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Azem Rexhaj* ■ Justina Shiroka-Pula**

MINING LEGISLATION AND REGULATORY SETUP FOR MINERAL RESOURCE MANAGEMENT - REVIEW AND EVIDENCE FROM THE TRANSITION ECONOMY OF KOSOVO

Abstract

Mining Sector in Kosovo is of crucial importance for the economic development of the country. Since 1999 it has been considered as one of the main areas that would attract foreign investments and thus improve the economy of a young country emerging from the conflict of 1998-1999. The regulation of the mining sector began with the UNMIK Regulation 2005/3 on Mines and Minerals and 2005/2 on Establishment of Independent Commission for Mines and Minerals. Mining regulations and regulatory arrangement in Kosovo were designed in line with James Otto's ideology and with regard to investors' confidence established an independent agency as the Regulator. The principles used in designing the mining regulatory arrangement were to find the best way of attracting foreign investors. Different laws and papers amended, including "Mineral Title Management and Regulatory Procedures". Since 2005, the mining legislation has

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* **Azem Rexhaj** is currently doctor candidate in University of Prishtina, Republic of Kosovo. Corrently he is working as Board member of Independent Commission for Mines and Minerals and lecturer in Univercity College UBT in Priishtina and International management College "Globus"; e-mail: azemrexhaj@gmail.com

** **Justina Shiroka - Pula** is corrently member of Acedemic Siencies in Republic of Kosovo and lecturer in the Economic Faculty "Hasan Prishtina" in Prishtina University. She was lecturer in several Universities in Kosovo, parlament member, Minister of Energy and Minerals, etc.; e-mail: justinapula@hotmail.com

been amended and supplemented several times in order to follow the needs of the sector, private entities as well as to preserve the public interest. Parallel with its crucial importance the mining sector is one of the most complex sectors. Its complex nature involves many different legislations and institutions followed by few challenges in this sector since 1999. The purpose of this paper is to outline the existing legal and institutional framework of the mining sector. Furthermore, this paper aims at addressing main legal and institutional challenges that the mining sector is facing. Finally, the paper includes the conclusions and few recommendations for improving the legal and institutional framework governing the mining sector.

Keywords: Mineral resources, mining legislation, mining licence, exploitation, exploitation, mining strategy, environment. EU Directive, consent.

1. INTRODUCTION

Regulation of the mining sector in the Republic of Kosovo is of particular importance as it is seen as one of the sectors with highest potential for the economic development of the country and attracting foreign investments.

Regulation of this sector is an important and complex task to. Among other things, the importance of the legal and institutional framework is essential. Existing legal and institutional framework capacities play a key role in the development of this sector towards a friendly trend towards the private sector and foreign investors. During the analysis of the existing situation of the legal and institutional framework of the mining sector in Kosovo it is important to identify the stagnation and the problems so that they can be addressed in the future in order to improve the regulation of this sector.

The importance of this sector requires review and analysis of some other sectors as the mining sector is associated with many other areas such as spatial conflict issues (infrastructure, settlements, blocking criteria, etc.) in general.

In this context, special attention should be paid to the analysis of property issues and their connection with the mining sector, respectively with the rights and obligations of the parties in the mining sector and possible difficulties that may pose different limitations in terms of ownership for the mining sector.

Taking into account the above, this paper focuses mainly the legal issues that are of practical importance to the Independent Commission for Mines and Minerals, as well as to other public authorities with competence in the mining. A special discussion will be devoted to the analysis of EU law (EU Acquis) relevant to the mining sector in Kosovo.

The basic law the following review and analysis will be based on is Law no. 03/L-163 on Mines and Minerals, as amended by Law no. 04/L-158. However, laws that regulate certain sectors related to the mining sector are tackled in the relevant context.

2. INSTITUTIONAL STRUCTURE OF MINING SECTOR

Kosovo mining sector is governed by several public institutions with various functions and responsibilities. From the analysis of the institutional framework as below, a functional division of responsibilities between the institutions involved in the exercise of competences in the mining sector can be observed. Under this functional division,

regulatory and strategic/planning responsibilities are mainly focused on the Government and the Ministry of Economic Development, while administrative and supervisory responsibilities are principally deployed at the Independent Commission for Mines and Minerals. With this, it can be said that two independent pillars, the one of the executive and the one of regulatory, govern the mining sector and both are linked to the Kosovo Assembly, which are reporting legally and politically.

2.1. Independent Commission for Mines and Minerals

The Independent Commission for Mines and Minerals (ICMM) is an independent agency that regulates mining activities in accordance with the law and the mining strategy. Its duty is to act in the public interest and to exercise its powers and functions independently. The ICMM reports to the Kosovo Assembly for its work.

In addition, the status of ICMM as an independent agency is protected by the Constitution of the Republic of Kosovo. According to the Constitution, independent agencies of the Republic of Kosovo are institutions established by the Assembly, based on the respective laws, which regulate their establishment, functioning and competencies. Independent agencies perform their functions independently from any other authority in the Republic of Kosovo. Independent agencies have their own budget, administered independently, in accordance with the law on Public Finance. Each body, institution or other authority exercising legitimate power in the Republic of Kosovo is obliged to cooperate and to respond to the requests of independent agencies in the exercise of their legal powers, in accordance with the law. However, ICMM is not specifically mentioned in the Constitution as an independent agency, such as, for example, the Independent Media Commission, the Central Bank of Kosovo or the Ombudsman, which enjoy constitutional guarantees (i.e., to abolish them, the Constitution must be amended), but it is only legally established.

Based on the law, ICMM is competent for:

- exploration and regular mining of mineral resources in Kosovo and optimum utilization of mineral resources in all mineral activities in accordance with the law on Mines and Minerals and Mining Strategy; and compliance of mining operations with the law, sub-legal acts issued in accordance with the law and the terms and conditions of licenses and permits issued by the ICMM, or consents issued as a prerequisite for approval by ICMM, in accordance with the law;
- issuing, transferring, renewing, suspending and revoking licenses and permits;
- establishment and maintenance of a mining cadaster and a GIS database containing geographic, geological and other relevant economic data as well as all existing mineral and mining right titles;
- Issuing regulation on ICMM internal organization and activities.

In addition, ICMM provides technical assistance to the Government on all matters relating to mines and minerals in Kosovo, if requested by the Government. The ICMM is chaired by a Board ("the Board") consisting of five (5) members. All ICMM powers are exercised by the Board.

ICMM is funded by the budget of the Republic of Kosovo. Revenues collected by ICMM in the form of license fees and other fees as well as funds provided by donors are dedicated ICMM revenues. Mineral rent is not a dedicated revenue, but it is a total

revenue of the Republic of Kosovo which is transferred to the budget of the Republic of Kosovo for economic development.

2.2. Mining Inspectorate

The Mining Inspectorate enjoys a special role within the ICMM regulatory component. The Mining Inspectorate functions as a Department within ICMM. Inspectors of the Mining Inspectorate operate independently and in accordance with the law. The Mining Inspectorate is led by the Chief Inspector, who is appointed by the ICMM Board in accordance with the applicable law on civil service. The Chief Inspector reports to the ICMM Board, in addition to the annual report, which he submits to the Minister of Economic Development, ICMM and the Government.

Mining Inspectors are competent to inspect the mining activities, exploration and special activities of any person to determine:

- if the person performing those activities possesses a license or permit granted by the ICMM;
- if the person possesses a license or permit to determine whether the activities are being carried out in accordance with the relevant license or permit and the relevant safety and environmental regulations issued by the Minister in accordance with the law.

2.3. Ministry of Economic Development

Based on the applicable legislation, the ministry responsible for the mining sector is the Ministry of Economic Development (Ministry). The Ministry is responsible for:

- preparation and monitoring the legislation for the mining sector;
- preparation and implementation of the mining strategy;
- cooperation in preparing and implementing the international agreements in the mining sector;
- cooperation with the finance ministry in order to develop a favorable environment for the development of investments in the mining sector;
- collecting, archiving, systematizing, processing and making geoscientific data available to Kosovo's geological resources;
- cooperation with other authorities regarding mining and mineral matters for the exercise of the functions and responsibilities set out in the legislation in force.

In addition to these general competencies related to the mining sector, the Law on Mines and Minerals also assigns special powers to the Ministry. Accordingly, the Ministry is responsible for:

- the preparation and issuance of the proposal of a mining royalty list that the licensee has to pay for the exercise of licensed mineral resource mining activities in Kosovo;
- preparation and submission of a mining strategy for approval by the Government;
- review the mining strategy and its implementation, and whenever necessary and reasonable makes recommendations to the Government and Assembly regarding its change or implementation;
- providing a written explanation to the Government that the implementation of a spatial or urban plan will significantly interfere with the coordinated and sustainable exploration of mineral resources in Kosovo;

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- review, approval and announcement of the Mineral Resource Management Plan;
 - the promulgation and publication of regulations on mining safety and environmental protection;
 - issuing a sub-legal act for specific types of crystalline structures that the licensees for exploration and mining are obliged to collect, preserve and submit to the museum.

2.4. Kosovo Geological Survey

Pursuant to the Law no. 04/L-232 Kosovo Geological Survey was established within the Ministry of Economic Development as an agency within that Ministry. Geological Survey performs the following activities:

- Geological researches of interest to the Republic of Kosovo;
- Geological and geochemical study of the territory of Kosovo and compilation of geological maps of different scales, filling in existing maps with new information for the territory of Kosovo;
- Research and evaluation of mineral resources, groundwater, mineral and geothermal waters;
- Conducting geological-engineering research;
- Provides ICMC's Mining Cadaster GIS and the updated data from the state database of geological data, geological archives and other geological data;
- Cooperates with other responsible institutions in drafting the Mining Strategy;
- Provides objective and impartial analysis for public authorities and private sector organizations, within the scope of its expertise;
- Explores and promotes activities aimed at reducing the pollution of geo-environment;
- Creates, maintains, enriches and expands the state base of geological data, as well as a geological archive;
- Performing qualified services such as expertise, analysis, counseling, monitoring for purposes and field determined by law;
- Conducts ongoing studies and monitoring of seismic activity;
- Designs research programs and projects for other public or private institutions, both within and outside the country, as well as with associations, foundations for the purposes and area determined by this law;
- Submits to the Minister an annual report on the research activity developed, this report after endorsement is made public;
- Manages the laboratory and conducts professional laboratory analyzes for geological research;
- Conducts surveys of geometries;
- Proposes sub-legal acts for the development of the Geology Sector.

2.5. Government of the Republic of Kosovo

The Government of the Republic of Kosovo has special powers in the mining field, as follows:

- Defines an area in Kosovo as a "Special Interest Area";

- Decides not to apply the competitive bidding procedure for a license for an energy mineral if, for reasons directly related to the need to ensure the security of energy supply or attracting significant direct investments in Kosovo, the PPP Committee recommends to the Government making the decision in question with which it finds that there is a public interest in the issuance of this license to a specific investor;
- Perform expropriation of the surface rights for the needs of mining activities;
- Makes decisions confirming that there are strong and objective reasons to conclude that the issuance of a license or permit in the public interest for the exercise of some or all of its activities is in the general public interest of Kosovo;
- Approves the proposal for the list of mining royalty and submits it to the Assembly for adoption;
- Receives applications for vacancies at the ICMM Board, establishes ad-hoc committee for the selection of two candidates and submits the names of candidates proposed by the ad-hoc committee to the Assembly of Kosovo;
- Reviews, approves and submits the Mining Strategy to the Assembly of Kosovo;
- Prior to the announcement of the Mining Strategy by the Assembly, issues consent to public authorities for the approval or implementation of a spatial or urban plan.

2.6. Assembly of Republic of Kosovo

The Assembly of Kosovo has the following competencies in the field of mining:

- Adopts the list of mining royalty;
- Appoints and dismisses members of the ICMM Board;
- Determines the salaries of Board Members and the ICMM Director;
- Adopts the mining strategy.

3. MINING STRATEGY

The basic legal framework for the management of mineral resources plan is defined in the Law on Mines and Minerals (hereinafter "LMM"). The Independent Commission for Mines and Minerals (ICMM) is obliged to prepare and submit to the Ministry of Economic Development ("Ministry") the Draft Mining Resources Management Plan for the year within the last three months of each calendar year. Within 30 days from the date of acceptance, the Ministry shall review, amend, if it deems fit, approve and publish the Mining Resources Management Plan. The ICMM is obliged to implement the plan and, if necessary, make recommendations to the Ministry for its modification or implementation. The Mineral Resource Management Plan should be in accordance with the Kosovo Mining Strategy. The Ministry, in cooperation with the ICMM and the Kosovo Geological Survey, prepares and submits for approval to the Government a Mining Strategy draft that outlines the goals and implementation plan recommended by the Ministry for Coordinated and Sustainable Mineral Resource and Mining in Kosovo. The Plan has to take into account the specific characteristics and conditions for each region, the resources of certain mineral resources as well as the conditions for exploration and commercial and industrial use.

The Government approves the Mining Strategy and submits it to the Kosovo Assembly for consideration and approval. The Ministry is obliged every three (3) years to review the Mining Strategy and its' implementation, and whenever it is necessary and reasonable it makes recommendations to the Government and the Assembly regarding its amendment or implementation.

Based on the Mining Strategy, the Ministry in cooperation with the Kosovo Geological Survey and the ICMM prepares, whereas the Government of the Republic of Kosovo approves the Program for the Implementation of the Mining Strategy for a period of at least three (3) years. The Ministry is responsible for monitoring and implementing this program. The Mining Strategy Implementation Program sets out the measures and activities for implementation, including forecasts of expenditures and expected sources of funding, expected time of implementation, and defines the entities responsible for implementation.

All relevant institutions in the mining sector are obliged to abide by the obligations deriving from the Mining Strategy and the Mining Strategy Implementation Program. During the preparation and implementation of spatial and urban planning, all public authorities should take full account and comply with the Mining Strategy promulgated by the Assembly. Mining Strategy has priority over any spatial or urban planning that is not in accordance with it. No public authority can approve or implement any spatial or urban plan without the consent of the Ministry. Prior to granting such consent, the Ministry should consult with the ICMM. The Ministry is obliged to grant the consent in question unless the ICMM submits to the Ministry a written explanation that clearly indicates that the implementation of such a plan significantly interferes with the coordinated and sustainable exploration of mineral resources in Kosovo.

Consultations with the private sector have identified as a priority the need for clear communication between the ICMM, the Ministry of Finance, the Ministry of Environment and Spatial Planning and Municipalities in relation to designated areas for exploration and mining, in order to avoid constructions in these areas. The mechanism described above, namely that no public authority may adopt and implement any spatial or urban plan without the consent of the Ministry, after consultation with the ICMM, is to be implemented in practice.

4. MINING LICENSES AND PERMITS

Mining activities, including exploration, mining and processing of mineral resources, are regulated activities and their exercise requires the respective license or permit issued by ICMM. The types of licenses and permits issued by the ICMM are as follows:

- Exploration License
- Mining Rights License
- Mining License
- Artisanal Mining License
- License / Permit for Public Interest
- Spatial Operation permits

The exploration license gives the licensee the exclusive right to conduct the specified exploration activities. The Mining Rights License gives its holder the right to submit a license for a mining resource. This license is issued if the commercial development of the relevant mineral resource is currently not profitable but can be done within five (5) years. Under the mining license, its' holder has the exclusive right to perform certain mining operations and related exploration activities, including (i) taking all reasonable measures on or under the surface in order to implement the program of (iii) the sale or dispose of in another form of extracted minerals, and (iv) the disposal of machinery, objects and buildings necessary for the purpose of mining, transportation or processing of mined minerals, or the dumping of minerals, waste or intermediate products that are awaiting enrichment in the source. The artisanal license can be issued only to the municipality. Based on this license, the municipality may allow artisanal activities by other persons within its territory and within the licensed area. The holder of a license must also possess a permit for specific activities such as drilling, excavation, sampling, geophysical measurements, machinery and equipment operation, use of explosives, start-up of mining activities, treatment, storage or processing of minerals.

Licenses and permits in the public interest are a specific kind because they differ from the standard licenses and permits as set out above. A license/permit in the public interest may only be issued to a public enterprise or a socially-owned enterprise. This license is issued if the concerned enterprise is in principle not solvent, is being re-structured or administered by a court, has not carried out fiscal obligations to the state or does not own financial or technical means to perform licensed works. The precondition for issuing this license/permit is the decision of the Government confirming that the issuance of the license/permit is in the general public interest of Kosovo.

Licenses and permits are principally issued by the ICMM under the authorization procedure. This means that the interested party submits the application for issuing the license or permit and the ICMM reviews it in the order of submission. If a party meets the conditions set by law, then the ICMM has a legal obligation to issue the required license or permit.

Exceptionally, licenses for the exploration or use of an energy mineral or mineral located in an area that is designated as a special interest area are provided only on the basis of a competitive procedure. The competitive procedure is implemented by the Public Private Partnership Committee (PPPC) established under the Law on Public-Private Partnerships. However, the competitive procedure does not apply to a license for energy mining if, for reasons directly related to the need to ensure the security of energy supply or the attraction of significant direct investment in Kosovo, the PPPC recommends to the Government the adoption of a decision ascertaining that there is a public interest in issuing this license to a specific investor. The decision of the Government should be approved by the Assembly of Kosovo. Upon approval by the Assembly, the ICMM issues the license to the investor concerned, provided that the terms of the license are in accordance with the law and the investor meets all the eligibility criteria established by law. Also, after the adoption of the decision by the Kosovo Assembly, the Government may enter into an investment agreement with the specific investor provided that (i) that investment agreement is in accordance with the law; (ii) the investment agreement meets the conditions of licensing determined by law; and (iii) the investment agreement includes benefits and optimal risk distribution for the Republic of Kosovo by attracting

significant direct investments or securing the security of the energy supply.

Consultations with the private sector have identified a preference for ICMM to function as a one-stop-shop, as the only contact point for investors who intend to apply for a license or permit for mining. According to current administrative legislation and practice, the investor is required to collect a number of consents and permissions from other public institutions before submitting the completed application to the ICMM. To simplify the procedure, to reduce costs and make investments in the mining sector more attractive, the private sector proposal is that the investor submits the application only to ICMM, which would then be coordinated with other public institutions regarding their requirements. Such one-stop-shop mechanisms are well-known and practiced in Kosovo, as is the case with business registration, where at the same time with the business registration the party receives the fiscal number and, if so requested, is registered for VAT. Simplification of this procedure has raised Kosovo significantly on the Doing Business Listing of World Bank and an implementation of this mechanism in the mining sector could produce similar positive effects for Kosovo as an attractive investment country.

The system of licenses and permits under the LMM should be harmonized the Law no. 04/L-202 on the System of Permits and Licenses. The entry into force of this law does not directly affect the provisions of the LMM regarding mining licenses. However, according to Article 33, paragraph 1, sub-point 1.1, of Law no. 04/L-202 all central institutions issuing permits and licenses are obliged to propose the amendment of respective laws within 6 months after the entry into force of this law to bring their requests for permits in accordance with this law. In other words, ICMM as a central institution has the duty to propose the amendment of the LMM in order that the criteria for issuing licenses under the LMM comply with Law no. 04/L-202.

4.1. Suspension and revocation of licenses

The Licensee is obliged to fulfill the relevant terms and conditions under which the license is granted and the other conditions during the entire duration of the license. In case of non-compliance, ICMM sends the license holder a "Failure Completion Notice". The notice in question must specify the nature of the failure and must give the holder of the license a reasonable period of time to correct such failure, a time period of at least thirty (30) days but not more than sixty (60) days. Furthermore, in case of major failures, the licensee is bound to submit to ICMM an improvement plan within thirty (30) days, including the implementation schedule. This improvement plan is submitted to ICMM for review and approval.

If, upon receipt of a failure notice, the license holder fails to comply with the notice and within the deadline specified in the notice, the ICMM will cancel the license by issuing a "Cancellation Decision". With the cancellation decision, the ICMM notifies the license holder of the cancellation of the latter and orders the license holder to immediately cease all the activities authorized by the license, to take all measures to avoid causing the environmental risk or health, immediately pay all accumulated unpaid mining charges and if the ICMM considers that the failure was deliberate or has caused a seriously dangerous situation, it may order the license holder to pay a fine.

Suspension or revocation of any license by the ICMM shall not relieve the Licensee of the responsibilities and obligations arising out of the activities exercised by

the Licensee.

A new legal challenge is the entry into force of Law no. 04/L-202 on the System of Permits and Licenses, which contains specific provisions for the suspension and revocation of permits, including licenses. Coordination of the Law on Mines and Minerals with this Law is not clarified and it remains to be clarified whether the Law on Mines and Minerals will be implemented as a separate law with the advantage of this law, or whether the Law on Mines and Minerals will have to be interpreted and implemented in accordance with this law.

The term "cancellation" should be interpreted in the sense of "annulment" and "abrogation" according to the Law on General Administrative Procedure and implies the termination of the legal power of an administrative act. First of all, this means that the rights deriving from an administrative act, namely a license or permit, cease to exist and the person can no longer exercise those rights. With regard to the obligations, the LMM explicitly stipulates that the suspension or cancellation of any license by the ICMM does not relieve the licensee of the responsibilities and obligations arising out of the activities exercised by the license holder. This means that the obligations deriving from the canceled license or permit cease to exist and the person concerned remains obliged to comply with these. This applies to the mining rent for mining operations until the moment of cancellation of the license / permit as well as for the remediation of the land surface used for mining.

5. PROPERTY – LEGAL ISSUES

5.1. Ownership on mineral resources

According to the LMM, mineral resources, irrespective of their origin, form or physical conditions located in or around the land and within the territory of the Republic of Kosovo, are the property of the Republic of Kosovo. Mineral resources that are issued a license for mining in accordance with the law are transferred to the ownership of the license holder for use at the time of their extraction and disposal on the surface. It turns out that ownership of mineral resources passes by law to the mining license holder, but not to the holder of any other license. The holder of another license may only have a right of possession and use of the mineral resource depending on the rights associated with the relevant license, such as in the case of a exploration license, but not a property right which remains with the Republic of Kosovo.

The same definition as the LMM is made by the Law on Nature Protection (Law No. 03/L-233), which stipulates that minerals, strata and fossils are the property of the Republic of Kosovo. The regulation of the ownership issue on mineral resources according to the LMM and the Law on Nature Protection may conflict with the regulation of the ownership right under the Law on Property and Other Real Rights (Law No. 03/L-154). Under this law, ownership is a total right on a thing. Within the items are also real objects, which are defined as a certain part of the land surface, which is limited or restricted, and which also includes underground natural resources. As a result of this definition, underground natural resources, including mineral resources, are owned by the person who owns the land surface under which these mineral resources are located. This is contrary to the definition in the LMM and the law on nature protection that mineral resources are owned by the Republic of Kosovo.

The Law on Property and Other Real Property Rights stipulates that the provisions of this Law shall not apply to public property rights or to common property rights which are regulated by special laws, unless specifically provided otherwise in this Law. Even if according to the LMM and the Law on Nature Protection Mineral Resources are owned by the Republic of Kosovo, the Law on Property and Other Property Rights specifically stipulates that mineral resources are part of the immovable property on which private ownership can be created.

Efforts can be made to resolve this collision of laws regarding the determination of the legal status of mineral resources through interpretation in conformity with the constitution. Article 122, paragraph 2 of the Constitution of the Republic of Kosovo stipulates that "natural resources such as water, air space, mineral resources and other natural resources, as well as land, forests, plant and animal world, other parts of nature, immovable property and other goods of particular cultural, historical, economic and ecological importance, which are determined by law that are of interest to the Republic of Kosovo, enjoy their special protection in accordance with the law". However, even this constitutional provision does not determine decisively that mining assets are property of the Republic of Kosovo. According to this provision, mining assets may be determined by law that they are of interest to the Republic of Kosovo and that by law enjoy special protection. This does not necessarily mean that mining assets should be owned by the state. They may also be in private ownership, but by law restrictions may be imposed on their use in the interest of the state.

Finally, it remains for lawmakers to determine the property status of the mining property. The lawmaker has done so through the LMM, the Law on Nature Protection and the Law on Property and Other Real Rights, but with controversial norms. This collision between the LMM, the law on nature protection and the law on property and other real rights must be resolved by the lawmaker by definitively determining the ownership of mineral resources of the Republic of Kosovo or the owner of the real estate where the mineral resources are located.

5.2 Surface Right for Mining Work

Surface Right for Mining Work in one of the prerequisites for obtaining a mining license is the submission to the ICMM of a Surface Rights Agreement in duration not shorter than that of the proposed license for mining between the applicant and any third party possessing a legally registered property right over the land surface which the applicant proposes to mine during the performance of the relevant mining activities, or evidence that the third party has refused or otherwise has rejected to enter into an agreement even though the latter has been on a reasonable basis.

The Surface Rights Agreement is defined in the LMM as an agreement between an Applicant for a License or Permit, namely the Licensee or Permit Holder, and a third party having legally registered property rights which the Applicant respectively, the licensee or permit holder proposes to use or is using it for the exercise of mining activities authorized by law or authorizing the applicant, respectively the holder of the license or permit, to carry out the activities in question.

Such an agreement is also expressly required for issuing a license for artisanal mining as well as for a permit for specific activities. However, such an agreement is not expressly required for the issuance of an exploration license, even though the exercise of

the rights related to the exploration license are conditional on, inter alia, the provisions of a Surface Rights Agreement for carrying out activities specified exploration. The fact that the lawmaker condenses the rights deriving from a exploration license with the provisions of a superficial agreement on specific exploration activities, but does not explicitly require such an agreement as a prerequisite for issuing an exploration license, may appear at sight seen as a collision of legal norms.

However, the law should be interpreted in such a way that the issuance of an exploration license does not require as a precondition an agreement on surface rights. However, if the licensee for exploration wants to conduct specific exploration activities, then the precondition for issuing a permit for specific activities is the conclusion of a superficial agreement for the site where these special exploration activities will be conducted.

The reason why the lawmaker did not request an agreement on surface rights as a prerequisite for issuing an exploration license is that the holder of this license will not necessarily utilize all the permitted area with an exploration license. In the typical case, it will utilize certain parts of that area and therefore it makes no sense to have the mining rights for the whole area. It is sufficient to have superficial rights for locations where specific exploration activities will be carried out and this is provided by the lawmaker by requesting an agreement on superficial rights as a prerequisite for issuing a permit for specific activities.

The Surface Rights Agreement with private persons and public enterprises is governed by the Law on Obligations Relationships. The characteristic of these agreements is that the submitter, respectively the holder of the license or permit, gains the right to use the surface without being its owner. These agreements may have different forms, such as contract for lending or lease contracts. Agreements with socially owned enterprises are concluded in the same way but are subject to approval by the Kosovo Privatization Agency. The agreement with the municipalities, when the land owned by the municipality is subject to such agreement is subject to the rules and procedures laid down in the Law on Provision for Use and Exchange of Immovable Property of the Municipality (Law No. 06/L-092).

Within the framework of agreements with the state institutions among the most important in practice is the agreement with the Kosovo Forest Agency for the use of forest land. According to the Law on Forests of Kosovo (Law No. 2003/3, as amended by Laws No. 2004/29 and 03 / L-153), forests and public forest lands are owned by the Republic of Kosovo. Public forests and public forestry is administered by the Kosovo Forest Agency, which is competent for the temporary replacement of the forestry and forest land use as well as for the lease of forest and public forest land. The lease contract between the Kosovo Forestry Agency and the investor is concluded for five (5) years and may be issued for an area of 5 hectares.

5.3. Expropriation for Mining Needs

Mineral activity and economic exploitation of mineral resources as important as economic activity for commercial gains is also useful for society, because through this economic activity, if practiced reasonably and sustainably, the local economy, fiscal and social aspect with positive economic effects is developed. For this reason, the lawmaker has created rules that allow the issuance of a license for use even in those cases where the

owner of the site, where mining operations are to be carried out, refuses to enter into a surface rights agreement.

If in such a case the applicant has provided evidence that the landowner has refused or failed to enter into an agreement on surface rights, the covering surface rights that are reasonably required by the applicant to pursue its Mining Program, then the ICMM submits a request to the Government for the expropriation of the claimed surface rights and the Government will expropriate these rights. Upon expiry of the expropriation process, the Government transfers the surface rights to the Applicant when the Applicant has paid the Expropriation Expenses. After expiry of the expropriation process, the Government transfers the surface rights to the Applicant when the Applicant has paid the Expropriation Expenses¹. The same rule applies in the case of permits for specific activities.

The LMM provisions regarding expropriation for mining needs should be read in conjunction with the relevant provisions of the law on expropriation of immovable property (Law No. 03/L-205). According to this law, if the Government intends to expropriate the surface rights to allow the holder of a license or permit issued by the ICMM to exercise his rights under a license or permit, the Government shall first seek from this carrier to sign a written commitment to pay the compensation for the expropriated person. The Government concludes the expropriation process only after paying the compensation from the license holder or permit. The Government then transfers the right to use the property in question to the holder of the license or permit. The scope and duration of this right of use should be reasonable to allow the holder of the license or permit to exercise his rights under his license or permit².

The expropriation request is filed by the ICMM in the Government only in the case of the owner's refusal to enter into a surface rights agreement for the needs of a mining license or permit for specific activities. In the case of an artisanal mining license, the expropriation is done directly by the municipality in accordance with the law on the expropriation of immovable property without going through ICMM.

5.4. Spatial Planning and Environmental Protection

The Law on Spatial Planning (Law No. 04 / L-174) regulates the systematics of spatial planning documents. At the central level for the entire territory of the Republic of Kosovo are (i) Kosovo's spatial plan, (ii) Kosovo's zoning map and (iii) spatial plans for specific areas. At the municipal level are (i) municipal development plan, (ii) zoning map of the municipality and (iii) detailed regulatory plans.

For the mining sector of special importance are the spatial plans for the special areas that are prepared for the areas identified in the Kosovo spatial plan and the zoning map of Kosovo, which are of special characteristics and require special organizational, developmental, user and defense regime. Such areas may include national parks and other areas of unique natural, economic, mineral, agricultural and cultural heritage value. Drafting of spatial plans for special areas is based, inter alia, on the objectives of the strategic development plans of the various sectors of the Government, including mining. Spatial plans for special areas are approved by the Government and the Kosovo

¹ Section 34, point 2, LMM.

² Section 14, point 1, Law on Expropriation

Assembly.

The LMM regulates the designation of an Area of Special Interest. Determination of an Area of Special Interest shall be made by the Government upon the proposal of the Ministry of Economic Development if (i) it is documented that such area contains resources of valuable metal or industrial minerals or precious or semiprecious stones in that quantity and those features that are reasonably expected to attract the interest of experienced mining companies with sound financial resources; and (ii) this determination is not inconsistent with the rights of any license holder under an existing license. If the Government establishes a Special Interest Area, then all exploration and mining licenses for a mineral located in the area are provided only on the basis of a competitive bidding procedure. With this, the LMM only regulates the procedure for granting licenses in such an area and specifies the conditions under which an area may be designated as Special Interest Area. However, the LMM does not regulate whether a Special Interest Area needs a spatial plan for a specific area under the Law on Spatial Planning.

Taking into account the definition of a spatial plan for specific areas under the Law on Spatial Planning, it can be concluded that for a Special Interest Area there should be a spatial plan for a particular area. The designation of a Special Interest Area under the LMM without a corresponding spatial plan for a particular area appears to be in violation of the Law on Spatial Planning. From these two conclusions emerge, (i) The Special Interest Area should be defined in the Kosovo Spatial Plan and the Kosovo Zonal Map before it is included in the Spatial Plan for the Special Zone, and (ii) the Spatial Plan for The Special Zone should be approved by the Assembly of Kosovo.

The Law on Spatial Planning also does not make the appropriate linkage with the Law on Mines and Minerals (LMM), which concerns the inclusion of the mining strategy in spatial planning. LMM explicitly stipulates that during the preparation and implementation of spatial and urban planning plans, all public authorities should take full account and comply with the Mining Strategy promulgated by the Assembly of Kosovo. Mining Strategy has priority over any spatial or urban planning that is not in accordance with it. This point is not clarified in the Law on Spatial Planning, although as a provision of the LMM, which is a special law in this matter, it has priority over the Law on Spatial Planning. Article 71 of LMM does not solve this problem because this provision only gives an inspector the power to undertake certain administrative actions if it finds that a person is carrying out mining operations in violation of the safety regulations or environmental protection issued by the Ministry. Article 71 refers to the protection of the environment rather than the spatial planning, the inclusion of the Mining Strategy for the preparation of spatial and urban plans.

In addition, the LMM stipulates, as noted above, that no public authority can approve or implement any spatial or urban planning plan without the consent of the Ministry of Economic Development (Ministry) as the ministry responsible for the mining sector. Prior to granting such consent, the Ministry should consult with the ICMM. The Ministry should grant such consent unless the ICMM submits to the Ministry a written explanation that clearly indicates that the implementation of such a plan will significantly interfere with the coordinated and sustainable research of mining resources in Kosovo.

The legal aspects of spatial planning and regulation of the mining sector are closely related to environmental protection as one of the principles on which the LMM is built. One of the main goals of the LMM is to promote exploration, mining and

processing of minerals in accordance with accepted environmental standards. It is obligatory that each license and permit must include conditions that require the taking of environmental protection measures.

The LMM explicitly requires the environmental consent issued by the Ministry of Environment and Spatial Planning as a prerequisite for issuing exploitation license, a license for artisanal mining and a spatial operation permit. These provisions are in compliance with Law no. 03 / L-025 on Environmental Protection, according to which no institution can issue a permit for the use of natural resources without the environmental consent of the project which should contain the measures of environmental protection and rehabilitation surface³.

The Law on Environmental Protection explicitly stipulates that the launch of a facility or facilities and equipment that has been subject to environmental impact assessment may not commence without the environmental permit issued by the Ministry of Environment and Spatial Planning. For all types of activities and projects for which environmental impact assessment is not required and which may cause environmental disturbances, a municipal environmental permit is issued. In this case, an environmental authorization issued by the Ministry of Environment and Spatial Planning is also required.

Law no. 03 / L-214 on Environmental Impact Assessment stipulates that no permit for construction or other permits can be issued and cannot be initiated with the execution of a project for a project referred to in the two appendices of the law in question for which assessment of the impact on the environment is required.

The private sector has criticized for the fact that in practice the Ministry of Environment and Spatial Planning requires the agreement with the Kosovo Forest Agency for the use of forest land as a document for review of the Environmental Impact Assessment report. According to Article 15 of Law no. 3/L-214 on Environmental Impact Assessment, the Environmental Impact Assessment report should not address the right of ownership or mining. On the other hand, according to Article 11, paragraph 3, of Law no. 03 / L-214 on Environmental Impact Assessment, the request for initiation of the Environmental Impact Assessment procedure is attached to all the documents determined by the Ministry, which may include the agreement with the Kosovo Forest Agency. However, determining the required documents is at the discretion of the Ministry and it is worth considering how much the agreement in question is needed for the needs of the Environmental Impact Assessment procedure.

5.5. Certain legal issues in the Mining Sector

In the course of analyzing the legal and institutional framework in the field of mines and minerals, it is necessary to analyze and address some of the problems that arise as a result of non-harmonization of relevant legal acts and their impacts on the legal framework of the mining sector as a whole.

5.5.1. Use of Forests and Public Forest Land

According to the Law on Kosovo Forests (Law No. 2003/3, as amended by Laws No. 2004/29 and 03 / L-153), forests and public forest lands are owned by the Republic

³ Section 10, Law on Environment protection

of Kosovo. The Kosovo Forest Agency administers the forests and forestry lands of Kosovo, which among other things is also competent for renting forests and public forest land. According to Administrative Instruction no. 10/2010 Amending and Supplementing Administrative Instruction no. 41/2006, the lease contract between the Kosovo Forest Agency and the investor is concluded for five (5) years and may be granted for an area of 5 hectares.

In cases where the surface, where the mining operations are to be performed, is forest land or forest, the agreement on the surface rights, which is a prerequisite for granting a mining license, should be concluded between the applicant and the Kosovo Forest Agency (KFA).

Given the time limit of five (5) years set out in Administrative Instruction no. 10/2010, presently presents one of the challenges and problems of issuing mining licenses by the ICMM, as according to the law, the mining license for all minerals, except for energy minerals, has a maximum duration of twenty five (25) years and the license for minerals of energy sector has a maximum duration of 30 years.

In this case, ICMM is bound for the five (5) year contract between the applicant and the Kosovo Forestry Agency and consequently cannot issue licenses for more than five (5) years.

The discrepancy between the duration of the mining license and the duration of the land use rights has also been encountered in the criticisms of private sector representatives, which requires the harmonization of the duration of the right to use with that of the mining license. The fact that an investor cannot acquire the right to use forest land as long as the mining license also entails financial and legal risks to make the necessary capital investment in mining work. The investor is not at all certain if the right to use will continue because the Kosovo Forest Agency is legally entitled not to do so after the expiration of the 5-year term. This makes it difficult to find the necessary financial resources for investment in the mining sector and increases the level of investment risk as returns of investment are not legally secure.

Private sector representatives have also criticized the practice of the Kosovo Forestry Agency (KFA), which requires municipal consent as a prerequisite for concluding an agreement on land use. Documents to be submitted to KFA are defined in Article 3 of Administrative Instruction no. 41/2006 on the change of destination of agricultural land, as amended by Administrative Instruction no. 10/2010 and 01/2011. According to this article municipal declarations are required for possible linkage to technical infrastructure, but no municipal consent is required, unless in practice municipal consent implies this statement.

5.5.2. Municipality Consent

The LMM stipulates that a person who wishes to undertake exploitation or exploitation of mineral resources in Kosovo must submit to the ICMM a full application for the granting of the License for the use of the relevant mineral resource and the documents to be attached to the application⁴. Although not expressly provided for municipal consent in this article, however, one of the documents that are required to be

⁴ LMM, Section 31.

attached to the application for mineral exploitation is municipal consent. According to the LMM, the submitter of a request possessing environmental consent must also submit the municipal consent. These results directly from Article 31, paragraph 1, sub-point 1.6, which requires the environmental consent as well as any other approvals from public authorities that are required by law. The word "and" clarifies that environmental consent and other approvals are cumulative, rather than alternative, and both must be fulfilled. Likewise, this article makes it clear that other approvals required by other authorities, including municipal consent, should be based on the law.

The legal basis and the nature of municipal consent are not clear. If the municipal consent is urban consent, then with the entry into force of Law No. 04-L / 174 on Spatial Planning has lost the legal basis for issuing such a consent, because this law no longer recognizes the institution of urban consent. If it comes to a municipal statement about the possibility of connecting to technical infrastructure, then the appointment is wrong, because it is not about consent, but for a statement, and thus changes the legal meaning of this document. The Law on Local Self-Government has explicitly defined the full and exclusive competencies of municipalities, among which is the competence for land use and development. However, the law does not clearly specify the competence of Municipalities to issue municipal consent as a prerequisite for obtaining a mining license. Also, with the entry into force of Law no. 04 / L-202 on the Permit and License System may present legal issues for issuing municipal consents. Article 17 of the law in question provides that licenses are only determined by law. In addition, according to article 32 of this law, all types of permits and licenses that do not appear in the Central Registry of Permits and Licenses have no legal effect. If a municipal consent is not in the central register, then it cannot have legal effect. In order to avoid legal uncertainty, it seems necessary that the issuance of municipal consent for mining needs should be regulated by law.

Recently, the ICMM is having problems with some of the municipalities which, instead of consents, are releasing reports to the ICMM. According to the ICMM this makes their work more difficult and causes confusion among the parties, since at the moment a municipality does not consent, but only notification does not allow the ICMM to consider the relevant documentation complete, always taking into account the LMM provision which, environmental envisages as a requirement of documentation "any approvals from other public authorities required under Kosovo law".

Another problematic issue regarding not only municipal consents but also consents issued by other public institutions is the case of their withdrawal during the term of the license term. There are cases where during the term of the license, any of the relevant institutions whose consent was a condition for issuing the license withdraw the consent to the license holder. This consequently causes problems to the ICMM because it should immediately result in the cancellation of the license and is mainly a problem when the ICMM is notified of the delay or is notified at the same time for the withdrawal of a large number of consent.

5.5.3. Sentences Pronounced by the Courts

Another current concern regarding the implementation of legal provisions in the field of mines and minerals is decision-making in the competent courts regarding cases of violations in the mining and mineral sector. In the concrete cases of fines imposed by the

ICMM due to the violation of the LMM provisions, the difference between the fines imposed and billed and the fines collected is remarkably high.

There is a disproportion between ICMM estimates of fines to be imposed and court decisions. This consequently affects efficiency and compliance with legal provisions, given the fact that in certain cases for violators the law is very small the cost of the fine compared to the benefits that the illegal operation brings. Coordination between the work of the competent courts and ICMM for the implementation of the respective legal provisions is required.

6. HARMONIZATION OF MINING LEGISLATION WITH EU AQUIS

The term "EU Acquis" means all the norms and standards of EU with which EU member states have to harmonize their legislation. EU has no norms that regulate in particular the mining sector, but has only regulated certain areas that affect this sector. Among the most important of these are:

- Directive 2006/21/EC on Waste Management by Extractive Industry;
- Directive 92/91/ EEC on minimum conditions for improving the safety and health protection of workers in the extractive mining industry through drilling;
- Directive 92/104/EEC on minimum conditions for improving the safety and protection of workers' health in the surface and groundwater extraction mining industries;
- Directive 2013/14/EU on the Annual Financial Statements, Consolidated Financial Statements and Relevant Reports of Certain Types of Enterprises.

6.1. Directive 2006/21/EC

Directive 2006/21/EC regulate the measures and procedures for the prevention or reduction of harmful effects on the environment and risks to human health as a result of waste management from extractive industries. Extractive industries are all enterprises that are involved in the surface or underground utilization of mineral resources for business purposes. Member States are obliged to take the necessary measures to ensure that mining waste is managed without endangering human health and that no processes or methods that could harm the environment are used. They should take measures to prohibit the uncontrolled dumping or disposal of mining waste. Member States also have a duty to ensure that operators take the necessary measures to prevent or reduce the adverse effects on the environment and human health as a result of the management of mining waste. The Directive requires inter alia the following:

- (i) issuing a waste management plan by the operator;
- (ii) preparation by the operator of a strategy for prevention of accidents for the management of mining waste;
- (iii) preparation by the state of an emergency plan;
- (iv) no waste facility can act without the consent of the competent body;
- (v) Notifying and consulting the public for issuing a consent to a waste facility;
- (vi) Measures for construction and management of waste facilities;
- (vii) Measures for closure and after closure of a waste facility;
- (viii) Financial Guarantee for activities related to the collection or disposal of mining waste;

(ix) Environmental Responsibility for Mineral Waste Management.

6.2. Directive 92/91/EEC

Directive 92/91 / EEC lays down minimum conditions for the safety and health protection of workers in the extractive mining industry by drilling. The directive in question sets out the general obligations of employers regarding:

- (i) Workplace;
- (ii) The preparation of the document for safety and health;
- (iii) Reporting of serious accidents;
- (iv) Fire protection and explosives;
- (v) Rescue facilities;
- (vi) Communication, warning and alarm systems;
- (vii) Informing employees;
- (viii) Health surveillance.

More detailed criteria are set out in the Annex to the Directive.

6.3. Directive 92/104/EEC

Directive 92/104 / EEC has a volume comparable to that of Directive 92/91 / EEC, with the exception that Directive 92/104 / EEC lays down minimum conditions for the safety and health protection of workers in the extractive and groundwater extractive industries. This directive has already been transposed with the entry into force of Law no. 05-L / 062 on Safety at Work in Mining Activity.

6.4. Directive 2013/14/EU

This Directive obliges large undertakings and publicly-owned enterprises active in the mining sector to submit in a special report all the payments they have made to the benefit of the governments in whose territory they operate. The purpose of this Directive is to increase the level of transparency and accountability to citizens of the payments that a government receives from an active enterprise in the mining sector. The report should be prepared for each state in which the enterprise operates as well as for each project it implements.

7. CONCLUSION

The ICMM function is mainly limited to the administration of the system of mining licenses and permits, the oversight of the legality of mining activities (through the Inspectorate) and the maintenance of the mining cadaster. The executive component (Ministry of Economic Development and Government) is responsible for normative regulation of the mining sector and provides the key impetus for mining strategy, mining resource management plan and mining rent. The ICMM role in these areas is relatively limited. It will be interesting to see the recent strengthening of the Kosovo Geological Survey, especially considering the competencies given to this agency for the conduct of geological exploration and the preparation of exploration projects not only for public but also private individuals.

The issues addressed in Directives 92/91 / EEC and 92/104 / EEC are partially regulated by Law no. 04 / L-161 on Occupational Safety and Health as well as Law No. 05-L / 062 on the Safety of Workers and Minerals. This law contains the general principles for the prevention of occupational hazards and the protection of health of workers in the mining sector, the obligations of the employer, the rights and obligations of workers and persons responsible for occupational safety and health of workers, establish the standards necessary for safety at work in mining activities. This law aims at the systematic improvement of the safety and health of workers at work, the prevention of occupational injuries, occupational diseases and other diseases related to the work of the mining sector

Moreover, through Regulation no. 02/2012 on Mining Waste Management, the Ministry has implemented the Directive 2006/21 / EC. The Directive 2013/14 / EU has not yet been transposed into Kosovo legislation.

Taking into account the above considerations, it can be concluded that there are some actions that can be taken in order to improve the institutional and legal framework of the mining sector.

Initially, the ICMM should become a one-stop-shop for all licenses, permits and approvals that an investor needs to carry out mining in Kosovo; to resolve the collision between the Law on Mines and Minerals and the Law on Property and Other Property Rights on Mining Resources; to harmonize the system of licenses and permits according to the LMM with Law no. 04 / L-202 on the System of Permits and Licenses and to propose the respective legal changes; to uniquely regulate the issuance of municipal consent for the needs of mining licenses and permits, clearly defining the form, conditions and deadlines within which consent must be given; to clarify in the Law on Mines and Minerals whether a spatial plan for a particular area is required for an area of special interest under the Law on Spatial Planning; harmonize the Law on Mines and Minerals and the Law on Spatial Planning in order to ensure the interconnection between these two laws regarding the observance of the mining strategy during spatial planning; establish legal supervision mechanisms that no public authority can adopt or implement any spatial or urban plan without the consent of the Ministry of Economic Development and on the basis of ICMM's opinion, to transpose into national legislation the European Union Directive 2013/14 / EU and to apply the punitive provisions of the respective laws and sanctions uniformly by all institutions, including the ICMM and the competent courts.

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