



CAO ASSESSMENT REPORT

**Regarding Concerns in Relation to
IFC's Investment in Galnaftogaz (Projects #30477, 31723 and 33721) in Ukraine**

March 2019

Office of the Compliance Advisor Ombudsman
for
the International Finance Corporation and the
Multilateral Investment Guarantee Agency
www.cao-ombudsman.org

About CAO

The Office of the Compliance Advisor Ombudsman (CAO) is the independent accountability mechanism for the International Finance Corporation (IFC) and the Multilateral Investment Guarantee Agency (MIGA), the private sector arms of the World Bank Group. CAO reports directly to the President of the World Bank Group, and its mandate is to assist in addressing complaints from people affected by IFC/MIGA-supported projects in a manner that is fair, objective, and constructive, and to enhance the social and environmental outcomes of those projects.

For more information, see www.cao-ombudsman.org

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LIST OF ACRONYMS

CAO	Office of the Compliance Advisor Ombudsman
IFC	International Finance Corporation
GNG	Galnaftogaz

1. OVERVIEW

In August 2018, a complaint was lodged with CAO by community members in Ukraine with the support of Ecoaction, a local NGO, raising concerns about environmental impacts and compliance with Ukrainian regulations of an OKKO gas station¹ being built in their neighborhood. CAO determined that the complaint met its three eligibility criteria and conducted an assessment, which concluded with the Complainants' decision to have the case referred to CAO's Compliance function for appraisal of IFC's role.

2. BACKGROUND

2.1 The Projects

IFC has three active projects with Galnaftogaz (GNG or the Company), a Ukrainian chain of gas stations under the OKKO brand. The three project numbers are 30477, 31723 and 33721, all with different objectives.

According to IFC, the purpose of project #33721 is to support the expansion of GNG through a) expanding the number of petrol filling stations, convenience stores, and liquefied petroleum gas modules; b) investing in infrastructure upgrades and measurement / control systems, and; c) managing working capital risks by partially replacing short-term loans with long-term debt. IFC committed a \$15 million A loan for this project, \$5.5 million of which IFC indicated were eventually not disbursed.

According to IFC, the purpose of project #31723 is to build/purchase and operate high-volume OKKO gas filling stations to bring the total network of GNG's stations to 80 stations. The IFC indicated that the expansion and operations area under this project did not include Kyiv, where the gas station mentioned in the complaint is located, and that in their view project # 31723 was not relevant to this CAO case.

According to IFC, the purpose of project # 30477 is to build/refurbish around 75 high-volume OKKO gasoline filling stations at prime locations and finance the associated working capital. IFC indicated that the funds for this project were disbursed and used by GNG in 2011-2012, whereas the complaint relates to a gas station constructed in 2016. In IFC's view, project #30477 is not relevant to this CAO case.

2.2 The Complaint

In August 2018, CAO received a complaint filed by community members with the support of Ecoaction, a local NGO. The Complainants state that they are residents of Revutskoho street in Kiev and raise concerns about environmental impacts and compliance with Ukrainian regulations related to a gas station being built in their neighborhood. Concerns about community consultation around the construction of the gas station and use of force against protesters are also cited. The issues raised during the assessment are described in more detail below.

¹ OKKO is the name of a network of gas station in Ukraine, which is owned by Galnaftogaz.

3. ASSESSMENT SUMMARY

3.1 Methodology

The aim of the CAO assessment is to clarify the issues and concerns raised by the Complainants, gather information on the views of different stakeholders, and determine whether the Complainants and the IFC client would like to pursue a dispute resolution process facilitated by CAO, or whether the complaint should be handled by CAO's Compliance function for appraisal of IFC's performance (see Annex A for CAO's complaint-handling process).

In this case, CAO's assessment of the complaint included:

- a desk review of project documentation;
- telephone conversations and an in-person meeting with the Complainants in Kiev;
- telephone conversations and an in-person meeting with the IFC client in Lviv; and
- telephone conversations with the IFC's project team.

This document summarizes the views heard by the CAO team, and describes next steps based on the parties' decision. This report does not make any judgment on the merits of the complaint.

3.2 Summary of Views

Complainants' perspective

The Complainants, who claim to be residents of Revutskoho street (buildings No. 8, 10/2, 19/1), allege that GNG is illegally constructing a gas filling station at the intersection of Revutskoho street and Anna Akhmatova street in the Darnytskyi district of Kyiv. The complaint raises a number of environmental and social concerns which include:

- Compliance with the Building Code requirements: The Complainants allege that according to the local building code the gas station should be 50 meters away from residential buildings and 100 meters away from public transport; and that it is in fact 30 meters away from the nearest residential building and 10.5 meters away from public transport (a bus station). They add that during an unscheduled inspection visit in July 2017, the Department of State Architectural and Construction Inspectorate of Kiev identified such regulatory violations and requested Guel Park to remedy them. The Complainants also allege that the construction of a gas station is not allowed in this area according to the cadaster² and that the permit granted for that lot was to construct a parking lot. They express that there still is a pending court case related to the legality of the construction and the permit granted to Guel Park.
- Lack of public consultations regarding the project: According to the Complainants, neither GNG nor Guel Park (the developer)³ conducted any stakeholder engagement before they began the construction of the gas station. They allege that this is a violation of Article 5 of Ukrainian Law on "the foundation of principles of urban development" and of Article 21 of

² A cadaster is a comprehensive land recording of the real estate or real property's metes-and-bounds of a town.

³ According to the Complainants, Guel Park is the developer and land owner of the gas station under construction. The Complainants allege that Guel Park is effectively a shell company controlled by GNG, which GNG uses to shield itself from liability during the construction phase of the gas station. They express that they have found proof of the tight connection between the two companies and GNG's control over Guel Park.

Ukrainian Law No 3038-IV on “regulation of urban development activities” and thus reject GNG’s contention that there was no legal requirement to conduct public consultations prior to the construction of the gas station. The Complainants indicate that they reached out to Guel Park and GNG in February 2017 to invite them to participate in a public discussion about the gas station, to which GNG responded that they were not in charge of its construction. Guel Park allegedly did not respond to the invitation. The Complainants add that they participated in a meeting organized by GNG in October 2017. They allege that at the start of the meeting, they stated they would only negotiate if GNG would withdraw the lien they unlawfully obtained on the apartments of three Complainants⁴. They claim that GNG responded that it was not in their power to withdraw the lien and that the meeting was eventually unsuccessful.

- Environmental and health impacts: The Complainants are concerned about the impact of the gas station on their health. The Complainants allege that the construction works violate their constitutional right for a safe environment (Article 50 of the Constitution of Ukraine). They add that contrary to Ukrainian law⁵, no ecological/environmental survey to assess the potential environmental risks of the planned construction was conducted prior to the start of the construction. The Complainants indicate that they filed cases in the Courts against GNG and Guel Park in order to block the construction of the gas station. The Complainants allege that GNG has bribed the judges deciding the cases, such that the cases have been decided against them. The Complainants add that in the same fashion as the gas station, other OKKO gas stations violate laws and regulations and cause negative environmental impacts. The complaint also mentions that they would like GNG to stop the construction of the gas station and set up a recreational public park with plants, trees, and a playground on the lot occupied by the unfinished station.
- Alleged incidents of reprisals: The Complainants allege that when GNG realized that the local community opposed the construction of the gas station, they retaliated against them. Specifically, the Complainants claim that during protests on September 27 and 28, and October 4, 2017, at the request of GNG, policemen violently cracked down on protesters using sticks and tear gas. The Complainants state that they were personally not involved in the destruction of gas station equipment that occurred on October 4, 2017. The Complainants also claim that GNG is intimidating Complainants by calling them on their mobile to threaten them and has bribed some residents in exchange of their acceptance of the project. They also share that a judge placed liens on some of the activists’ apartments at Guel Park’s request in May 2017. According to the Complainants, Guel Park’s judicial request was not well-founded and should not have been granted. The Complainants request that GNG stop all retaliation measures and intimidation of residents and remove the lien they obtained on the three apartments belonging to the Complainants.

The Complainants indicated they are not interested in a dialogue with GNG and would like CAO to initiate a Compliance process, particularly to address the issue of alleged reprisals and to seek an alternative to the domestic legal system for remedy and protection of their rights.

⁴ According to the Complainants, the Company unlawfully placed liens on the apartments of three Complainants as a retaliation measure after the protests against the construction of the gas station in which those Complainants participated in September and October 2017 (See “alleged incidents of reprisals” below).

⁵ The Complainants refer to Ukrainian Law No 45/95-BP “on ecological expertise”, which they believe was applicable at the time of issuance of the construction permits and of construction of the gas station.

Company's perspective

According to the Company, the gas station mentioned in the complaint is being constructed (as a reconstruction of the existing real-estate object) by Guel Park LLC. They add that GNG and Guel Park LLC signed an agreement according to which GNG will either lease or purchase the gas station after the completion of construction works, official commissioning of the facility and registration of Guel Park's title to GNG. Hence, GNG indicates that it does not have any legal connection with the construction of the gas station and has no legal right to interfere in a business activity of an independent legal entity (Guel Park LLC).

In response to the Complainants' concerns, GNG indicated that:

- Compliance with Building code requirements and environmental concerns: GNG claims that they invest only in the construction of those gas filling stations that are designed and built in accordance with applicable laws, sanitary-ecological rules, and high corporate standards of the OKKO brand. According to the Company, the construction of the gas station fully complies with building codes and sanitary regulations, including the protection distance from the emission points (i.e. fuel pump nozzles and tank valves) to residential buildings⁶. GNG indicates that before the start of the construction, Guel Park obtained an approving opinion on the construction project from UkrDerzhBudExpertyza (a state authority that examines construction projects' compliance with applicable rules and regulations) as well as all other construction permits required by Ukrainian law. In addition, officials of the State Architectural and Construction Inspectorate carried out inspections of the construction site and did not find any breach of the urban planning laws. Furthermore, according to GNG, experts of the Kyiv Scientific Research institute of Forensic Expertise conducted a study of the construction project at the request of the Kyiv City State Administration, which concluded that the construction complied with all legal requirements applicable at the time of the issuance of the construction permit. GNG adds that as a potential future operator of the gas station, they regularly inspect the developer's construction documents to ensure that the construction works are carried out in full compliance with the current legislation and relevant regulations.
- Lack of public consultation regarding the project: GNG indicates that Guel Park is in charge of the construction of the gas station. They add that current legislation does not require a developer to conduct public consultations in connection with every new construction or reconstruction project. The Company states that last year, when they learned about the community's discontent with the construction of the gas station and the lawsuit brought against Guel Park, they reached out to Guel Park and asked that all construction works be put on hold until the dispute is resolved in courts or settled otherwise. They also called for a meeting with local residents to find a satisfactory solution without the intervention of political forces and representatives of the developer.⁷ The meeting took place on October 26, 2017. According to the Company, the meeting's participants discussed the issues at stake, identified potential solutions and agreed to collaborate further to implement the discussed options. The Company adds that the local community is being manipulated by political organizations which disseminate false information about the gas station.

⁶ According to the Company, the legal requirement applicable at the time of the design phase of the gas station was that the minimum environmental spacing should be 50m. In this case, the smallest distance from the technical equipment of the gas station to the nearest building is 49.5m. The Company adds that this deviation from the rule was duly approved by the Ministry of regional development and construction according to official procedures, after Guel Park designed appropriate compensatory measures to remove relevant risks to nearby buildings and residents.

⁷ https://www.okko.ua/en/company-news?page=2&pub_id=2943, https://www.okko.ua/en/company-news?page=14&pub_id=2958

- Environmental and health impacts: According to GNG, the Ukrainian Law on Environmental Expertise, which was effective until December 2017, mandated companies to carry out an environmental impact assessment only for constructed and commissioned gas stations but not for real-estate objects that were being constructed or reconstructed. Nevertheless, GNG expresses that Guel Park voluntarily requested and received such an assessment of the non-commissioned real-estate object (future gas station) that was under reconstruction at the time. In addition, GNG states that under the current Ukrainian law (in particular the Law on Environmental Impact Assessment) there is no obligation to carry out an environmental impact assessment of gas stations.
- With regard to the legal proceedings, GNG indicated that the Deputy Prosecutor of Kyiv (on behalf of Kyiv City Council) brought an action before the Kyiv Economic Court against Guel Park on August 17, 2017. According to GNG, the Deputy Prosecutor of Kyiv was seeking demolition of the gas station on the basis that (i). the construction was illegal because the designation purpose of the land plot did not allow for the construction of a gas station; (ii). Guel Park did not obtain necessary official permissions for the construction; and (iii). the gas station was built with material deviations from construction norms. Both Kiev City Economic Court (as a first-instance court) and Kyiv Appellate Economic Court (as a court of appeal) dismissed the lawsuit as legally groundless, having inferred *inter alia* that the land plot and the construction of the gas station thereon by the developer were compliant with all applicable legal requirements. According to GNG, on August 22, 2018, the Supreme Court (as a cassation court) upheld the judgements of the lower courts and ruled that Guel Park acquired its lease title to the land plot in full accordance with applicable laws and used the plot in compliance with its designation purpose; obtained all necessary construction permits and other official permissions; and that the construction project was compliant with all relevant construction standards, norms, and rules (pursuant to the examination carried out by a forensic expert).
- Protests in October 2017: GNG alleges that on October 4, 2017, a group of masked people carrying heavy objects attacked the gas station under construction, smashed refuelling pumps and other equipment, broke windows and display counters, and destroyed inventory, station accessories, and other property, thus causing serious damage to the developer.

The Company indicated that although they believe in the benefit of dialogue, they have already tried that path with the Complainants but without success. The Company believes that it is not possible to reach an agreement with the Complainants for reasons that include the lack of cohesiveness of the Complainants' group and the fact that political forces allegedly stand behind them, fueling the conflict. Therefore, GNG prefers for the complaint to be referred to CAO's Compliance function.

4. NEXT STEPS

During CAO's assessment, the Complainants expressed their preference for the complaint to be referred to CAO's Compliance function. Therefore, given the voluntary nature of the dispute resolution process, and in accordance with CAO's Operational Guidelines, the complaint will now be referred to CAO Compliance for appraisal of IFC's performance related to the GNG projects.

ANNEX A. CAO COMPLAINT HANDLING PROCESS

Once CAO declares a complaint eligible, an initial assessment is carried out by CAO Dispute Resolution specialists. The purpose of CAO's assessment is to: (1) clarify the issues and concerns raised by the complainant(s); (2) gather information on how other stakeholders see the situation; and (3) help stakeholders understand the recourse options available to them and determine whether they would like to pursue a collaborative solution through CAO's Dispute Resolution function, or whether the case should be reviewed by CAO's Compliance function. As per CAO's Operational Guidelines,⁸ the following steps are typically followed in response to a complaint that is received:

Step 1: **Acknowledgement** of receipt of the complaint.

Step 2: **Eligibility**: Determination of the complaint's eligibility for assessment under the mandate of the CAO (no more than 15 working days).

Step 3: **CAO assessment**: Assessing the issues and providing support to stakeholders in understanding and determining whether they would like to pursue a consensual solution through a collaborative process convened by CAO's Dispute Resolution function, or whether the case should be handled by CAO's Compliance function to review IFC's/MIGA's environmental and social due diligence. The assessment time can take up to a maximum of 120 working days.

Step 4: **Facilitating settlement**: If the parties choose to pursue a collaborative process, CAO's dispute-resolution function is initiated. The dispute-resolution process is typically based on or initiated by a Memorandum of Understanding and/or mutually agreed-upon ground rules between the parties. It may involve facilitation/mediation, joint fact finding, or other agreed resolution approaches leading to a settlement agreement or other mutually agreed and appropriate goals. The major objective of these types of problem-solving approaches will be to address the issues raised in the complaint, and any other significant issues relevant to the complaint that were identified during the assessment or the dispute-resolution process, in a way that is acceptable to the parties affected.⁹

OR

Compliance Appraisal/Investigation: If the parties opt for a Compliance process, CAO's Compliance function will initiate an appraisal of IFC's/MIGA's environmental and social due diligence of the project in question to determine whether a compliance investigation of IFC's/MIGA's performance related to the project is merited. The appraisal time can take up to a maximum of 45 working days. If an investigation is found to be merited, CAO Compliance will conduct an in-depth investigation into IFC's/MIGA's performance. An investigation report with any identified non-compliances will be made public, along with IFC's/MIGA's response.

Step 5: **Monitoring and Follow-up**

Step 6: **Conclusion/Case Closure**

⁸ For more details on the role and work of CAO, please refer to the full Operational Guidelines: http://www.cao-ombudsman.org/documents/CAOOperationalGuidelines_2013.pdf

⁹ Where stakeholders are unable to resolve the issues through a collaborative process within an agreed time frame, CAO Dispute Resolution will first seek to assist the stakeholders in breaking through impasse(s). If this is not possible, the Dispute Resolution team will inform the stakeholders, including IFC/MIGA staff, the President and Board of the World Bank Group, and the public, that CAO Dispute Resolution has closed the complaint and transferred it to CAO Compliance for appraisal.