; 13.3 14 16.2.7 19.19; 19.20 26.2; 26.5; 26.8		
III - Compliance Monitoring	1.1		
III,1	1.6 17.4 19.9; 19.20 26.2		
III,2	1.2 5.5 6.6 7 17.4	14.7 15.5	
III,3	15.2	13.3	
III,4		15.5	
IV - Enforcement	1.1 5.6		
IV,1	23.16		

OECD Recommendation	Ukraine's Draft Law on State Environmental Control		
	Convergent: Article Number, Clause & Point where relevant.	**Divergent: Article Number, Clause & Point where relevant.**	**Gap (or potential divergence if not covered elsewhere e.g. other laws, procedures etc)**
IV,2			No mechanism to correct violation before sanction
IV,3	17.6		
IV,4	23.15; 23.16 24.18		
IV,5			No mechanism to enforce payment of penalties
V – Institutional Aspects			
V,1	23.11		
V,2	19.9 26.2; 26.5; 26.8		
V,3	17.4		
V,4			Capacity Building not mentioned
V,5			Performance assessments of environmental enforcement authorities not mentioned

4.2 Convergences

A wide number of convergences were identified which will contribute to delivering the OECD Recommendation. It was highly unlikely that there would be complete convergence between the two documents, primarily as the draft Law was not explicitly drafted to deliver legislation on wider compliance assurance. This has proven to be the case. In addition, it should be noted that, even when a convergence is identified, it does not indicate that this element has been completely met. For example, the draft Law delivers well on administrative sanctions, but does not significantly cover criminal sanctions; this is likely to be because it is covered in alternative legislation.

The clear intent in Article 1, Clause 1 that *state environmental control is carried out by preventing and detecting violations of environmental protection legislation, as well as bring offenders to justice* shows a positive intent towards compliance assurance and implementing the three pillars of environmental compliance assurance (promotion, monitoring and compliance).

Throughout the draft Law, there is a focus on transparency and openness, which shows convergence with OECD Recommendation II, 5 ("Promote transparency of compliance assurance activities and public disclosure of compliance records as a tool to apply market and public pressure on non-compliant businesses"). The proposed integrated information and telecommunications system with open access is very positive and shows good convergence with the OECD Recommendation's section III on compliance monitoring and OECD Recommendation II, 5. This appears to be a move towards being open by default, which is a positive approach.

There is a very clear high-level intent that state environmental control bodies will focus on compliance promotion. State environmental control bodies have a mandate to carry out a wide range of activities which underpin the three pillars, including the provision of advice on compliance during inspections, which is sometimes woefully absent in other international systems. The clear linking of violations and associated administrative penalties with risk is a strong element of convergence with OECD Recommendation section IV; the use of multipliers to the minimum wage (Article 23) will keep the penalties current.

The fact that there is not full convergence, and indeed gaps between the draft Law and the OECD Recommendation, is not troubling. However, it does highlight the need for further consideration by environmental control bodies as to whether these aspects are covered elsewhere, and if not, what else they or other ministry and state institutions could do to play their part. It may take many elements, implemented by many actors (policy, permitters, inspectors, enforcement etc.) to fully implement a particular compliance assurance aspect as listed in the OECD Recommendation. It should also be highlighted that many compliance assurance elements do not need legislation to be effectively implemented.

4.3 Divergences

It is difficult to be categorical with the declaration of divergences between the draft Law and the OECD Recommendation. That said, there are at least three divergences and it is possible that there could be more depending on whether some of the gaps or potential divergences identified are not satisfactorily addressed elsewhere.

Divergence 1
OECD Recommendation III, 2 states: *"Focus compliance monitoring on areas of known or suspected non-compliance and/or activities that are of higher risk to human health or the environment, calibrating the frequency of inspections and the resources employed with the risk posed by potential infractions; as part of risk-based inspection planning, systematically consider, among other factors, the inherent environmental risk of the regulated activity, its location and the operator's compliance record."*

Whilst there are some convergences with Recommendation III, 2, there are also, and more importantly, divergences (Table 1). There is clearly a risk-based methodology which has been planned with risk criteria (Article 14.1.3) in the draft Law that looks at antecedent information (previous inspection history and violations) and which gives a clear inspection frequency (Article 14.7) based on the risk category (high, medium and low risk).

There are, however, a few aspects of OECD Recommendation III, 2 that Article 14 of the draft Law diverges from:

- In any risk-based system, the output of the risk process is usually pyramidal, with the lowest number of high-risk sites and the highest number of low-risk sites. If every site is inspected, even considering inspection frequency and inspection duration (as the draft Law does here), it is very likely that inspectors will put more effort into low-risk sites than high-risk sites. This is different from the focus being on non-compliance or high risk as stated in the OECD Recommendation.

- The OECD Recommendation also states that the frequency of inspections and the resources employed must be calibrated. The draft Law has not done that. As Article 14.7 dictates a fixed inspection frequency and Clause 9 of the same article specifies a fixed maximum inspection duration, a fixed amount of resources is dictated based solely on the number of sites in each risk category. This is likely to lead to very high staffing requirements which may be unrealistic. Not only could this mean that there are no available resources to deliver against the inspection plan, but it could divert resources away from the highest priority activities.

Rather than attempting to inspect every low risk ("*insignificant degree of risk*" as stated in the draft Law) activity on a systematic 5-year cycle, there may be more value in targeting thematic or sector-specific low risk activities, which would be in closer convergence with the OECD Recommendation (III, 2), rather than trying to do everything. This may mean that the workload can be better managed, based on available resources. The plan can therefore be designed to be achievable from the outset. To understand trends within the lowest-risk activities, it may be beneficial to carry out a

random sample of inspections from a variety of sectors each year to identify if compliance or risk is changing. This random sample can be built into the inspection programme & plan.

Some countries have historically had a three-level risk tier model in Law, similar to Ukraine, but it has either required significant extra resources to deliver the plan or meeting the plan has been very challenging. The merits of significantly increasing resourcing for very low-risk activities are questionable. It is more beneficial to spend time closing out non-compliance of high and medium-risk activities than target truly low-risk activities. Technically this is a separate divergence (III, 4 "*and thematic or sector-specific inspection campaigns for low-risk activities" of the OECD Recommendation)*, however, the resolution is the same.

Although not a divergence from the OECD Recommendation, Article 14 of the draft Law potentially sets up a conflict with the EU IED. There are two potential issues, with the first being largely a naming issue. In the relevant extracts of the Directive (below), the inspection frequency for lowest risk sites is once every 3 years, while in the draft Law on State Environmental Control it is once every 5 years for lowest risk sites. In reality, low-risk IED sites are likely to be of medium level risk when considering all the entities a state has. This can be easily corrected by ensuring that IED lower risk sites equate to the medium level in the draft Law.

Article 23 of the IED on Environmental Inspections states:

"4. Based on the inspection plans, the competent authority shall regularly draw up programmes for routine environmental inspections, including the frequency of site visits for different types of installations.

The period between two site visits shall be based on a systematic appraisal of the environmental risks of the installations concerned and shall not exceed 1 year for installations posing the highest risks and 3 years for installations posing the lowest risks.

If an inspection has identified an important case of non-compliance with the permit conditions, an additional site visit shall be carried out within 6 months of that inspection."

The second issue is perhaps more significant. The draft Law's Article 14, Clause 7, Point 3 states that "*In the event that during the scheduled inspection of a business entity, which is assigned to a high degree of risk from the conduct of economic activity, the state environmental control body did not find violations of the requirements of the legislation on environmental protection - the next scheduled inspection of such business entity is carried out no earlier than two years later*". Were this to be implemented for an IED high-risk installation this would be a clear breach of the directive. It also seems counter-intuitive to seek to relax control of the high-risk activities but not of medium or low-risk activities.

Ukraine's draft Law no 6004-d "On Ensuring the Constitutional Rights of Citizens to a Safe and Healthy Environment" aims to implement the provisions of the EU IED and to establish integrated permitting and control mechanisms in Ukraine. The IED is not an international treaty of Ukraine, which would have taken precedence over the draft Law (No. 3091) as described in Article 2. Presumably this draft Law should be designed from the outset to facilitate compliance with other EU Directives that have been transposed, are in the process of being transposed or maybe transposed in the future.

To avoid conflict between the laws, Article 14, Clause 7, Point 3 should be deleted (ideally) or clarified to state that it does not apply to IED sites.

Divergence 2

There is a divergence between the second part of OECD Recommendation III, 4 *("Compliment, as appropriate, integrated, cross-media site inspections with in-depth compliance assessments to identify root causes of non-compliance rather than only detect it, ...")* and Article 15, Clause 5 of the draft Law

on unscheduled measures. This clause states "*In the event of an unscheduled inspection, only those issues that became the basis of implementation are checked,…*".

The divergence comes from the mandatory requirement in the draft Law to only focus on the issue which has been reported, which restricts the ability to investigate the root causes of non-compliance. For example, according to this draft Law, during an unscheduled inspection of a municipal waste incinerator due to dark smoke from the stack, an inspector would be unable to follow the process through to the root cause; this could, for instance, be due to poor quality or inappropriate feedstock material (waste) or to a failure in onsite processes. If the root causes of non-compliance go unrectified, there are likely to be further environmental incidents with impact on human health and/or the environment.

To close the divergence, it is recommended to change the sentence to something like "*In the event of an unscheduled inspection, only those issues that lead to the identification of the root cause of the non-compliance can be checked, …*".

Divergence 3

It can be difficult to be definitive about whether a divergence can be called such. Divergence 3 is one of those where the recommendations of this report could be considered as being overly cautious, however, there is merit in including it. OECD Recommendation III, 3 states that "*While maintaining the priority of proactive, planned compliance monitoring, implement adequate procedures to respond to citizens' complaints…*". Article 13, Clause 3 of the draft Law is probably a divergence from what would be considered as adequate procedures.

The Clause is clearly designed to ensure transparency by having appointed business entity representatives present and presumably avoid potential areas of future complaint around for instance findings or potential for corruption. It could be argued that waiting 4 hours for an appointed representative to show up for an announced planned inspection is somewhat excessive and could be reduced, however, the real issue lies with the need to wait prior to undertaking unscheduled or unplanned inspections.

Article 15, Clause 2 of the draft Law sets out eleven criteria for when an unscheduled inspection can be carried out against a business entity. Many of these criteria are quite significant in nature and would require an almost immediate response. In these instances, Article 13, Clause 3 of the draft Law could allow significant unfettered pollution to continue or the evidence of non-compliance to be eliminated to avoid or mitigate against enforcement action.

It is suggested that the need to apply the 4-hour rule is reviewed, especially for unscheduled inspections. Immediate entry on site would be appropriate during a significant pollution event. In protecting the rights of the business entity, it is also likely that there is inadvertent conflict with Article 4, Clause 1 of this draft Law which seeks to put the environment first.

4.4 Gaps or Potential divergences

This section identifies potential divergences between the OECD Recommendation and the draft Law and gaps (non-inclusion of certain provisions of the OECD Recommendation) in the draft Law. Seven of the points in the OECD Recommendation have neither a convergence or divergence listed against them. This may be totally appropriate as this draft Law does not try to cover environmental compliance assurance in its totality. That said, there is merit in discussing them here to ensure that they are being or have been addressed elsewhere, perhaps in other legislation.

OECD Recommendation II,1 speaks to "*Develop and implement compliance promotion approaches and tools tailored for specific economic sectors, …*". There is nothing in the draft Law that refers to differentiating between sectors. This is not necessarily a surprise as many state environmental control

bodies have the discretion to do this without legislative or top-down direction. For example, employees of the Scottish Environment Protection Agency have the freedom to create work and inspection plans for specific sectors. Introducing tailored approaches for specific sectors would also support the closure of the divergence between Recommendation III, 4, and Article 15 noted above. This does not necessarily need to be enshrined in the draft Law, but should be addressed.

OECD Recommendation II, 3 covers the dissemination of "*information on regulatory requirements and good compliance practices…*". Again, there is no expectation for this to be necessarily defined in legislation. The drafting of materials to support wider compliance assurance is important, and inspectors from state environmental control would be well placed to contribute to them.

OECD Recommendation II, 4 on the promotion of "*corporate environmental management systems*" (EMS) is again likely to be outside the usual scope of legislative requirements, although it does feature occasionally in relation to permitting and inspection. Some legislative systems use the adoption of an EMS by a business entity as a reduction factor in their risk assessment system. The EU Commission goes further, making a risk criterion on an Eco-Management and Audit Scheme (EMAS) a mandatory requirement of their IED risk assessment process. Article 23, Clause 4, of the IED requires that the "*The systematic appraisal of the environmental risks shall be based on at least the following criteria: … (c) the participation of the operator in the Union eco-management and audit scheme (EMAS), …*". Some countries also use the presence or otherwise of an EMS to extend the fixed period of a permit from, for example, 6 years to 8 years.

As a more general point, Article 5 of the draft Law sets out that "*Basic principles of state environmental control is carried out according to the principles of: … 4) orientation of state environmental control on prevention of violations of legislation on environmental protection*". Other than on transparency of compliance assurance activities (OECD Recommendation II, 5) there is little in this draft Law to support this principle. This in and of itself is not necessarily a problem as much as it can be done outside of the legislation. However, if this draft Law is meant to encapsulate this principle, then it fails to do so.

OECD Recommendation IV, 2 states *"Allow, in cases of non-criminal infractions, offenders an opportunity to correct the violation before a sanction is imposed; consider the possibility of an alternative environmentally beneficial expenditure to replace part or whole of a monetary penalty.".*

The aim of this is to drive remediation and encourage environmental justice for communities. A financial penalty in isolation will not necessarily benefit either the environment or the communities affected by the infraction. There are no Articles or Clauses in Ukraine's draft Law that reflect this recommendation. In addition, because of the clear violation and associated penalty nature of Article 23 (of the draft Law), it would appear that there is no scope to facilitate inclusion of Recommendation IV, 2 in the draft Law.

A potential opportunity to close this gap could lie in a point similar to those in Article 23, Clause 1, Points 15 and 16, but instead of being a multiplier, it could be a reduction factor (or elimination) if the cause of the violation were remediated to a satisfactory degree within a certain time period.

OECD Recommendation IV, 5 requires that adherents "*Create an effective mechanism to enforce payment of imposed monetary penalties in collaboration with fiscal authorities.".* Although the swift payment of fines within 15 days is encouraged (with the requirement to pay additional costs if this time limit is not met - Article 24, Clause 18), there is nothing specifically in this draft Law to enforce payment of the fine. It may be covered in another law of Ukraine such as on "Executive Proceedings" or "On Enforcement Proceedings". If this is not covered elsewhere, to close out this divergence it is recommend that additional clauses are inserted into Article 24.

OECD Recommendation V, 4 incorporates a range of issues which are not covered in the draft Law. These would all normally fall outside the scope of legislation; however, it is mentioned here for completeness.

OECD Recommendation V, 5 requires that Adherents "*Conduct regular performance assessments of environmental enforcement authorities…"*. This is not covered in the draft Law and it could possibly be a divergence from the OECD Recommendation if it is not addressed elsewhere. There are two potential opportunities to implement this aspect of the Recommendation. The first would be to conduct a performance assessment of the state environmental control bodies by a separate part of the Ministry of Environmental Protection and Natural Resources of Ukraine. The scope of this could be covered in this draft Law.

The second option is for the state environmental control body to conduct performance assessment of other responsible bodies. In Article 11, on types of state environmental control measures, the draft Law states in Clause 1 that "*Measures of state environmental control include: 1) measures of state environmental control in relation to central bodies of executive power and their territorial bodies, local bodies of executive power, bodies of local self-government"*. This will likely include meta regulation (regulation of other environmental control bodies) that could fall under OECD Recommendation V, 5. A performance scheme could be covered outside the draft Law or in Article 21 on interaction with local-self-government bodies and state bodies or perhaps in Article 16 covering rights and obligations.

The best example in the EU of this type of performance assessment of environmental control bodies happens in Ireland. The Irish Environmental Protection Agency provides a support and co-ordination role to 31 county and city councils in Ireland and has a statutory role to supervise their environmental activities. A scheme has been developed to measure performance, called the Local Authority Environmental Performance Framework. More information can be found at https://www.epa.ie/our-services/compliance--enforcement/support-and-supervision-of-local-councils/

5. Recommendations

To achieve better convergence with the OECD Recommendation, this report recommends:

- Cut fixed-frequency, mandatory low-risk inspections and replace them with sufficient sample inspections to ensure that data and trends are understood to identify where there is a problem. These inspections can then be supplemented with targeted campaigns for economic sectors and/or specific activity types as indicated by the data (Divergence 1).

- Remove from legislation fixed inspection duration and start and end dates to increase flexibility to enable better targeting of activities and resources (Divergence 1).

- Refocus Article 15 to allow the root cause of the non-compliance to be addressed (Divergence 2).

- Review Article 13, Clause 3 to allow immediate entry on site during a significant pollution event (Divergence 3).

- Review identified gaps or potential divergences, and consider whether these gaps are adequately filled elsewhere in the state system. If not, identify mechanisms to close these gaps. If legislation is required and is not included elsewhere within the body of the wider Ukrainian acquis it is recommended that changes are made to this draft Law to enact them.

- Encourage remediation of violations by including a financial incentive in Article 23.

- Amend the draft Law to ensure compliance with the EU IED.

- Review the comments in Chapter 3 of this report, which identify minor omissions or areas requiring clarification (for example, on issues like minimum wage levels, national security, commercial confidentiality etc.) and implement changes as required.

- Consider how the legislation of some activities included within the draft Law could take away potential flexibility of regulatory institutions to apply wider compliance assurance tools and techniques. It is acknowledged, however, that there could also be potential counter arguments and reasons why there would be a wish to include them within legislation.

- Draw up a plan to identify potential mechanisms and opportunities to enhance compliance assurance as even where convergences are identified, more could or should often be done to achieve full adherence with each particular requirement of the OECD Recommendation. Enact this plan.

6. Conclusions

The OECD Recommendation on Environmental Compliance Assurance provides an overarching approach to delivering compliance assurance, including sections on compliance promotion, compliance monitoring, enforcement and institutional aspects of compliance assurance. This report identifies strong convergence between the high-level intent of Ukraine's draft Law on State Environmental Control and the OECD Recommendation.

Compliance assurance, however, is multifaceted and cannot be delivered by one piece of legislation. It is therefore no surprise that there is not complete convergence between the two documents and that gaps have been identified. Compliance assurance can be delivered in many ways, by many actors, and through both statutory and non-statutory mechanisms. Where gaps have been identified, it is recommended that consideration is given to whether these gaps are adequately filled elsewhere in the state systems.

It is important, however, that there is no conflict between the approach adopted in the draft Law and achieving compliance assurance. For the three divergences that have been identified, the report has provided reasoning for why a solution is required and potential options for closing the divergences. It is considered that all three divergences have straightforward solutions.

In addition, one possible conflict with EU law has been identified. To remove any future conflict between the draft Law and other Ukrainian legislation, this should be addressed now. Again, the report offered a simple solution to address this issue.

Annex 1

Technical aspects of compliance assurance, extracted from the OECD Recommendation of the Council on Environmental Compliance Assurance.

Section II - Compliance Promotion

Section II requires Adherents to:

"provide advice, guidance, training and engage in other forms of outreach to help regulated entities, particularly small and medium-sized enterprises, understand and meet its obligations, as well as promote proactive compliance."

Under Section II, there are 5 components which should be carried out by the Adherents:

II, 1. *"Develop and implement compliance promotion approaches and tools tailored for specific economic activity sectors, through enhanced collaboration between various regulatory bodies and in partnership with trade associations and business support organisations."*

II, 2. *"Provide compliance assistance through direct contact with businesses where feasible, including interactions during site inspections, other face-to-face meetings, phone help lines and outreach events."*

II, 3. *"Disseminate information on regulatory requirements and good compliance practices through a variety of channels, ensure that this information is easily accessible and user-friendly."*

II, 4. *"Promote corporate environmental management systems as a tool for identifying, understanding and managing the regulated entity's compliance as well as a vehicle for increasing its market competitiveness, make compliance one of the criteria of green public procurement."*

II, 5. *"Promote transparency of compliance assurance activities and public disclosure of compliance records as a tool to apply market and public pressure on non-compliant business."*

Section III - Compliance Monitoring

Section III requires Adherents to:

"ensure effective and efficient compliance monitoring, adapting it to regulatory priorities and the profile of the regulated community while reducing unnecessary administrative burden on regulated entities."

Under Section III, there are 4 components which should be carried out by the Adherents:

III, 1. *"Collect, maintain and analyse information on the regulated community and share it with all relevant bodies."*

III, 2. *"Focus compliance monitoring on areas of known or suspected non-compliance and/or activities that are of higher risk to human health or the environment, calibrating the frequency of inspections and the resources employed with the risk posed by potential infractions; as part of risk-based inspection planning, systematically consider, among other factors, the inherent environmental risk of the regulated activity, its location and the operator's compliance record."*

III, 3. *"While maintaining the priority of proactive, planned compliance monitoring, implement adequate procedures to respond to citizens' complaints and facilitate citizen participation in*

compliance assurance efforts through various information technology tools; set up a mechanism to filter complaints to overburdening the competent authority."

III, 4. *"Compliment, as appropriate, integrated, cross-media site inspections with in-depth compliance assessments to identify root causes of non-compliance rather than only detect it, and thematic or sector-specific inspection campaigns for low-risk activities."*

Section IV - Enforcement

Section IV requires Adherents to:

"use appropriate administrative, civil and criminal enforcement tools in a timely manner to restore compliance, punish the offender proportionately to the severity of non-compliance and provide deterrence against future violations."

Under Section IV, there are 5 components which should be carried out by the Adherents:

IV, 1. *"Adopt, make available to all relevant actors and implement formal non-compliance response policies and guidance accounting for severity of the offence, aggravating and mitigating factors, and aiming at deterrence of violations, from an informal warning and directions for corrective actions to issuing administrative notices and penalties, to prosecution with increasingly serious consequences."*

IV, 2. *"Allow, in cases of non-criminal infractions, offenders an opportunity to correct the violation before a sanction is imposed; consider the possibility of an alternative environmentally beneficial expenditure to replace part or whole of a monetary penalty."*

IV, 3. *"Provide for criminal prosecution of wilful, knowing or negligent unlawful behaviour that causes serious damage to, or endangerment of, human health or the environment, or in cases where other enforcement instruments have not been sufficient to ensure compliance; depending on the country's legal tradition, consider alternatives to prosecution under civil or administrative law."*

IV, 4. *"Ensure that monetary penalties (fines) provide sufficient deterrence from violating the law by removing the economic benefit of non-compliance for the offender; and that such penalties are determined consistently, using the same approach, methods and factors, including those accounting for the gravity of the offence."*

IV, 5. *"Create an effective mechanism to enforce payment of imposed monetary penalties in collaboration with fiscal authorities."*

Section V - Institutional aspects of compliance assurance

Section V requires Adherents to:

"take measures to address the challenges of multi-level governance, engage all stakeholders having compliance-related competencies, build institutional capacity and measure performance of environmental enforcement authorities."

Under Section V, there are 5 components which should be carried out by the Adherents:

V, 1. *"Ensure nationwide consistency of environmental enforcement and a level playing field for regulated entities by defining compliance monitoring and enforcement priorities and approaches in formal or informal partnership between national and subnational environmental enforcement authorities; and, as appropriate, providing for oversight of lower-level authorities by higher-level ones."*

V, 2.*" Co-ordinate compliance monitoring activities and share relevant data across regulatory agencies that have authority in areas that affect, or are affected by, environmental policy implementation, including food safety, occupational health and safety, natural resource management, land-use planning and emergency response."*

V, 3. *"Strengthen collaboration between environmental enforcement authorities, the police, customs and prosecutors in fighting environmental crime; ensure that police officers, prosecutors and judges in charge of environmental cases receive proper training; consider establishing specialised environmental police and prosecution units and/or dedicated environmental courts, as appropriate."*

V, 4. *"Build capacity of environmental enforcement authorities by developing standard operating procedures or guidance and offering formal training to inspectors to ensure they accumulate sufficient knowledge and practical experience; promote peer learning through national and international networks of environmental compliance assurance professionals."*

V, 5. *"Conduct regular performance assessments of environmental enforcement authorities using input (resource), output (activity) and outcome (result) indicators; emphasise outcome performance measures that characterise changes in compliance knowledge and behaviour of the regulated community to enable policy makers and the public to see the impact of compliance assurance activities on the state of the environment and draw conclusions on the quality of regulations."*