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Legal approximation to the EU Environmental Acquis under the Association Agreement

Policy Insight | Salome Markozia*

The historic Agreement of Association between the European Union (EU), its member states and Georgia, signed in 2014, created a new legal approach to EU-Georgian relations. This was accomplished by determining specific obligatory measures for Georgia in terms of "adjusting policies to align with the EU Acquis in various socio-economic dimensions. This naturally implies the introduction of new European standards and practices, which inevitably leads to important legislative initiatives. To this extent, obtaining a clear view on the process of transposition is crucially important in assessing three years of progress.

Introduction

The treaty on Georgian Association to the European Union is a very important and complicated bilateral instrument that gives new light to long-term relations between the EU and Georgia. The document is oriented towards large-scale reform that covers major policy areas. The paper will focus on one of the most interesting of those policy areas, environmental protection, which reflects all the main pillars of the EU Environmental *Acquis*. Included are the provisions for good environmental governance, regulations on air, water quality, biodiversity and waste management.

Generally speaking, the Association Agreement covers environmental law and policy in two different dimensions. On one hand, it clearly states that the parties will cooperate in terms of environmental protection, including the creation of a relevant legal base for the EU to

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financially support associated environmental reforms in Georgia. On the other hand, the agreement relates to Georgia's obligations to implement selected EU laws within the defined timeframe, as well as effectively enforce multilateral environmental agreements and principles of good environmental governance[1].

Hence, this paper aims at reviewing Georgia's commitments in terms of its alignment of its national environmental legislation to the Environmental *Acquis* of the European Union, and the assessment of current progress and the challenges[2].

Overview of the Environmental Protection obligations under the Association Agreement

Georgia's obligation to ensure its legal alignment to the EU Environmental *Acquis* is defined in Article 306 of the Association Agreement. The list of EU environmental provisions that should be transposed are defined in Annex 26 of the Agreement. In total there are provisions from 25 different EU acts (directives, regulations), each with individually determined timeframes. Generally speaking, transposition refers to both horizontal legislation, namely principles of good environmental governance and provisions regulating sectoral legislation as well.

First and foremost, establishing good environmental governance implies transposing the relevant directives of the Aarhus Convention[3], which lays down the fundamental principles of international environmental law, as well as the directive on environmental liability, that creates a system for the remediation of the damaged environment.

In regards to the Aarhus Directives, it is worth considering that since 2001, Georgia itself is a contracting party to the Aarhus Convention and takes an active role in its decision making. Together with this privilege, Georgia is provided with additional responsibility for effective implementation of the Convention. In this regard, there are a number of obligations that concern the improvement of legislation in achieving full compliance with the Aarhus Convention. Additionally, the Association Agreement, through the mandatory provisions of the Aarhus Directives, requires that all public institutions make environmental information publicly available. In particular, the Directive on Access to Environmental Information[4], which aims to implement requirements established under the first pillar of Aarhus Convention, requires that all public institutions ensure that environmental information be available upon request to

[1] art.230, 301, 306; Association Agreement
[2] For the purposes of the paper only the obligations for the 2016, 2017 and 2018 will be considered. respectively.
[3] Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, 1998
[4] Directive (EC) 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC

everyone. Furthermore, such information should be proactively disseminated on a regular basis. The Directive also defines the mandatory and discretionary grounds for refusal to provide such environmental information. It is envisaged that such information should be provided to an applicant's request in any reasonable manner required, and public institutions are obliged to provide assistance to those interested in obtaining such information. It is also noteworthy that the Directive requires the public institution to ensure designation of the person responsible for dissemination of environmental information and also make this information easily accessible in the premises of the institution. In addition, it is important that there is also a government obligation in the Directive that makes ensures that access to matters of environmental decision-making is available, and that the claim will be reviewed by a court or independent administrative body. According to the Aarhus Directive to ensure constant public involvement in environmental decision, the public institution is obliged to permanently disseminate environmental information through electronic resources, regardless of the request.

Consequently, the Directive, in line with the Convention mainly focuses on access to environmental information, public involvement in environmental decision-making and access to justice in environmental issues. All three principles are mandatory provisions to be transposed. In particular, the Association Agreement calls for the adoption of relevant measures, which will guarantee rights referred to in the Convention and its relevant directive.

In looking through current Georgian legislation, it appears that accessibility to environmental information is not specifically addressed. However, according to Articles 27 and 37 of the General Administrative Code of Georgia (GAC), there is a clear definition of "public information" and the procedural issues related to its issuance. Defined by the same code, Article 42 (a) is also in place, stating that environmental information *is* indeed public information. In assessing the compliance of Georgian legislation to the Aarhus Convention and the relevant EU directive, we should consider the standards already established by the general administrative legislation of Georgia. In particular, the first paragraph of the GAC's Article 10 states that everyone has the right to become acquainted with public information authorized by the administrative body. Article 37 of the same law, states that all public institutions are obliged to provide access to public information, while the administrative authorities are exhaustively defined in Article 27 (a) of the GAC. At the same time, an interested party is not required to indicate the motivation or purpose of requesting information as it is specified by the Directive and the Convention. So, in this sense, the requested actions noted above are already addressed under general administrative legislation. However, there are still some other practical mechanisms that are to be covered. For instance, Article 40 of the GAC regulates general rules for issuing public information, as well as the procedural issues related to it. This sets a higher standard of a 10-

day period rather than a one-month term proposed by the Directive for Issuance of Public Information. However, the code does not fully comply with exceptional implications that, in some cases, may be the basis for refusal to issue environmental information. There is also no particular regulation on obligatory, proactive dissemination of environmental information for public institutions. A bylaw[5] on the proactive dissemination of the general public information does exist, however, the list provided in the document is not thoroughly exhaustive, and thus we might assume that some obligations may only be considered as partially fulfilled.

The other obligation at this stage of transposition, in accordance with Annex 26, is the procedure for appealing a decision on issuing environmental information, which includes the existence of the least two stage appealing system. This is thoroughly regulated by Georgian general administrative legislation and is fully in line with the requirements of the Convention and the Directive at interest.

As for recent developments in regards to environmental information, the amendment to the Law of Georgia on Environmental Protection is a significant factor in fulfilling the requirements set out by the Aarhus Directives. The initiative aims to define the concept of "environmental information", which is crucial for effective enforcement of those regulations related to access to such information. With this respect, it is also important that there be an order from the Minister of Environment and Natural Resources Protection of Georgia on approving the procedure of proactive publication of public information. The order should also address the standard of electronic requesting of public information and the approval of access to environmental information, which is intended to fill the gaps related to the compliance with the Aarhus Convention and the Aarhus Directive. However, as the order only applies to the system of the Ministry, and these international obligations require that all public institutions be engaged in this process, the requirements can only be labeled as partially implemented, given the requirements stated above. A requirement by the law on Environmental Protection orders the government to draft a resolution on access to environmental information, which will cover all administrative bodies in Georgia before June 1st 2018.

It is also worth mentioning that with the aim to implement the requirements of the Aarhus convention, the recent amendments to the Georgian Constitution include *inter alia*, the right for public participation in environmental decision making. This ensures the adoption of the pillars of environmental democracy at the constitutional level.

[5] Resolution of Government on Requesting the Public Information electronically and its Proactive Dissemination; 29/08/2016

Together with the progress of ongoing reforms, we should also consider a number of issues that still need to be regulated. In this regard, it is especially important to also ensure one of the main principles of the Aarhus Convention - access to justice in environmental matters. According to the Convention, the relevant EU directive also includes the Principle of Effective Access to Justice, which states that even environmental non-governmental organizations (NGO) should have standing in court in environmental cases. In Georgia's case, there is no such legislative basis, however, recent Georgian court practice shows that the Aarhus Convention has been used as a primary source of law and NGO's have direct access to the court. This is accepted even though the General Administrative Code of Georgia says that the "interested party" should have been directly impacted by the decision, and thus have sufficient interest in order to have standing in court. However, in cases of environmental justice, the practice is in full compliance with the Aarhus Convention.

Another piece of EU law that implies the implementation of the Aarhus Convention, is the Directive on Environmental Impact Assessment[6] of certain state and private projects. In particular, the mandatory provisions of the Directive require to have some practical mechanisms adopted to identification and evaluation of direct and indirect negative impacts to the environment posed by a prospective project, prior to its approval. The directive specifies activities necessary for an environmental impact assessment, as well as activities that may be subject to the discretionary decision of the government within the scope of the screening procedure. Only after the screening results is the action to be subject to an Environmental Impact Assessment Procedure. Furthermore, it is important that the Directive is fully in line with the Aarhus Convention and utilizes the element of public involvement at all stages of the decision-making process.

In respect to the Aarhus Directives, there is also the Directive on Environmental Impact Assessment of certain plans and programs[7] (EIA), and the Strategic Environmental Assessment (SEA), which also requires the existence of a competent designated authority. Additionally, relevant legislation must be in place that will ensure the evaluation of potential adverse impacts on the environment before the program is implemented. This is particularly important, because through implementation of this directive, environmental policy is integrated into other fields of governmental decision making.

[6] Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment
[7] Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programs on the environment

It is also important that the strategic Environmental Impact Assessment Directive, unlike the Environmental Impact Assessment directive, does not provide a specific list of plans and programs. Given this, it is important to consider that all plans and programs carried out in the sectors of the agriculture, forestry, energy, industry, transport, waste, telecommunications, tourism, land planning or land use, could potentially have a negative environmental impact and automatically fall under the SEA requirement. With regard to the SEA, there is also the Directive on public participation in the development of concrete plans and programs[8] related to environmental protection. In this case as well, it is mandatory to ensure the implementation of the second pillar of the Aarhus Convention at the legislative level through the regulation of public participation in the strategic environmental assessment process.

In regards to the requirements of the Directive on Environmental Impact Assessment in applicable national Georgian legislation, the environmental impact assessment is regulated by the law on the Environmental Impact Permit. However, this law does not fully comply with the Directive or the Convention. For instance, there is no screening procedure specified by the Directive, within which the competent authority decides to issue a permit for concrete activities. In relation to public participation in the decision-making process for ensuring transparency of the procedure, the applicable law only requires that the report of the EIA be publicly reviewed. However, at other stages of decision making, the public is not properly involved. There is also no regulation of the relationship between other states in the implementation of transboundary projects.

The new Code of Environmental Assessment, which is effective from January 1st 2018, will repeal the existing EIA legislation. The large-scale reform has been implemented in terms of legislative approximation with the requirements of the SEA/EIA directives. As a result, the Code of Environmental Assessment establishes an environmental impact assessment system closer to European standards and introduces a sectoral strategic environmental assessment system that is new to Georgian legislation. Specifically, the environmental impact assessment will be obligatory to all activities that have a significant impact on the state of the environment and human health. In addition, efficient mechanisms for public participation will be introduced at all stages of the decision-making process.

[8] Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programs relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC - Statement by the Commission

Another EU *acquis* related to key environmental governance principles that must be transposed, is the Directive on Environmental Liability[9]. The obligation says that by the 2018, Georgia is required to establish rules and procedures aimed at the prevention of damage and restoration of a damaged environment based on the "Pollutant Pays" principle. Georgia must also ensure that operators prevent significant environmental damage and ensure the remediation of any damage incurred. Specifically, in the case of significant damages that fall under the Environmental Liability Directive, the responsible party is held accountable for restoring the environment at its baseline condition or a condition very similar to its original. According to the Directive, the significance of the damage should be assessed based on relevant criteria and should be considered in terms of biological diversity, as well as water and land resources. The Directive also requires that based on the type of activity, the law should distinguish strict and fault-based liability.

As for Georgian regulations in regards to environmental liability, Article 5 of the Law on Environmental Protection states that Georgian environmental legislation is based on the principle "pollutant pays". This principal implies obligation on the part of the responsible person to restore damage caused to the environment. However, there are no specific mechanisms yet established, which can guarantee actual enforcement of the abovementioned principle. It is also important that the way the Directive determines the significant damage is totally different from the perspective that is established in the current legislation. From this fact, we could assume that requirements set out in this Directive require full incorporation, for which purpose the relevant draft law is already being prepared to ensure the fulfillment of the obligations under the Directive. However, considering that national legislation is not consolidated in relation to other forms of damage, this law has to incorporate, or at least make some reference, to other types of damages as well. This is done in order to create a proper environmental liability system. With this respect, this reform is also essential in changing the methodology for calculating environmental damage, given that existing principles, prescribed by existing legislation[10], do not meet the main objectives set by the relevant directive. Accordingly, the transposition of these obligations is a quite complex and complicated process. Such a process involves various stakeholders and considering that legislative amendments are not initiated in the Parliament of Georgia yet, it is expected that implementation will be met with a serious violation of timeframe.

[9] Directive 2004/35/CE of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage.

[10] Resolution of Government on approval of Technical Regulation - "Methodology for Determining (calculating) the Environmental Damage"

Taking into consideration all of the above-mentioned challenges in developing good environmental governance, it is noteworthy that there are a number of requirements set out in the national legislation still to be regulated. However, good progress has been made in environmental reforms, especially in terms of development of environmental impact assessment.

As for other legislative reforms based on the Association Agreement, the paper will also concentrate on a few important sectoral initiatives. One initiative in particular, "Approving the Limitation of Sulfur Containment in Some Liquid Fuels[11]" is a technical regulation that has been taken on through a resolution by the Government of Georgia. This initiative aims to reduce sulfur content in various liquid fuels[12] and introduces appropriate sampling, analysis and control methods. It also prohibits the use of fuels that contain more sulfur than established by law.

The next important sectoral development concerns the regulation of biodiversity, specifically in regards to the Environmental Annex of the Association Agreement. It is mandatory to implement the specific requirements of the Directive on Birds[13] and Habitats[14], to ensure that there are measures in place for the conservation of wild bird species. This is done by the creation of protected areas where it is prohibited to disturb, kill or hunt wildlife. The EU directive also ensures the conservation of natural habitats through the creation of special conservation sites that function under sound environmental management. As for existing national regulations, there is the law on the "Status of the Protected Areas", however, it does not properly illustrate the requirements under its relevant directive. Accordingly, the draft Law on Biological Diversity is in the development process, setting measures for conservation and defining special areas for bird species. As it appears from the draft, if the current version is unchanged at this stage, it will only establish the legal framework for certain important requirements, not directly implement them. This requires the Government to issue other bylaws, which will take much more time than scheduled, and considering that in terms of the Birds and Habitat Directive, there are already certain deadlines missed. It would probably be necessary to discuss restructuring the draft law to most closely align with the Directive There is also the obligation to apply conservation measures to other migratory birds that are not listed in the Directive, but the draft law contains no such information. A requirement to approximate

[11] Resolution of Government 25/05/2017

[12] Council Directive 93/12/EEC of 22 March 1993 relating to the sulfur content of certain liquid fuels replaced by the 2016/802 (EC) Directive.

[13] Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds

[14] Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora

issues regulating the hunting of wild birds is also not specified in the draft. So, it is advisable to reflect these issues in a separate normative act and indicate this intention in the explanatory note to the draft, which will be helpful in monitoring the transposition process. Another issue that should be transposed is the criteria for determining the Emerald Network Areas. The subject itself is developed in the draft law, however, there is no specific criteria provided in the draft, creating only framework for further consideration.

And finally, the current situation with regard to Articles 17-18 of the draft law is particularly interesting, as they partially regulate significant damage caused to biodiversity. As there is environmental liability to implement further on, it is reasonable to consider avoiding double regulation or overlapping the approach to evaluate significant damage to biodiversity. These two draft laws should be analyzed together and should develop a common way of understanding this subject.

Thus, with regard to the Birds and Habitat Directives, taking into consideration the current progress, we can assume that the implementation of these obligations will take some time and has already violated the first two deadlines.

For further consideration of the sectoral developments, it is worth mentioning that the environmental annex of the Association Agreement requires the designation of the competent authority for the implementation of the directive on developing a framework for action in the field of marine environmental protection[15]. This has recently been accommodated when adopting the law on the Georgian Marine Area. The draft amendments provide necessary information and ensure that marine environmental strategy and action plan, intended to achieve good environmental status, will be drafted and renewed every 6 years. At the moment, the draft law has gone through the second hearing in Parliament, and most likely be successfully adopted soon.

The next legislative initiative to be reviewed is the implementation of the EU Water Framework Directive[16]. This introduces a river basin management system that is quite new to Georgian Environmental Legislation, as Georgian Law on water is based on a very different model of management. The draft law is already prepared however, it is not initiated yet because it has gone through the Regulatory Impact Assessment and has to be reviewed according to the findings of the assessment. The main idea of the draft law, in compliance with the EU directive,

[15] Directive 2008/56/EC of the European Parliament and of the Council of 17 June 2008 establishing a framework for community action in the field of marine environmental policy (Marine Strategy Framework Directive).

[16] Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy.

is to reduce pollution in water bodies, restore ecosystems and ensure the sustainable use of water.

With respect to waste management, the requirements set under the Association Agreement focus on three key directives that cover the management of waste[17], the management of mining waste[18] and regulations on landfills[19]. As for transposition, the Waste Management Code, which entered into force in 2014, addresses most requirements of the Waste Framework Directive. This establishes a waste management system that minimizes risks to human health and the environment. The law sets out a hierarchy of waste management, such as prevention, reuse, recycling and restoration, as well as determination that the waste generator is responsible for waste management costs according to the "pollutant pays principle". As for landfills, strict technical requirements for the operation of landfills are required by the EU directive, including landfill classification (hazardous, non-hazardous and inert). The relevant Georgian bylaw is the technical regulation on landfills, which means that the obligation, namely the adoption of the national legislation and determination of the competent authority are fully met.

Considering that there is no regulation or draft on mining waste so far, we should also take into account that the first deadline has already passed and there is no proper justification provided.

The next important directive to consider is the Flood Risk Management[20] Directive that determines the obligation to assess whether there is a potential flood threat, an impact on human health and the environment and ensuring proper mitigation measures. In addition, the Directive also promotes public involvement in developing these measures. It is also important that the actions undertaken in accordance with the Directive shall comply with the Water Framework Directive, namely, that the River Basin Management and Flood Management Plans be in harmony with each other. As for the requirements of the Directive on Floods, there is no regulation associated with flood risk management at this stage. Therefore, it is crucial to timely consider whether it is better to introduce a number of amendments to the existing Water Law

[17] Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste and repealing certain Directives.

[18] Directive 2006/21/EC of the European Parliament and of the Council of 15 March 2006 on the management of waste from extractive industries and amending Directive 2004/35/EC - Statement by the European Parliament, the Council and the Commission.

[19] Council Directive 1999/31/EC of 26 April 1999 on the landfill of waste.

[20] Directive 2007/60/EC of the European Parliament and of the Council of 23 October 2007 on the assessment and management of flood risks.

or add relevant legal basis for further regulation in the draft law on Water Resource Management.

Important changes are foreseen in permitting as well. The Environmental Annex of the Association Agreement sets the obligation for introducing the new integrated permitting system according to the Directive on Industrial Emissions[21], that addresses pollution prevention and control for industrial facilities. This is achieved by reducing harmful industrial emissions using the best available technologies in the field. The integrated approach covers the best available technologies, flexibility, inspection and public involvement in decision making. The issues related to permits at this stage are only regulated by the Law on Environmental Impact Permit, which does not include the existence of the similar integrated approach. Therefore, in order to achieve compliance with this requirement, it is necessary to develop new legislation accordingly.

Similar to the integrated system, national legislation is not familiar with specific regulations on the threats of major accidents related to the use of hazardous substances. The Seveso[22] Directive requires establishment of effective coordination mechanisms between competent authorities, ensuring prevention of such accidents.

In respect to other transpositions under the Association Agreement that are scheduled by 2018, we should consider the Directive on Ambient Air Quality, which establishes an obligation to present the Air Quality Plan. The Directive on Concentration of Arsenic, Cadmium, Mercury, Nickel and Polycystic Aromatic Hydrocarbons in Atmospheric Air should also be noted. With regard to following directives: The Directive on Urban Wastewater Treatment, Directive on the Protection of Water from Contaminated Nitrates used in agriculture activities, Directive on the Quality of Water Intended for Human Consumption tasked for regulating the quality of pollution of drinking water in relation to human health requirements, mandatory provisions to be transposed by 2018 are a designation of the competent authority and adoption of the legislation. However, neither discussion nor drafts are currently available publicly.

In light of this very brief overview of key environmental obligations under the EU-Georgia Association Agreement, and the assessment of the current progress on the transposition of the EU Environmental Acquis, we can assume that EU environmental policies initially, may not be

[21] Directive 2010/75/EU of the European Parliament and of the Council of 24 November 2010 on industrial emissions (integrated pollution prevention and control).

[22] Directive 2012/18/EU of the European Parliament and of the Council of 4 July 2012 on the control of major-accident hazards involving dangerous substances, amending and subsequently repealing Council Directive 96/82/EC.

the main subject of partnership with the EU, however, it has become one of the most complex and crosscutting directions, which cannot be downgraded in the process of the association.

On the other hand, considering that Georgian environmental legislation, similar to that of many other countries with a transitional economy, has been adapted and deregulated to support industrialization, this policy area has been plagued with outdated legal norms and a lack of expertise. That means that, besides treaty obligations, we have to approach this legal approximation process encouraged, and strategize on how to bring principles of environmental protection to life in our national legislation.

As a result, we can propose that an extensive amount of obligations still require further legislative actions, however, the process has been successfully initiated and good progress, especially in terms of environmental governance, is already evident.

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