



საქართველოს სახალხო
დაცველი

PUBLIC DEFENDER
(OMBUDSMAN)
OF GEORGIA

Alternative report of the Public Defender (Ombudsman) of Georgia
on the Status of Implementation of the Aarhus Convention

2017-2020

Introduction

1. The Public Defender's Office of Georgia (hereinafter PDO) presents this submission to draw attention to the inadequacies in the implementation of the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (hereinafter referred to as the Aarhus Convention).
2. This submission mainly refers to the 6th national report (2017-2020) submitted by the Government of Georgia and concerns issues relating to the assessment of the implementation of the Aarhus Convention during the period of 2017-2020, according to the practice of the PDO. In addition, we make a series of proposals about further steps, which we consider are required to ensure the full and effective implementation of the Convention.
3. The Public Defender's Office of Georgia is an „A“ Status National Human Rights Institution mandated by the Constitution and Organic law of Georgia to oversee human rights situation in the country. The PDO's work combines the functions of examining complaints, reporting, awareness raising and research activities on human rights related issues.

Article 5 - Collection and dissemination of environmental information

4. During the reporting period, in accordance with the Law of Georgia on Environmental Protection, the environmental damage caused by the violation of Georgian legislation in the field of environmental protection and use of natural resources was considered property damage, which was to be compensated by transferring a certain amount of money calculated according to the relevant rule to the state budget. Until 2021, legislation relating to the environmental compensation had been fundamentally flawed and failed to meet international standards, including the requirements of Directive 2004/35/EC and the legal guarantees based on the "polluter pays" and "restitution" principles, the aim of which should be to prevent/mitigate/eliminate environmental damage. In addition, there had not been regulations on measures to be taken by the violator to remedy the damaged environment. Even in case of compensation payment for property damage, the transfer of money to the state budget could not remedy the dire consequences of the environmental damage. It is noteworthy that in early 2021, the Parliament adopted the Law on Environmental Responsibility. The Public Defender welcomes the adoption of the law and hopes for its smooth and effective enforcement in practice.
5. Access to information on compensation was also problematic. Legislation did not specify which public institution was required to collect the relevant information. State agencies (Department of Environmental Supervision and LEPL Forestry Agency) did not have such information, nor was it obtained or systematized. The only mechanism available for reimbursement was payment of compensation in a material form, nonetheless the State did not collect any data on similar cases. Consequently, it was unknown to the state control bodies whether the environmental damage they had calculated was ultimately compensated or not. Despite efforts and communication with state agencies, statistics (e.g. for

a period of 2013-2018) on compensated or non-compensated damages¹ could not be obtained by the Public Defender's Office either, due to the fact that no such information is available in the country. The above, of course, prevented public access to information on environmental damage; Consequently, the public was not able to assess the effectiveness of measures taken by the State in response to environmental damage.

6. Although the State has taken some effective steps in recent years to collect and disseminate environmental information relating to ambient air, the current situation cannot fully meet the requirements of the Convention.
7. It is welcomed that the country started to gradually transit to the European standards of ambient air quality monitoring and management from September 1, 2021 and undertook a legislative commitment to develop relevant air quality management plans to respond to local challenges and to divide the country into zones and agglomerations and to classify them according to the pollution levels.² Effective and timely implementation of these regulations will significantly facilitate the collection and dissemination of information on air pollution challenges across the country. Accordingly, the Public Defender will closely monitor the enforcement of the law.
8. Nevertheless, the flawed air quality monitoring system remains a significant challenge, which fails to reflect a complete picture of pollution across the country and poses a problem not only in terms of responding to emissions, but also in terms of assessing the impact of air pollution on the health of the population.³
9. In this regard, the main challenge is the lack of monitoring facilities, which includes only 7 fixed and 1 mobile stations and 1 non-automatic station.⁴ According to the Ministry of Environmental Protection and Agriculture of Georgia, in 2020, a plan was developed for air quality monitoring network,⁵ which indicates the types, number and locations of stations, and provides the first outline of the division of the Georgian territory into zones and agglomerations.⁶ It is noteworthy that according to this document, the final monitoring network should be much wider than the existing one and should consist of 18 fixed and 3 mobile stations. According to the information available to the Public Defender's Office, the Ministry of Environmental Protection and Agriculture of Georgia plans to purchase one automatic mobile station in 2021.
10. Thus, in order to implement the substantial part of the positive changes made to legislation and, as a result, to provide the public with relevant environmental information, the air quality monitoring network needs to be significantly improved. The Public Defender is well aware that the expansion of the monitoring network is associated with significant financial resources, but emphasizes the need for its timely completion by attracting budgetary and donor support. The Office is also informed that the Ministry of Environmental Protection and Agriculture is actively working with the EU Delegation to Georgia to obtain the necessary financial assistance for the implementation of the plan.⁷

¹ Whereas according to the statistics of this period, environmental damage amounted to 196.8 million GEL.

² Law of Georgia on Amendments to the Law of Georgia on Ambient Air Protection, No 95948, May 22, 2020.

³ 2019 Special Report of the Public Defender of Georgia – "Right to Clean Air (Ambient Air Quality in Georgia)", p. 16

⁴ Ambient air quality monitoring is carried out by 8 automatic stations in Tbilisi, Rustavi, Batumi, Kutaisi and Poti. In addition, ambient air quality is monitored in Zestaponi, in a non-automatic observation facility.

⁵ The plan, which represents a guideline for the National Environmental Agency, was developed within the framework of the project "Improving Air Quality Management Capacities in Georgia" funded by the Swedish International Development Agency.

⁶ Letter No 1430/01 of the Ministry of Environmental Protection and Agriculture of Georgia of February 18, 2021.

⁷ Letter No 1430/01 of the Ministry of Environmental Protection and Agriculture of Georgia of February 18, 2021.

11. The preparation of the Voluntary Code of Good Agricultural Practice for Reducing Ammonia Emissions and the analysis of international practices of reducing emissions in the agricultural sector was also a step forward in the reporting period.⁸ The document addresses issues relating to the reduction of emissions, including manure management, livestock feeding and use of fertilizers. According to the Ministry of Environmental Protection and Agriculture of Georgia, before the adoption of this Code as a mandatory legislative act, it is necessary to raise awareness of farmers and prepare the sector to meet the new requirements.⁹ This process will significantly augment knowledge of the target audience about the agricultural activities that cause air pollution and about the practices that reduce the relevant risks. It should be noted that in order to prevent and reduce air pollution caused by the agricultural sector, the adoption of the relevant legislative changes has been recommendation of the Public Defender.¹⁰
12. Unfortunately, to date, pollution from the industrial sector has not been properly regulated and the relevant legal framework is still not in line with Georgia's commitments under the Association Agreement.¹¹ It is noteworthy that the draft law on industrial emissions designed to reduce such emissions and to introduce European standards¹² in order to control them should have been submitted in the Parliament of Georgia in 2019, but was initially postponed for the fall session of 2020,¹³ while currently the bill is planned to be submitted by the end of 2021.¹⁴ The Public Defender points out that the adoption of this bill, as well as timely enactment of its provisions, is the main lever to reduce emissions from the industrial sector, which has been an unresolved problem in many municipalities for years.
13. Legislation regulating the transport sector, which is one of the main sources of air pollution, and the mechanisms for its enforcement are also problematic and need to be improved. In particular, the country does not effectively control the exploitation of vehicles, the emissions of which contain pollutants in excess of the established norm. Consequently, no categorized statistics on similar vehicles are available. The Public Defender has been consistently pointing to this problem for years.¹⁵
14. It is also noteworthy that green urban spaces help reduce the risks posed by pollution sources characterizing to cities. Thus, the Public Defender has been emphasizing for years the need to determine the ratio of green space per capita in the municipalities and to approve the relevant assessment standard.¹⁶

⁸ The documents are prepared within the framework of the project "Improving Air Quality Management Capacities in Georgia" funded by the Swedish International Development Agency.

⁹ Letter No 10/01 of January 4, 2021 of the Ministry of Environmental Protection and Agriculture of Georgia.

¹⁰ 2019 Special Report of the Public Defender of Georgia - "Right to Clean Air (Atmospheric Air Quality in Georgia)", pp. 37-39; 2019 Parliamentary Report of the Public Defender of Georgia, p. 271.

¹¹ Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Georgia, of the other part, Chapter 3, Article 302, Annex XXVI, Air Quality.

¹² Including the obligation to use the findings of the best available techniques in defining permit conditions, launching an integrated permit system and establishing an effective mechanism for monitoring compliance with permit conditions.

¹³ 2019 Parliamentary Report of the Public Defender of Georgia, p. 256.

¹⁴ Letter No. 1430/01 of the Ministry of Environmental Protection and Agriculture of Georgia, February 18, 2021.

¹⁵ 2018 Parliamentary Report of the Public Defender of Georgia, p.171; 2019 Parliamentary Report of the Public Defender of Georgia, p. 257; 2019 Special Report of the Public Defender of Georgia - "Right to Clean Air (Ambient Air Quality in Georgia)", p. 28-29.

¹⁶ 2018 Parliamentary Report of the Public Defender of Georgia, p. 172; 2019 Parliamentary Report of the Public Defender of Georgia, p. 259.

Article 6 - Public participation in decision-making

15. In terms of assessing public participation in the decision-making process, the Public Defender of Georgia, considering the present reporting period (2017-2020), emphasized that it is important to distinguish between the periods before and after the adoption of the Environmental Assessment Code.
16. Pursuant to the regulations (Law of Georgia on Environmental Impact Permits, Law of Georgia on Licenses and Permits) in place until June 1, 2017, the Environmental Impact Permit had been issued through simple administrative proceedings, which did not provide adequate guarantees for public participation in the decision-making process; in addition, the licensing authority did not have any obligation to inform the public about the decision-making process or to ensure their participation in the decision-making process, and a number of responsibilities were delegated only to the operator. It should be also noted that the list of activities subject to Environmental Impact Assessment (EIA) did not correspond to the activities defined by the Aarhus Convention.
17. The Public Defender considers that after the adoption of the Environmental Assessment Code of Georgia in 1.06.2017 (the Law of Georgia on Environmental Impact Permits was declared invalid on 01.01.2018), the new legislative regulation, among other important issues, introduced fundamentally improved EIA system and important mechanisms for ensuring public involvement in the decision-making process. Activities subject to EIA have been fundamentally changed, screening and scoping procedures have been introduced, mechanisms have been established for ensuring public participation in screening, scoping and environmental decision-making, as well as in the process of making recommendations relating to strategic documents; the State has been obliged to provide information to the public and organize public hearings, etc.
18. Thus, in view of the above legislative regulation, the practices of the respective periods also vary. The decisions made before the enactment of the Environmental Assessment Code did not explicitly meet the minimum standards set out in the Convention and can be considered as decisions made without informing the public, which were usually based on formal administrative proceedings.
19. The vicious practice of signing agreements with investors through concluding memoranda regarding energy projects had been common over the years. For the most part, the memoranda with investors were considered by the State to be a complete or partial commercial secret, which did not meet the standards relating to information and data transparency.
20. As for the period after the enactment of the Environmental Assessment Code, the Public Defender considers that some of the problems remain unresolved and the effective enforcement of regulations is still a challenge. This is especially true for large infrastructure projects, as the risk of human rights abuses is always higher in relation to such projects and therefore it is more important to ensure that citizens are involved in the decision-making process.
21. Practice shows that, as a rule, decisions relating to large projects are accompanied by active protests of the local population and lack of trust in the decisions made by the State. The practice of the Public Defender's Office shows that despite the existence of environmental impact assessment documents and organization of public hearings, for the most part, legitimate questions remain unanswered relating to large infrastructure projects, namely relating to individual aspects of the projects or expediency of their implementation. The public usually questions the comprehensiveness and qualifications of the

assessment conducted. Most of the problematic issues indicate that despite the existing legislative regulations, communication with citizens regarding the planned activities at an early stage, provision of comprehensive information to the public and their involvement in the decision-making process remain as the main challenges.

22. In this regard, the Namakhvani HPP Cascade Project attracted special public attention in 2020. The population has been actively and continuously protesting against the planned implementation of the project throughout the year (still protesting). Apart from the fact that it was problematic to ensure proper provision of information and involvement of citizens at the initial stage, it is noteworthy that the State did not respond to the protests for a long time, did not hold continuous, result-oriented, in-depth or comprehensive dialogue with citizens or stakeholders. Such approach further deepened the crisis.
23. This case has once again confirmed the existence of systemic problems identified as a result of the oversight carried out by the Public Defender's Office in recent years. Decisions of state agencies have failed to answer the legitimate questions of the society for years. As a rule, public hearings fail to provide comprehensive or reasoned answers to citizens' questions on important issues. This, in turn, is caused by distrust in the quality of the EIA documents and the procedures conducted. It is important for the State, in compliance with the procedural requirements, to pay special attention to the real participation of citizens and to use all effective means of communication with them.
24. Challenges relating to the quality of EIA reports are also problematic in terms of access to information. The safety and scale of the expected impacts of the planned project, alternative options and aspects of the impact on the property of local residents, are mostly the subject of concern of the population and professionals. As a rule, main questions arise from the fact that the above issues are incorrectly reflected or not reflected in the EIA documents at all; In addition, one of the main questions, which is usually not answered by the EIA documents, is the cost-effectiveness of the project and thus the expediency of the implementation of the project. Thus, while the EIA fails to address a number of important questions, it is clear that it is impossible to achieve the goal of providing information to the public through this mechanism.
25. The Environmental Assessment Code provides a list of activities subject to environmental impact assessment, which are presented in two annexes, taking into account the environmental impact risks and degrees. The activities listed in Annex 1 are subject to EIA due to significant environmental impacts; the activities listed in Annex 2 are subject to the screening procedure, which determines, by assessing the scale of environmental impact, whether the planned activities are subject to EIA.
26. It is true that the Public Defender of Georgia positively assesses the fact that the adoption of the Environmental Assessment Code brings the environmental impact assessment activities closer to international standards, but practice shows that the list of activities subject to environmental assessment needs to be revised. The threshold criteria for the activities defined in the above-mentioned annexes need to be refined in some cases, taking into account the specifics and reality of Georgia.
27. For example, setting a 10-hectare threshold for urban development projects with development area is unjustified;¹⁷ It should be taken into account that Directive 2011/92/EU does not specify an area for urban development projects at all.

¹⁷ Directive 2011/92/EU does not specify an area for urban development projects at all.

28. It is especially noteworthy that screening does not apply to sand-gravel extraction activities,¹⁸ which is inadmissible considering the risks relating to the extraction of sand-gravel with violation of the established rules;¹⁹ This also contradicts the requirement of Directive 2011/92/EU, which provides for the obligation to assess the need for EIA for open-cast mining of construction materials, including sand and gravel. The present issue is quite problematic for Georgia, as the extraction of inert materials from rivers is one of the intensive activities and is sometimes carried out completely illegally, without any environmental impact assessment.
29. The practice shows that the regulations related to the screening procedure also need to be improved, as screening is the most important stage that determines the need for EIA, which in turn is related to a number of mechanisms of access to information and public involvement. Currently, the Code sets out general criteria for screening procedures, but does not establish procedures for reviewing screening applications and making decisions by a decision-making body. It is particularly noteworthy that procedures do not provide for the need to verify the information submitted. This, in turn, creates a threat of formal conduct of the screening-related decision-making process. The Public Defender considers that the screening procedure should be focused on verifying the information provided by the operator and to make the above mandatory at the legislative level, in order to enable the public to participate in all decisions relating to projects that are potentially related to their legitimate interests.

Article 7 - Public participation concerning policies

30. Public participation is gaining special importance in relation to energy projects in Georgia. In addition to the above-mentioned challenges relating to the implementation of the EIA system, which are clearly relevant to such projects as well, it is also noteworthy that Georgia does not have a long-term state energy strategy. In order to plan and develop energy sector, first of all, it is necessary to develop relevant long-term policies. In line with international obligations and national law, the Parliament has to approve a 10-year state energy policy document, which has not been done yet. This situation, in turn, is directly related to the issue of transparency of and access to information, as the lack of a document developed and adopted on the basis of public participation and relevant procedures completely calls into question the activities planned/implemented in this area and makes it impossible to ensure the standard of transparency of information.
31. Thus, it is still unclear what benefits the State has received/is receiving from the projects implemented, and it is natural that, as a rule, questions are particularly acute in relation to the energy projects, especially given that the negative consequences of the construction of energy projects are usually large-scale.

Proposals and recommendations

- Modify threshold indicators for the activities envisaged under the Environmental Assessment Code I and II Annexes considering the area of the country and other specificities, among them, reduce/cancel urban

¹⁸ Except for cases when the contractor plans to open-cast mining and when the extraction area is more than 25 ha. Annex I.

¹⁹ This also contradicts the requirement of Directive 2011/92/EU, which provides for the obligation to assess the need for EIA for open-cast mining of construction materials, including sand and gravel.

development projects related indicator, as well as introduce screening requirement for sand and gravel mining activity;

- Introduce in the Administrative Offences Code of Georgia the liability for breaching the rules for placement, transportation or processing of dust-producing materials throughout all municipalities;
- Continue and carry out active and effective parliamentary supervision over Namakhvani HPP, among them, by examining the activities of government entities in relation to the Namakhvani HPP project and produce a relevant conclusion.
- In each case ensure effective enforcement of the regulations related to the EIA system;
- Examine the challenges related to the quality of EIA reports and identify best effective measures and carry out all necessary activities for implementing them to ensure quality improvement and control;
- Complete activities for the approval of the Voluntary Code –Best Agricultural Practice for Ammonium Emission Reduction into a binding legal act by the end of 2021.
- Initiate a draft law on industrial emissions at the Parliament of Georgia by the end of 2021.
- Allocate adequate resources for timely implementation of legislative changes for the detection of excess amount of harmful substances in engine exhaust and the establishment of an effective response mechanism of such offences;
- Develop a clear methodology for determining the area of green space per capita in the territory of a municipality and its assessment standard;
- Develop on a timely basis state energy policy in accordance with Article 7 of the Georgian Law on Energy and Water Supply and conduct all necessary procedures for its approval by the Parliament.