



PARTICIPATION OF LOCAL COMMUNITY IN DECISION-MAKING PROCESS CONCERNING EXPLOITATION OF MINERAL RESOURCES

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RESOURCES

Social Justice Center

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Key Findings

- State policy and practice in the mining sector cannot ensure protection of the interests and rights of residents in the mining area;
- Mechanisms for participation and involvement of the local communities affected by mining activities in decision-making processes are extremely weak and cannot meet international standards. Namely, at the licensing stage, local communities are completely excluded from the formal decision-making processes, sometimes they are not informed at all, while in other cases, it is done in a fragmented and insufficient manner;
- Non-participation of local communities at the licensing stage, when important parameters of the planned activity such as the mining area, reserves, amount of investment to be undertaken are decided, violates the Aarhus Convention, which requires that participation of residents affected by the activity in decision-making processes must be ensured as far as the main parameters of the activity and environmental impact are concerned;
- Accordingly, the argument that the mechanisms provided for in the Environmental Impact Assessment (EIA) procedure are sufficient to ensure full participation is incorrect, especially considering that the first EIA procedure on mining activities was conducted only this year and there was no such precedent in Georgia;
- On the other hand, participatory mechanisms provided for in the Environmental Impact Assessment procedure, in particular, written submission of views and conduct of public hearings, are formalistic in practice and are not used by state agencies to ensure real and meaningful involvement of local community and to obtain their informed consent;
- The weakness of the Environmental Impact Assessment procedure was particularly evident in the process of assessing the planned extraction in the area inhabited by ethnic minorities, when representatives of relevant agencies and companies did not properly take into account the naturally existing language barrier and did not even ensure translation of the basic documentation;
- When making the final decision, state agencies ignore the position of the local community on the project and do not pay due attention to their social or environmental concerns.

Introduction

In Georgia, weak state supervision over the activities of private actors and neglect of public interest is often manifested in human rights violations and damage to the environment. Mining is not an exception in this regard. In the mining sector, both the issue of communication with and participation of the directly affected population at the decision-making stage, as well as the weakness of state control and monitoring of issued licenses and environmental decisions are problematic.

In the recent period, cases of resistance in different regions of Georgia show that the measures taken by the state for the purpose of community participation are ineffective and cannot ensure prevention of further conflicts. In addition, excluding local people from decision-making processes and non-consideration of their opinion grossly violates fundamental human rights and the principles of environmental democracy.

It is noteworthy that challenges related to participation on environmental issues intersect and expose many other problematic issues; On the one hand, a safe, healthy and sustainable environment is a prerequisite for the enjoyment of various rights and on the other hand, realization of rights such as access to information and participation is vital for the protection of the environment itself.¹

It should be noted that, naturally, problems in the sector are not unique to Georgia. In other countries as well, when making licensing decisions state agencies usually act with the motive of promoting economic development.² However, it should be taken into account that due to the nature of mineral exploitation, both the mining activity and its multifaceted effects, as well as income for the state in the form of taxes and fees, are spread over time. Therefore, due to the nature of extractive activities, a cautious and far-sighted decision-making process in line with the legal framework and institutional arrangements in force, is vital.

However, low-income countries with weak and fragile institutions face additional challenges in regulating extractive industries. Institutional weakness is compounded by issues of political expediency, which prioritizes short-term benefits for the ruling elite and connected commercial entities over the establishment of a regulatory system that protects the public interest in the long term.³

¹ Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, 24 January, 2018, A/HRC/37/59, para 2

² Addison, Tony, and Alan Roe (eds), *Extractive Industries: The Management of Resources as a Driver of Sustainable Development* (Oxford, 2018; online edn, Oxford Academic, 22 Nov. 2018), 245.

³ *Ibid*, 248.

1. State Policy and Data in Mineral Sector

According to the Constitution of Georgia, everyone has the right to live in a healthy environment, to enjoy the natural environment and public space.⁴

Mining activities with deep ecological impact directly interfere with the scope of the right to live in an environment safe for health. Accordingly, protection of the constitutional right requires that the extraction of minerals is regulated in accordance with the public interest - taking into account the significant social, economic and environmental impact of the activity.

The goal of the state policy in the field of mining should be to achieve real economic and social improvement in accordance with the principles of sustainable development. The specifics and "life cycle" of extractive activities should be taken into account during the legislative regulation. Mineral extraction consists of many stages, among which are exploration-research activities, discovery following the said geological study, extraction, which is preceded by the project developer's investment, generation of income, which should be followed by project closure, deposit conservation, and recultivation. Therefore, at the licensing stage, when making a decision, issues that may arise at all stages of the project's duration should be taken into account.⁵

It should be noted that state policy document as such is non-existent in the mineral sector; The process that started with the financial and technical support of the European Development and Reconstruction Bank a few years ago for the purpose of developing the policy resulted in the approval of the strategy by the government, without the Parliament discussing main aspects of the mineral policy in the country.⁶ According to available information, at the next stage of the mining reform, the relevant legislative framework should be revised and a mining code should be developed; At this point, it is unknown when the work on the code will be completed and when it will be available to the interested public.⁷

According to the legislation, mineral management is part of the state policy and its goal, alongside achievement of economic benefits, is also rational use of state resources as well as protection of minerals and the environment.⁸

State involvement in the mineral sector includes three components - accounting, licensing and control-supervision.⁹ To fulfill the first component of mineral management, there is a state accounting system.

⁴ Constitution of Georgia.

⁵ Ibid 246.

⁶ Green Alternative, „ Labyrinth of Planning in the Mineral Sector of Georgia”, August 2020

⁷ While working on the research, in order to get acquainted with the content of the draft code on Subsoil Use, we officially addressed the LEPL National Agency for Mineral Resources Agency and officially requested the mentioned document, however, according to the agency, "draft code to be prepared during the second phase of the reform is in the process of development, and therefore, at this stage, the agency is deprived of the opportunity to provide the working version of the said code" , Correspondence #22/162 of the LEPL National Agency for Mineral Resources Agency dated November 30, 2022.

⁸ Law of Georgia on Subsoil Use, article 22, para 1

⁹ Law of Georgia on Subsoil Use, article 21, para 3

The following types of information are recorded in the unified state fund: mineral exploration works, mineral deposits (their stocks and resources).¹⁰ The agency has drawn up a map of the deposits, which shows information about the mineral resources on the balance sheet, their location and volume.¹¹

It is significant that, according to the report on the current state of the sector prepared by the European Bank for Development and Reconstruction within the support of the mineral sector reform, the state does not have a common national-scale geological map, which would comprehensively reflect the mineral reserves of the country. However, there is a "cadastral map" which marks existing licenses.¹² The report notes that the collection, secure storage and access of geological data in Georgia, as well as the technical skills of data analysis in government agencies, are problematic and need improvement. According to the document, the absence of a sufficiently detailed geological map limits the possibilities of making decisions about the strategic development of resources.¹³

It should be noted that the existence of data and detailed information is important not only for the decision-making by the state agencies themselves, but also for ensuring real and meaningful community participation. The same issue is emphasized by the Aarhus Convention on "Access to Information on Environmental Matters, Public Participation in Decision-Making Processes and Access to Justice in Environmental Matters" (hereinafter, "Aarhus Convention"), where it is stated that the integration of environmental factors into the decision-making process requires that public agencies have accurate, comprehensive and up-to-date information.¹⁴

2. Participatory Mechanisms for Community Resident in the Mining Area

The Constitution of Georgia establishes that the right to participate in making the decisions related to environmental issues is to be guaranteed by law.¹⁵ In addition, the requirement of guaranteeing participation of the communities resident in the impacted area in the process of decision-making about the planned activities is directly stated in the Aarhus Convention¹⁶ and derives from other norms of international human rights law.

It should also be noted that ensuring participation of local communities should be of interest to state agencies acting in accordance with the public interest: it is accepted that taking into account opinions of the population impacted by the project when making environmental decisions increases public support

¹⁰ Law of Georgia on Subsoil Use, article 23, para 1

¹¹ See map of mineral and thermal resources: <https://bit.ly/3hgHAWz>.

¹² European Bank for Reconstruction and Development, Georgia Mining Sector Development Programme, Phase I, Policy and Strategy, Status Report, November, 2018, 8.

¹³ Ibid, 34.

¹⁴ Convention on Access to Information on Environmental Matters, Public Participation in Decision-Making Processes and Access to Justice in Environmental Matters, Preamble, para 16, at: <https://bit.ly/3VMQxNe>.

¹⁵ Constitution of Georgia, article 29, para 1.

¹⁶ Convention on Access to Information on Environmental Matters, Public Participation in Decision-Making Processes and Access to Justice in Environmental Matters, article 6 at: <https://bit.ly/3VMQxNe>.

for the project, promotes sustainable development and realization of the rights, which, in turn, depend on the existence of a healthy environment.¹⁷

UN Special Rapporteur on Human Rights and the Environment lists the factors necessary to ensure effective participation: an assessment of the environmental impact of a planned activity should be carried out at the earliest possible stage of the decision-making process, evaluation process should create real opportunities for public participation, alternatives to the implementation of the activity should be considered, assessment should address all potential impact, including cumulative impact that may result from interactions with other existing or planned projects, a written report shall be prepared that clearly explains and describes the impact of the activity, and the report and final decision shall be reviewable by an independent body.¹⁸

Participation of local communities in decision-making processes in the mineral sector and beyond, is extremely limited in Georgia which is caused by deficiency of the sector's regulatory legislation and as well as gaps in the enforcement process. Namely, when considering participation in the decision-making processes in the mineral sector, two main stages are relevant: issuance of a license for the subsoil use and the procedure for environmental impact assessment. Accordingly, the following chapters discuss participatory mechanisms in the said stages and assess their effectiveness.

2.1 Public Participation at the Licensing Stage

2.1.1. Issuance of Mineral Exploitation License through Auction

The license to use minerals is issued through an auction.¹⁹ Auction is conducted and a license is issued by the Licensing Department of the National Agency for Mineral Resources (hereinafter also referred to as the "Agency") under the Ministry of Economy and Sustainable Development of Georgia.

The basis for holding an auction for the license can be the application of the license seeker or the license issuer i.e. Agency decision.²⁰ The decision of the agency to auction a specific object or not is determined by the investment policy of the Ministry of Economy and Sustainable Development. For example, since

¹⁷ Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, 24 January, 2018, A/HRC/37/59, Framework principles on human rights and the environment, para 23.

¹⁸ Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, 24 January, 2018, A/HRC/37/59, Framework principles on human rights and the environment, para 20.

¹⁹ Except for two circumstances - extraction of underground mineral waters by water supply license holder for obtaining drinking water and extraction of mineral water (or extraction-exploration) for therapeutic mud or curative baths – procedures applicable for direct licensing apply (Law of Georgia on Licences and Permits, article 17¹, para 1).

²⁰ Law of Georgia on Licences and Permits, article 18, para 2.

2019, the Ministry of Economy and Sustainable Development has been implementing the project "100 investment offers for business", which among others includes mineral deposits.²¹

In cases where the basis for holding an auction is an application of a license seeker, the procedure includes the following stages: the license seeker submits an application to the agency for scheduling of an auction to obtain a license, indicating the type of resource, amount, location coordinates, as well as a validity period of the license.²² The next stage of the application requesting an auction to obtain a mineral exploitation license is the preparation of a geo-information package by the National Agency for Mineral Resources. The geoinformation package is a key document, the content of which depends on the next stage - auction. Geoinformation package should include the following components:

- Geological belonging, that is, mineral extraction within the territory indicated in the application – “outline of the optimal territory” intended for study;
- topographic map; and
- Information package, which together with the engineering-geological report contains quantitative, qualitative and temporal information on the use of minerals.²³

It should be noted that before announcing an auction for the issuance of a license, the National Agency for Mineral Resources submits for approval information about the auction to be announced to the Government of Georgia. The government then approves the initial auction price and license terms by decree, including, for example, the amount of investment to be made by the licensee.²⁴

According to the Law of Georgia "On Licenses and Permits", a license to use a specific resource is issued through an auction on the basis of undertaking the obligation to meet the norms and rules established for use while presenting the highest price. In addition, every license seeker who meets the license conditions established by law and undertakes to meet the requirements defined by the license issuer has the right to participate in the issuance of a license through an auction.

At the stage following the positive resolution of an issue, the law defines range of documents that the license seeker must submit in order to participate in an auction. Namely, the documents required for participation in the auction in order to obtain a license for extraction and exploration of minerals are those

²¹ LEPL National Agency for Mineral Resources, 100 investment offers for business <https://nam.gov.ge/?m=text&menu=131>.

²² Government Resolution 136 on Approval of Rules and Conditions for Issuing a Mining License, article 3, para 6, “b.a” subparagraph

²³ Government Resolution 136 on Approval of Rules and Conditions for Issuing a Mining License, article 3, para 7²

²⁴ For example, “through decree #1313 dated July 25, 2022, a mining license holder for the purpose of exploration and extraction of minerals (gold-polymetals) in the territory of Bolnisi and Marneuli municipalities (administrative units of Talaveri, Rachisubani, Nakhiduri, Kvemo Bolnisi, Kveshi, Mamkhuti, Shaumian) was obligated to invest no less than total amount of 12 million USD equivalent to GEL within 5 years since the entry into force of the license in order to conduct search and exploration works.

confirming identification of the subject and payment of the license fee,²⁵ as well as the receipt confirming an advance payment.²⁶

According to the European Bank for Development and Reconstruction, the legal framework that regulates transfer of mining rights on mineral resources is fragmented and incomprehensive. According to the current legislation, the license will be awarded to the highest bidder. Technical and other types of criteria as a prerequisite for the transfer of the license are not required. This process does not properly take into account the fact that mining for minerals are a non-renewable investment.²⁷

In addition, it is necessary to separately assess the question to what extent the publication of the announcement about the auction one month before the auction date ensures creation of fair and equal conditions for applicants and proper competition,²⁸ especially in cases when the auction is held based on the application of a specific license seeker, and thus, compared to other participants, the latter is already relatively prepared.

According to the legislation, candidates should have at least 15 days to receive announcements.²⁹ Information about the holding of an auction is published in the press, or in case of holding it in an electronic form - on the website WWW.EAUCION.GE. Information about the announcement of the auction should contain key details such as authority conducting the auction, object of the license, timeframes, license conditions, requirements for the use of the object and the criteria for identifying the winner.³⁰ Until the end of the process, the identity of the persons participating in the auction is not known to the public.³¹

The holder of the mineral exploration-extraction license is obliged to study mineral resources within the period established by the administrative body. This period should not exceed 5 years, however, based on the reasoned request of a license holder, this period may be extended (in total, this term should not exceed a ten-year period).³² The license holder submits exploration materials to the Agency for the purpose of approving extractable supplies.³³

It should be noted that the decision of the agency on licensing through auction is an administrative act in its content³⁴ and is made in a simple administrative procedure,³⁵ which does not allow the interested parties to express their opinions at the oral session.

²⁵ Law of Georgia on Licences and Permits, article 17, paragraph 3.

²⁶ Government Resolution 136 on Approval of Rules and Conditions for Issuing a Mining License, article 3, para 16, "d" subparagraph

²⁷ Ibid, 10.

²⁸ Law of Georgia on Licences and Permits, article, 18, para 9.

²⁹ Ibid, article 17, para 4.

³⁰ Ibid, article 18, para 10

³¹ Government Resolution 136 on Approval of Rules and Conditions for Issuing a Mining License, article 3, para 12.

³² Ibid, article 7, para 1, subparagraph "h"

³³ Ibid, article 7, para 1, subparagraph "h"

³⁴ Law of Georgia on Licences and Permits, article 18, para 3.

³⁵ Law of Georgia on Licences and Permits, article 8.

As it transpires from the public information available to us, in practice the National Agency for Mineral Resources uses the method of requesting written opinions and positions from various competent agencies and local self-government bodies. Namely, after receiving the auction application from the interested party, the agency applies to administrative bodies such as LEPL National Agency of State Property, LEPL National Agency of Forestry, National Agency for Cultural Heritage Preservation, and local municipalities to obtain their position within their competence.

Undoubtedly, the decision to license extraction of minerals is a complex and multi-dimensional issue and requires balancing of many interrelated circumstances. Accordingly, the question arises as to what extent the agency's individual agreement with various agencies in the manner described above enables consideration of all factors and to what extent the agency should have the competence, expertise and authority for such balancing, especially considering that the draft decree forwarded to the cabinet session already entails specific parameters and indicators.

The Problem of Lacking Formal Mechanisms for Local Community Participation

It should be noted that the legislation regulating mineral extraction in Georgia does not provide for special mechanisms for public participation whatsoever. The legislation does not take into account the fact that mineral extraction has a significant impact not only on the environment, but also significantly changes the living environment for the communities. Therefore, the decision to issue a license directly affects the people who live in the vicinity of the planned extraction. Nevertheless, a license is issued in such a manner that the locals may not be aware of it at any stage, especially when the planned mining is not subject to an environmental impact assessment procedure.

This is so despite the requirement of Article 6 of the Aarhus Convention that “the public concerned shall be informed, either by public notice or individually as appropriate, early in an environmental decision-making procedure, and in an adequate, timely and effective manner.” Special attention should be paid to the "effectiveness" of notification. State agencies should make efforts to ensure that the message not only reaches the addressee, but also that the latter understands its content and meaning, and participation in the decision-making process is promoted.

According to a report prepared by the European Bank for Development and Reconstruction, participation of villages affected by extractive activities is limited to random, word-of-mouth communication.³⁶

It is noteworthy that despite the examples and experience of resistance to mining activities, in August this year, the license for exploration and extraction of gold-polymetals in Kvemo Kartli region was issued in such a manner that the public opinion was not obtained this time either. Regarding the above-mentioned license, we asked the Agency for Mineral Resources whether consultations/public meetings with the communities living in the respective villages preceded the issuance of the mineral exploration-mining

³⁶ European Bank for Reconstruction and Development, Georgia Mining Sector Development Programme, Phase I, Policy and Strategy, Status Report, November, 2018, 66.

license. In the response letter of the agency, it was indicated that since the license area falls within the borders of the municipalities of Bolnisi and Marneuli, the agency wrote to the mayors' offices of the said municipalities and asked them to present their position, to which they replied by stating that they considered it appropriate to issue a license and accordingly, "the license-order is issued taking into account the position of the municipality (the municipality's town hall expresses the interests of the population).³⁷ It transpires from this that the agency considers receipt of an official position from the municipality mayors' offices as a way to take into account the opinion and interests of the population.

It is also paradoxical that part of the licenses issued by the agency stipulates that the mining company must "together with the representative of the relevant municipalities inform the local community about the work to be carried out before resuming it".³⁸ In this situation, naturally, the license has already been issued, the decision has been made and the local community is informed only after.

It should be noted that, similar to the exploitation of hydro resources, in case of mineral extraction, the state bodies may argue that public participation in the decision-making process will be ensured within the framework of the project's environmental impact assessment (hereinafter, also "EIA") procedure and, thus, the issuance of the license without public involvement does not pose a problem. Precisely, the next chapter will discuss how valid this argument is and whether the EIA procedure conducted after issuing the license, taking into account all the accompanying circumstances, actually ensures the real and meaningful participation of local communities.

2.2. Ensuring Public Participation through the Mechanism of Environmental Impact Assessment

First of all, it should be clarified that the EIA procedure envisaged in the Environmental Assessment Code of Georgia entails identification and study of the possible impact on the environment by those planned activities that may have a significant impact on the environment. Environmental impact itself is defined by the Code as any impact on the environment caused by the implementation of activities, which may include impact on the following factors: human health and safety, biodiversity and its components, water, air, soil, land, climate, landscape and protected areas. Environmental impact can also extend to cultural heritage or socio-economic factors.³⁹

The activities that are subject to the formalized procedure of environmental impact assessment provided for by the law are listed in the annexes of the Code. It should be clarified that among the activities listed

³⁷ Public information provided in the correspondence #22/168 of LEPL National Agency for Mineral Resources dated December 13, 2022

³⁸ See license #60 of September 27, 2022 issued by LEPL National Agency for Mineral Resources – Order on issuing a license for exploration-extraction of minerals to Ltd Goldsept Kartli (ID 404638317) "I" paragraph; Also, Order #898/r of the Agency dated July 9, 2021 on issuing a license for exploration-extraction of minerals (Magnanum) to Ltd "technology 2021"

³⁹ Environmental Assessment Code of Georgia, article 3 at: <https://bit.ly/3hvZ881>.

in the first annex of the Code and automatically subject to the EIA procedure, the following part is relevant for mineral extraction:

- mining of minerals by open pit method, if the mining area is more than 25 ha; However, according to the change to be implemented from January 1, 2023, the set benchmark is reduced and mining activities with an area exceeding 10 ha will be subject to EIA.⁴⁰

As for the activities listed in the second annex of the Code, they will be subject to EIA if the need for environmental impact assessment is determined based on the screening. Among the activities listed in the second annex, the following part is relevant for mineral extraction:

- Open-pit mining of peat or solid minerals (except sand-gravel) (if the mining area is more than 10 ha). The change to be implemented from 2023 will affect this provision, but only as regards solid minerals, and the extraction area of more than 5 ha will be subject to screening.⁴¹

The Code stipulates the obligation of the National Environment Agency to inform the public about the decision to be made in the most accessible ways. The agency shall determine the "scope of necessary information" and provide access to it both in physical and electronic forms.⁴² Thus, the environmental impact assessment report drawn up by those implementing the planned activity is published on the agency's website and the agency is given a deadline for submitting opinions on them. The invitation for public comment should be preceded by publication of the necessary data (subject under consideration, need for access to documentation, means of participation and submitting opinions).⁴³

The following subsections discuss why the above procedures are not sufficient to ensure real participation and which elements of the current system do not comply with the requirements of international human rights law.

2.2.1. Licensing prior to Assessing Environmental Impact of the Planned Activity

As noted, Article 6 of the Aarhus Convention requires that the interested public be adequately, timely and effectively informed through public or individual notification (taking into account the circumstances) at the initial stage of the environmental decision-making processes. As a rule, in Georgia, the obligation to participate defined in Article 6 is interpreted as part of the environmental impact assessment procedure and competent agencies often argue that making various decisions in advance is not problematic, because community participation will be ensured at the next, EIA stage.

In fact, equating of the participation procedure under the Aarhus Convention with EIA in no way derives from the Convention itself. The Convention's Implementation Guide explicitly states that, although it may

⁴⁰ Ibid, annex 1, para 26.

⁴¹ Environmental Assessment Code of Georgia, annex II, article 2, paragraph 2.1.

⁴² Ibid, article 33, para 2.

⁴³ Ibid, article 32, para 2.

seem so at first glance, "EIA is not itself a process concerning a permit or transfer of rights".⁴⁴ The EIA procedure should be understood as a mechanism for assessing possible environmental impact, which can be integrated into the process of making a broader decision about the planned activity, for example, issuing a license.

In practice, such arrangements for the transfer of rights to mineral extraction, when licensing precedes the environmental impact assessment procedure, on the one hand, limits the characteristics of the planned activity with specific parameters (already set out in the license) and, on the other hand, reduces the possibilities of considering community views.

According to one of the reports of the Convention's supervisory body - the Compliance Committee, it is true that it is not necessary to ensure community participation in all decisions provided for by national legislation, however, limiting participation to only one decision will not necessarily be sufficient.

According to the committee, the said issue should be decided taking into account the local context and legal force of each decision. In cases where national law provides for several different decisions, the Committee applies the following "significance" test to determine compliance with the Convention:

The question consists in the following: Does the decision (or decisions) within which public participation defined in Article 6 is ensured, fully cover all the parameters of the planned activity and the core environmental impacts? In the event that participation is ensured for one of the decisions, while there are other decisions affecting the main parameters of the activity and environmental impact, which are made without full public participation, it is considered that the requirements of the Convention have not been met.⁴⁵

In case of Georgia, it is clear that a number of issues affecting environment that are no longer subject to consideration and/or simply do not change through the EIA procedure are actually resolved at the licensing stage. Namely, when a license is issued, mining area is already determined. For example, in the environmental impact assessment report of the Mushevani 2 deposit, the RMG company stated that "according to the current law, a license is issued for the extraction of minerals, which strictly defines the mining perimeter of the mineral deposit, and violation of the defined perimeter is not allowed."⁴⁶ In other words, the company ruled out the possibility of changing the extraction area stipulated by the license within the framework of the EIA procedure.

2.2.2. Limiting Possible Alternatives due to a Pre-judgement

Prior issuance of mineral extraction license also limits the consideration of alternatives, which is directly required by the "Environmental Assessment Code" of Georgia.

⁴⁴ Ibid, 127.

⁴⁵ Report of the 3rd Meeting of the Parties : Economic Commission for Europe, Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, 3rd meeting, 2008, 7 ECE/MP.PP/2008/5, para 57.

⁴⁶ Environment Impact Assessment report on Mushevani 2 gold-copper extraction project of JSC „RMG Copper” at <https://nea.gov.ge/Ge/GZSH/177>.

Namely, according to Article 39 of the Law of Georgia "On Subsoil Use", it is prohibited to design and build settlements, industrial complexes, communications, agricultural and other facilities, until it is confirmed that there are no mineral deposits in the area of future development.

The said norm is interpreted in practice in such a way that if a license has already been issued, discussion of alternative mining activities is limited, which is an essential part of the environmental impact assessment procedure, both according to the environmental legislation of Georgia and international norms. However, as already mentioned, the public has the right to get involved early at the stage when all alternatives are considered, including the possibility of rejecting the activity. However, in practice, this possibility is extremely limited, among other things, due to the problematic interpretation of the above-mentioned norm.

For example, during the environmental impact assessment of the Mushevani 2 mine in Bolnisi municipality, RMG indicated that due to the aforementioned provision of the Law on Subsoil Use "in case of non-implementation of the activity [zero alternative], the possibility of developing the territory of Mushevani 2 gold-copper deposit for other purposes [was] practically limited"⁴⁷ and that "the holder of the mineral extraction license, in accordance with the terms of the license, has agreed on a mineral exploitation plan with the relevant agency, and according to the amount of minerals specified in the said plan, the mineral exploitation tax established by law is charged. Refusal to extract minerals, i.e. zero alternative, means that the license holder refuses to perform the activities provided for in the license, which is contrary to the terms of the license and will lead to a fine."⁴⁸

If such an approach is accepted, then a positive decision about the operation of a mine is made immediately and public opinion has no importance. It is true that the National Environment Agency pointed out to the company that in the submitted EIA report, the area of the enterprise's location was not clearly defined and properly justified,⁴⁹ however, in the documentation presented in response, the company again did not consider an alternative deposit location with reference to the mining regulatory

⁴⁷ Information submitted in the correspondence #59.136 of "RMG Gold" dated September 12, 2022 regarding matters/comments indicated by LEPL National Environmental Agency in the correspondence N21/4232 dated August 8, 2022, at: <https://nea.gov.ge/Ge/GZSH/770>.

⁴⁸ Environment Impact Assessment report on Mushevani 2 gold-copper extraction project of JSC „RMG Copper”, 12 at <https://nea.gov.ge/Ge/GZSH/177>. Such an interpretation made by the company was critically assessed by "Green Alternative".

"Clearly, such an approach to the consideration of zero alternative is unjustified. It is mandatory to evaluate the zero alternative along with various alternatives of the project and consider it when selecting the alternative. The fact that a license has already been issued in the project area and the license holder is subject to a fee for use of minerals does not affect the necessity of an environmental impact assessment for a mineral extraction project. According to Georgian legislation, environmental impact assessment of the mineral extraction project is carried out by a license holder after the license is issued; However, clearly, existence of a license does not necessarily mean that the environmental decision must be positive, and that an alternative of non-implementation shall not be thoroughly studied and considered during the evaluation process" see remarks and comments of Green Alternative "Regarding EIA report on open pit mining (Mushevani 2 gold-copper extraction) project of JSC „RMG Copper" in Bolnisi municipality" July 28, 2022.

⁴⁹ Correspondence N21/4232 of LEPL National Environmental Agency dated August 8, 2022 at: <https://nea.gov.ge/Ge/GZSH/546>.

legislation,⁵⁰ while the agency seems to have accepted the argument and issued an environmental decision.⁵¹

Accordingly, practice shows that dividing the decision-making process into stages of licensing and environmental impact assessment leads to a number of problems in terms of public participation and consideration of alternatives.

2.2.3. Possibilities for Integrating Environmental Impact Assessment in the Main Decision

As noted above, on the one hand, the EIA procedure is an important mechanism for assessing appropriateness of activities, and on the other hand, it plays the role of preventing conflicts and complications related to the project. In this sense, it is noteworthy that in some systems environmental impact assessment procedure is considered part of the main decision (e.g. license).

As is known, on the basis of the Association Agreement, Georgia undertook the obligation to bring its legislation closer to EU law in a number of areas, including the environmental direction. Annex 26 of the Agreement envisages the obligation to implement the EU Environmental Impact Assessment Directive at the national level.⁵²

Article 2 of the EU Environmental Impact Assessment Directive obliges Member States that projects that due to their nature, scale and location may have a significant impact on the environment must be subject to an environmental impact assessment procedure before a "development consent" is issued. The same article also indicates that the EIA procedure can be integrated into existing "development consent" procedures.⁵³

On the other hand, EU Industrial Emissions Directive requires that early and effective participation be ensured before a permit is issued or renewed.⁵⁴

Accordingly, a systematic interpretation of the provisions of the above-mentioned EU directives shows that public participation should be ensured both at the early stage when the activity is approved and the

⁵⁰ Information submitted in the correspondence #59.136 of "RMG Gold" dated September 12, 2022 regarding matters/comments indicated by LEPL National Environmental Agency in the correspondence N21/4232 dated August 8, 2022, at: <https://nea.gov.ge/Ge/GZSH/770>.

⁵¹ Order N430/s issued by LEPL National Environment Agency dated November 1, 2022 "regarding environmental decision on open pit mining (Mushevani 2 gold-copper extraction) by JSC „RMG Copper” in Bolnisi municipality": <https://nea.gov.ge/uploads/GZSH/1015>.

⁵² 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, June 27, 2014 at: <https://bit.ly/3yFoyD5>.

⁵³ Directive 2014/52/EU of the European Parliament and of the Council of 16 April 2014 amending Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment Text with EEA relevance, at: <https://bit.ly/3Flix2Qk/>.

⁵⁴ Directive 2010/75/EU of the European Parliament and of the Council of 24 November 2010 on industrial emissions (integrated pollution prevention and control) (Recast) at <https://bit.ly/3UPe3bd>.

main parameters, including scale and location, are determined, as well as, at later stages, when additional issues are discussed before the exact technology and data are approved.⁵⁵

Furthermore, in Germany, the EIA assessment is "an integrated part of the main licensing decision and as a procedural tool is included in the decision-making process regulated by the relevant sectoral legislation".⁵⁶ A similar practice applies in the United States of America, where integration of EIA assessment into the planning process shall be undertaken at the earliest possible stage.⁵⁷

It is noteworthy that the argument of the Georgian state, as stated, presumably lies in the fact that despite license being issued in advance, as extraction is subject to the EIA procedure and the activities cannot resume before the environmental decision is issued, Georgia does not violate its international obligations. Namely, according to the "Environmental Assessment Code", if the activities covered by the exploitation license are subject to EIA or screening in accordance with this Code, this license can be issued without an environmental decision, provided that the extraction of minerals will be possible only after the environmental decision is made.

At first glance, this norm should ensure the superiority of the EIA procedure over the previously issued license. However, as it transpires, in reality, environmental impact assessment application is submitted to the Ministry for activities major scope of which is already specified and decided by the National Agency for Mineral Resources at the licensing stage. Accordingly, the National Environment Agency only evaluates the environmental impact of the mentioned activity in such a way that modification of the agreed parameters is practically excluded. Also, while international instruments require participation at an early stage, when all alternatives are considered and possibilities are open, community participation taking place only within the framework of the EIA procedure grossly violates both the Aarhus Convention and fundamental rights of local communities.

In addition, it is equally important that extraction of minerals is subject to EIA procedure only in certain cases (according to the current regulation - when the area subject to extraction is 25 ha or more). Besides, environmental impact assessment of mining was carried out in Georgia for the first time only in 2022 at the Mushevani 2 deposit and until now, other activities were carried out without applying this mechanism at all.

Public participation at an early stage, when alternatives are open, is also important because the affected communities need to be in the position to influence the final decision.⁵⁸

⁵⁵ United Nations Economic Commission for Europe, Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention), An Implementation Guide, Second Edition, 2014, 130 at <https://bit.ly/3Y8IL1P>.

⁵⁶ Koba Khalichava, Environmental Law, 2018, 191.

⁵⁷ Ibid.

⁵⁸ Convention on Access to Information on Environmental Matters, Public Participation in Decision-Making Processes and Access to Justice in Environmental Matters, article 6, para 4 at: <https://bit.ly/3VMQxNe>.

2.2.4. Possibilities for Influencing the Final Decision

Public participation requires much more than upholding of procedural rules. It should mean real interaction of the public agencies with members of the public and openness to their opinions. Public participation should ensure a certain correlation between the opinions expressed within the participation procedure and the content of the decision. In other words, public opinion should be able to have a tangible impact on the content of the decision. In cases where it is possible to identify impact of such influence on the final decision, it is clear that public agencies have taken public opinion into account.⁵⁹

On the one hand, the standard of early participation, does not prohibit public agencies from taking various steps, collecting and processing information, developing an initial position regarding the planned activity, however, on the other hand, measures that limit possible solutions will be considered to violate the Convention.⁶⁰ For example, although conclusion of an agreement between a private company and a state agency may not formally be considered as an "environmental decision", it narrows down the list of alternatives and thus, is problematic from the perspective of public participation. It should be noted that conclusion of agreements/memorandums on energy investment projects in Georgia precisely follows such a practice. Namely, similar to mining, here as well standards of the EIA procedure are formally respected and the right to build a hydroelectric power plant or other type of generation facility will be given to the company only if it obtains an environmental decision, however, in reality, capacity of the power plant, output, river marks and other parameters are determined in the agreement approved by the government in advance and the application for the decision of the National Environment Agency is submitted within that framework. We face a similar problem in case of mineral resources, namely, license for the use of mineral resources in this case issued by the National Agency for Mineral Resources comes much before the start of the EIA procedure, and thus, the scope of the public influence on the final decision is limited.

Conclusion

Thus, the legislation regulating public participation in decision-making processes in the mineral sector in Georgia, as well as its implementation practice, are flawed and cannot ensure protection of the community rights and prevention of social conflicts.

One of the goals of community participation is to achieve optimal results in the process of decision-making and policy development. States may be tempted to start implementing the decision speedily as, at first glance, such an approach may seem effective, but in reality, examples show that many of projects' problematic factors and concerns are exposed as a result of public participation. Consequently, making a decision hastily and excluding proper participation often leads to costly mistakes, which was also shown by the resistance to various large-scale projects in Georgia.

⁵⁹ United Nations Economic Commission for Europe, Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention), An Implementation Guide, Second Edition, 2014, 120, at <https://bit.ly/3Y8IL1P>.

⁶⁰ Ibid, 144.