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The present brief is intended for decision-making bodies and persons, responsible for public policy and good government. It might be useful also for those who try to influence Georgia's public policy with the view of its improvement.

This policy brief is also available in Georgian.

REGULATION FEE FOR THE USE OF NATURAL RESOURCES – THE LAW AND CORRUPTION THREATS

INTRODUCTION

At the initiative of Georgian government, and the consent of the Parliament, regulation fee for the use of natural resources has been introduced since 17 May 2011. In particular, changes were introduced in the law of Georgia "On Regulation Fee", according to which legal persons of public law regulating the use of natural resources, oil processing, gas conversion, and/or transportation activities, alongside with independent regulatory authorities, are entitled to collecting regulation fees from license holders. Respectively, arose the obligation of licensees to pay the regulation fee.

It should be mentioned that prior to these changes, it was the function of the Agency for Natural Resources, a legal person of public law under the Ministry of Energy and Natural Resources "to manage natural resources and their use for sustainable development of the country". Hence, after the changes to the Law of Georgia "On regulation fees" head of the Agency for Natural Resources on 12 August 2011 issued the order asserting the procedure for collecting fees and their amounts.

After October 2012 elections political forces that came to power decided to return the "deprived" function to Ministry of Environment. Respectively, regulation function for the use of natural resources was handed over to the Agency for the environment, legal person of public law of Ministry of Environment and Natural Resources. As for oil processing, gas conversion, and/or transportation activities regulation functions, they were granted to Oil and Gas National Agency, legal person of public law of the Ministry of Energy.

It is important to mention that "the fee for regulation of the use of natural resources" is, and has always been, an important source of budget replenishment for appropriate agencies.

Table 1. Regulation fees paid by license holding organizations by years

No	Kind of natural resources	LPPL Agency of Natural Resources 2011	Agency of Natural Resources 2012	LPPL Agency of Natural Resources until 12.05.2013	LPPL Environment National Agency- 12.05.2013 – 31.12.2013	LPPL Environment National Agency- 2014	LPPL Environment National Agency- 01.07.2015
1	Coal	12 591.53	134 941.55	35 720.93	36 458.34	83 750.05	40 333.70
2	Manganese	352 692.93	1 462 923.05	446 474.84	968 084.05	1 505 855.13	988 214.82
3	non-ferrous metal	2 066 591.11	6 912 995.99	2 147 180.38	1 274 198.50	5 013 656.12	3 410 298.16
4	Carbon dioxide	55 873.23	129 167.40	49 282.81	79 082.00	130 411.92	99 899.17
5	Underground mineral water	239 003.26	470 653.54	276 143.22	406 573.57	752 084.69	309 318.44
6	Underground fresh water	99 881.90	101 089.98	33 212.00	32 772.23	53 353.73	24 771.25
7	Underground fresh water (industrial)	134 376.80	334 419.45	101 476.70	269 286.24	463 858.24	171 455.58
8	Anchovy		762 527.00	529 752.00	445 250.00	1 309 839.23	617 027.44
	Total	2 961 010.76	10 308 717.96	3 619 242.88	3 511 704.93	9 312 809.11	5 661 318.56

Taking into account the traditionally small funding of environmental protection this method of money mobilization should have been considered a positive phenomenon, if not its inconsistency with the law, and creation of favorable conditions for violation of the law and corruption.

In this public policy brief we will try to justify the need for the abolition of “fees for regulation of the use of natural resources” and show the threats of this mechanism to economic development and democracy of the country.

WHAT IS REGULATION OF THE USE OF NATURAL RESOURCES?

Georgian law does not define what activities are implied in “regulation of the use of natural resources”. The only source to define the term is the explanatory note, prepared prior to initiating the 17 May 2011 draft law on the changes to the law of Georgia “On the regulation fee”. According to the explanatory note the reason for changes to the law was introduction of regulation fee for the use of natural resources, and oil processing, gas conversion, and/or transportation activities. It explained that this would facilitate efficient implementation of public functions of legal person of public law, regulating these sectors of the use of natural resources (**such as adoption of legal acts within its own authority, issuing licenses, monitoring, coordination, supervision and control over implementation of the terms of license**). This explanation makes it clear that the introduction of regulation fee did not imply any action/service or a product, but only the fulfillment by a legal person of public law – Agency for natural resources of Ministry of Energy and Natural Resources – of state functions as defined by its charter.

Under Georgian Government Resolution¹ of April 25, 2013 LPPL Agency of Natural Resources of Ministry of Energy and Natural Resources of Georgia was reorganized to LPPL National Forestry Agency of Ministry of Environment and Natural Resources of Georgia. Under the same Resolution functions of the Agency of Natural Resources was redistributed to several different organizations within their competence (functions): Department of Environmental Supervision of Ministry of Environment and Natural Resources; LPPL Oil and Gas State Agency of Ministry of Energy of Georgia; and two LPPLs of Ministry of Environment and Natural Resources – National Forestry Agency and National Environment Agency.

As a result of the above structural changes National Environment Agency acquired two new functions in its relations with consumers of natural resources: (1) issuing licenses under the law of Georgia “On licenses and permits” for the use of natural Resources (except for oil and gas) and conducting and coordinating activities in this regard; (2) approval of quotas for the extraction of natural resources for licensees in accordance with existing regulations. Respectively, it would be logical to assume that these are the functions of the Agency meant under the regulation of use of natural resources.

WHAT IS REGULATION?

In contrast with “regulation of natural resources”, the meaning of “regulation” is defined by Georgian law. Pursuant to the Law of Georgia “On Independent National Regulatory Authorities” it is the adoption of legal acts, issuance of licenses/permits, monitoring, coordination, supervision and the exertion of control over the fulfilment of licensing/permit terms and conditions by an independent regulatory Authority, within the limits of authority established by the applicable law. This definition is word for word the same as in explanatory note prepared prior to initiation of 17 May 2011 draft law on changes to the Law “On Regulation Fee” with a minor difference that the regulation shall be executed by independent national regulatory authorities.

In general the idea and the aim of regulation, pursuant to the same law of Georgia “On Independent National Regulatory Authorities”, is “ensuring in various fields of economy the equilibrium of interests of license holders and consumers, efficient price formation and supply in respect to the goods and services”.

Pursuant to the Law of Georgia “On Competition”² “regulated areas of economy are the areas, established under the: organic law of Georgia “On Georgian National Bank”, laws of Georgia “On the activities of commercial banks”, “On Investment funds”, “On electronic communications”, “On broadcasting” and “On electricity and natural gas”; also the areas of municipal services, where competition and free price formation are limited and are subject to tariff regulation”.

As is clear from the above definition, there are no criteria by which to consider the use of natural resources a regulated sphere of economy. It should be mentioned herein, that besides incompatibility of its activities/functions with the theme of regulation, national environment agency has no appropriate status to practice regulation. In particular, in compliance with the Law of Georgia “On Independent National Regulatory Authorities” regulation shall be effected by national regulatory authorities, created purposefully to regulate the spheres, designed by the government, and, what is most important, they are independent from any other national authority and have no public supervisory authority. As for National Environment Agency, it is a legal person of public law under the Ministry of Environment and Natural Resources, and the ministry carries out state control of the lawfulness, appropriateness, and effectiveness of its financial and economic activity³.

¹ Resolution No. 93

² No. 6148, 8 May 2012

³ Order No. 27 by Ministry of Environment and Natural Resources of Georgia of 10 May 2013.

REGULATION FEE

The Law of Georgia “On regulation fee”, before introducing 17 May 2011 changes into it, provided that the regulation fee is the primary source of the budget of independent regulatory authorities, established by the law “On Independent National Regulatory Authorities” and is immediately related with public and independent execution of regulation of the sector in accordance with the powers assigned by law. Respectively, only two independent regulatory authorities in Georgia had the right to collect regulation fee: National Communications Commission of Georgia and Energy and Water Supply Regulatory National Commission.

After the introduction of 17 May 2011 changes LPPL National Agency of Natural Resources (now Environment National Agency) was allowed to replenish the budget through fees. Likewise the cases with National Regulatory Authorities, the regulation fee should be immediately related with **public and independent** execution of regulatory functions. Taking into account the fact, that regulation of use of natural resources implies the processes, related to issuing license, it becomes clear that the agency is not independent in the performance of this function, not to mention publicity. Decisions are taken by simple administrative proceedings, which does not imply a public process. Environment National Agency does not even publish its decisions regardless the fact that the Law “On Licenses and Permits” requires so⁴.

In compliance with the law “On regulation fee” head of LPPL Agency of Natural Resources under Ministry of Energy and Natural Resources issued an order on 12 August 2011 “on approval of rules of payment of regulation fee and its amounts”, which is still in force. It is noteworthy that two changes had been introduced in the Order within two months of its issuance. Two years passed after reorganization of the Agency of natural resources and the transfer of the right to collect regulation fee to LPPL Environment National Agency under the Ministry of Environment and Natural Resources. However, Environment National Agency still follows 12 August 2011 Order, according to which LPPL Agency of Natural Resources under the Ministry of Energy and Natural Resources of Georgia is regulating the use of natural resources of Georgia.

In accordance with the above Order regulation fee paid by all who use natural resources in accordance with the rules laid down by law; except for the persons who use natural resources for own purposes.

For unknown reason, the amount of regulation fee is set for only the resources listed in the table below. For all other resources (including different types of wood bark, snowdrop bulbs, cyclamen tubers, fir cones, other representatives of fauna and minerals), their regulation is free. The foundations and regulations of calculating the fee, as well as the reasons for free regulation of other resources are unknown.

⁴ Licensor or/and issuer of permit under the administrative procedure shall be obliged to notify the body providing the public license/permit registry concerning the data included into the departmental license/permit registry on the license/permit issued under the administrative procedure within 10 days from inserting it.

Table 2. Amounts of regulation fees:

No	Natural resource	unit	Price in GEL
1.	Coal	1 ton	0.10
2.	Manganese	1 ton/1% content	0.10
3.	Copper	1 ton	127.5
4.	Lead	1 ton	14.8
5.	Zinc	1 ton	36,0
6.	Gold	1 gr	1.5
7.	Silver	1 gr	0.02
8.	Diatomite	1 ton	3,0
9.	Carbon dioxide (CO2)	1 ton	10
10.	„Borjomi“ mineral water	1m ³	3
11.	„Nabeglavi“ mineral water	1m ³	3
12.	„Sairme“ mineral water	1m ³	3
13.	Other underground bottling mineral water	1m ³	3
14.	Underground bottling fresh water	1m ³	2
15.	Underground fresh water (industrial), which is used as basic raw material for production	1m ³	2,5
16.	Anchovy	1 ton	15

The rules of payment of regulation fees are also interesting. According to the Order the payment for mining shall be paid not later than 15th of the month next to each quarter, in equal parts, depending on the annually developable volumes in accordance with respective mining plan. In case when the volume of the mined minerals exceeds the volumes under respective plans, the regulation fee shall be paid according to actually mined volumes. Holders of license for fishing in the Black Sea shall pay for fishing anchovy according to the full amount of fishable anchovy by the percentage of annual quota set in the license, in equal installments twice a year every 31 January and 31 July.

As is clear from the above the state obliges license-holders to pay regulation fee not for actually extracted resources but for the planned ones. However, the accounts audit of Environment National Agency held by National Audit Office showed that “monitoring of the payment of regulation fees is also a problem. In particular, part of the licensees do not have the plans for the development of mineral resources, as is required under respective order of the Head of Agency “On the approval of the rules and terms of issuing licenses for development of mineral resources”. This makes it difficult for the Agency to monitor the observance of terms of the license (production volumes and timing) by licensees; and account of incomes related to regulation fee depends on it. Licensees periodically provide the Agency with a letter on the amount of produced mineral resources, but because this information cannot be verified, we were unable to obtain sufficient audit assurance of the completeness of revenue on the balance of agency”⁵.

⁵ <http://sao.ge>

CONFORMITY WITH GEORGIAN CONSTITUTION

Inconsistency of the regulation fee for the use of natural resources with Georgian Constitution should have been clear to Georgian parliamentarians at the moment of its initiation; still they unanimously voted for the bill in three hearings.⁶ It is noteworthy that at all three hearings legal department of the office of Parliament pointed out the unconstitutionality of the bill. In particular, it was noted in its conclusion, that: “para 1 of Article 1 is a new wording of Article 3 of the Law defining the concept of regulation fee. However, this provision of the law does not fully explain legal nature of regulation fee and is quite vague. In particular, it is understood that the regulation fee is one of the sources, forming budgets of regulatory authorities and of a legal person of public law, regulating oil processing, gas conversion, and/or transportation activities and the amount of the fee is established under the regulations of these bodies. However, the bill does not explain why, i.e. for the fulfillment of which obligations is it paid. It should be mentioned that when with regard to establishing regulation fee, one should take into account decision #2/1/187-188 of 10 January 2003 of Constitutional Court of Georgia on the case “Airzena” Ltd. vs. Georgia”, where the establishment of regulation fees is recognized unconstitutional.⁷

According to the Constitutional Court Decision⁸ “Article 94 of Constitution of Georgia recognizes two kinds of payments: taxes and duties”.

According to Article 5 of the Tax Code of Georgia “a tax is a mandatory, unconditional cash payment to the state, which shall be paid by a taxpayer, having a mandatory, non-*quid-pro-quo* and gratuitous nature of payment. I.e. in this case the fee, as well as the tax, are mandatory payments with the only difference – taxes go to budget, and the fee – to administration account. ... the fee carries some of features of duties. According to Article 1 of the law of Georgia “On the grounds of the system of duties” “duties are mandatory payments to the budget paid by natural and legal persons in order to receive from the State the right to certain activities or use of activities, also for certain services provided by public bodies”. Hence, since the fee is paid for administrative services, it carries some of the features of duties with only difference that the fee goes to administration account, and duties – to the State or local budget.

The court agrees with the opinion of invited expert, prof. Meskhia in that “regulation fee has the features of both, taxes and duties, and ultimately **“the fee” is rather a tax**, which airlines have to pay under the law”.

Para 1 of Article 94 of the Constitution of Georgia provides, that “the payment of taxes and duties shall be obligatory in the amount and in accordance with a procedure established by law” and para 2 of the same article imperatively indicates that “the structure of taxes and duties and the procedure for the introduction thereof shall only be determined by law.

The court finds that the structure and rules of introduction of taxes and duties imply the amount of payment, the payer, terms, form of payment and the grounds for these rules. This can be established only by law and the court can not accept the fact that the issues that should be discussed in the Parliament would be delegated to executive agencies..”

It should be mentioned hereby that the case before the Constitutional Court referred to regulation of the activities of civil aviation airlines, i.e. the sector, where there is a subject of regulation: theoretically there may be a need to balance the interests of licensees and the customers, to ensure efficient pricing and provision of services and goods... and in the case of use of natural resources there is no reason to believe this sphere the state-regulated sector of economy.

⁶ <http://parliament.ge/ge/law/7601/14842>

⁷ http://parliament.ge/ge/law/download_58223/17052011-pdf

⁸ <https://matsne.gov.ge/ka/document/view/1378395>

CONCLUSIONS AND RECOMMENDATIONS

All the above illustrates that regulation fee for the use of natural resources was introduced in 2011 for the only purpose of budget replenishment of LPPL Agency of natural resources under Ministry of Energy and Natural Resources. Moreover, the fee was introduced without offering any additional product or service to a customer; this, in its turn, gives grounds to resource users to consider cost as a legal way to bribery or, at best, as a “state racket”.

Regrettably, when LPPL Agency of Natural Resources under the Ministry of Energy and Natural Resources was re-organized in 2013, and its functions were reallocated to the environment department of Ministry of Environment and Natural Resources and LPPL National Forestry Agency and National Environment Agency under the Ministry of Environment and Natural Resources, Georgian government did not properly assess the legitimacy of such way of budget replenishment and the threats therein.

As a result we have the situation, when the relations between Ministry of Environment and Natural Resources (supervisory body) and licensees (controlled body) are based on an exchange model, which according to 10 January 2003 court decision No. 2/1/187-188 is “**not allowed in international practice and is a source of many violations (including corruption)**”.

In view of the above we deem it necessary that Georgian Parliament immediately: (1) abolishes the fee for regulation of the use of natural resources and (2) find ways of raising the financial resources necessary for Ministry of Environment to carry out the tasks and duties established by law – the ways that would not contradict to basic principles of democracy and not create favorable for the corruption situation is such a hazardous, in this sense, sphere as government regulation of the use of natural resources.

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