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A Proposal for an in depth discussion on the way forward: Improving the EU's legislative framework for the extractive industry

I. General remarks

We would like to reiterate what the Commission and its various DGs have stated in a number of documents over the years: Having come to a considerable amount of EU legislation, one of the key challenges of Europe today is the enforcement of that legislation. The same has been found to be true in the extractive sector and in related policy areas.

Many efforts of Member States have concentrated on coping with the vast range of EU initiatives and legislation and their transposition into national laws. Sometimes arguably at the cost of putting sufficient resources and effort into areas where in the past and today the subsidiarity principle still prevails.

The current lack of national Mineral Policies and their linkages to other relevant national policies is a reflection of the neglect that the raw materials sector has experienced due to the attitude “we can buy it on the world market” that arose in the 1980s & 1990s during a time when commodity prices were low and decreasing and it was fashionable to become a “service-based economy”. More recently, a lack of capacity has contributed to the neglect - partially impacted by the major restructuring that happened during and after the accession of Eastern European countries to the EU and by the latest economic crisis which has had a major impact on public finances and related cuts in parts of the administration. Recent studies for the OECD have suggested that the EU was slower to recover from the Global Financial Crisis partly because of the weaknesses of the “service-based” or “knowledge-based economy” model. Some measure of raw-materials self-sufficiency increases economic resilience.

New pieces of legislation are therefore simply not necessarily the answer to the current problems. The main issues are manifestly structural and capacity problems which will not be addressed by an EU Directive which if enacted would in turn, and almost ironically, have to contend with implementation problems.

2. Reflection on issues to be addressed

2.1 Minerals Policies

A fair number of EU Member States have revised or are in the process of creating a minerals policy. Some of these processes like all political and legislative processes take time. It is therefore too early to say that Member States have not made any progress on the subject.

2.2 Land planning policies

Land-planning policies are a matter of subsidiarity and therefore fall under the complete competence of Member States. In several Member States this competence is delegated to regional and local authorities. Changes in these will take time and cannot – by definition – be addressed through an EU initiative, but only through a commitment of political will of Member States.

Access to land is regulated not only differently in the Member States, but also for commodities.

Those commodities that are mostly owned by the land-owners are in most cases of relevance locally and regionally and are therefore less regulated at national level. It is doubtful that an EU law would trigger the appropriate regulations at national level and would certainly not be able to touch on the land-owners' rights nor on the public acceptance.

Those commodities that are owned by the states are the ones that are often considered more strategic for the country and are covered by national laws. Their main issues today are likely to be public acceptance, politicization at highest levels, recurring court cases in the national judicial system. Again it is questionable how this can be addressed by an EU initiative except through the sustained and effective political will of Ministers nationally.

2.3 Permitting

Permitting issues are related very often to available capacities on all sides, to knowledge and information availability, to legal procedures. Whilst some will be easier to address such as qualitative capacity and knowledge and information availability through improving existing systems, rather than creating new ones from scratch (unless they are non-existing and totally inadequate), legal procedures do take time to be revised.

Where the issues in permitting are linked to public consultations and acceptance EU initiatives are not likely to change anything since lack of information, mistrust and concerns are closely linked to history, culture, and previous experience as well as national and regional mind-sets. This needs to be changed from the bottom-up.

Where the issues of permitting are linked to other procedures this is very often linked to judicial provisions in the countries and regions and therefore cannot be influenced easily by European initiatives from DG Enterprise.

3. Legal considerations

3.1 The Subsidiarity rule

EU legislative initiatives should only be launched where there is an added value for doing it at EU level, where it fosters the EU cohesion, the EU internal market, not where Member States, especially a few of them, fail to govern themselves in an appropriate way.

Whilst there are commodities which can be found in each Member State, there are a number of commodities, in particular metals, for which there are currently known economically viable deposits and operations only in a few Member States, sometimes only in 1 or 2. Land-planning and land access issues and permitting issues are therefore might be very specific to a very limited number of Member States only. An EU directive would fail to meet the subsidiarity principle simply because instead of addressing EU wide issues, it would aim at addressing mostly issues that are specific to a few Member States and it is questionable that an EU directive can capture these in an appropriate way.

In addition, such a piece of legislation would impact also on other pieces of national legislation that clearly falls under subsidiarity, such as land-planning.

According to the EU Treaty and its Protocol No 2 on Subsidiarity any such proposal would have to be widely consulted beforehand, and it would have to be submitted to all national parliaments for consultation. Given that the Commission has identified “lack of awareness of the general population on the importance of raw materials” as one of the key issues, the question arises whether this is such a good idea even with a campaign of preparation beforehand.

3.2 Conflict with EU internal competences

It should be noted that energy related raw materials should be excluded from the scope since on the one hand it does not fall into the competence of DG Enterprise and on the other hand there is a high risk at the moment that the shale gas discussion will jeopardize any reasonable approach to other minerals extraction.

3.3 Which type of initiative – some first reflections

Furthermore, we would like to raise the issue that in EU law a Framework Directive is a tool to regulate an area by setting a frame and then following it up with a series of daughter directives. It would be very questionable what such daughter directives would cover and it might well exceed what is necessary to achieve its given objective(s).

4. Further procedures

Whatever form and contents an EU initiative might take, it should be launched with sufficient buy-in from the Member States. The current Ad Hoc Working Group 2 on Minerals Policy, Land-planning and Permitting is a sub-group of the Raw Materials Supply Group and has a limited number of participants - also from the EU Member States. It seems logical that, if nothing else, the Ad hoc Group's report needs to be discussed and endorsed by the RMSG, but certainly any further steps following from this report should be discussed by the RMSG and a mandate for future work should be given if and where necessary. Formally speaking, an Ad Hoc Working Group can make its recommendations only to the RMSG which could then decide whether it takes up these recommendations and follows them up.

The proposed public consultation

Following from this, a public consultation on contents and the form of such an EU initiative in this area therefore should be agreed with the RMSG first as an essential prerequisite. The public consultation should be addressing the right questions. It is certainly premature for a consultation to ask about the feasibility of a Framework Directive or a Council Decision in the field of minerals policy. If anything, it should try to assess the core of the problem as described above, that is the missing national and regional structures and capacities for implementation of existing legislation in some Member States.

In the WG 2 there has been no intensive discussion on the deficits of the legal framework in the EU-Member States, just a highlighting of good practices. Furthermore, the indicators used especially in the legal framework were not appropriate to identify these deficits. Respectively, some were lumped together in the final assessment (such as number 1 where policy and subsidies were collated) which gives a distorted picture. Therefore, a thorough discussion should take place in the RMSG, in which all Member States are represented, to analyse and to discuss prior to any further measures:

- potential deficits of the framework conditions for the extractive industry, particularly regarding access to raw materials in the EU and most appropriate solutions,
- to decide if the deficits identified can be addressed and solutions can be best implemented through measures at European and/or national level,

- to secure sufficient support from a large majority of Member States for any initiative to be taken since it will otherwise fail.

5. Leadership in innovation

At the heart of any innovation are knowledge and its implementation into practice. This is the challenge for today's raw materials sector in Europe and around the world.

The key challenges are:

- 1. Safety**
- 2. Competitiveness**
- 3. Community and environmental protection**

The sector has continuously developed a series of guidance on how to improve the sector's performance as is documented for example in the publications of ICMM or in the NEPSI agreement. The European Union has developed a series of guidance over the past years on how to improve implementation of EU legislation into national laws, such as the Natura 2000 guidance or the proposed guidance for inspections of mine waste facilities. More guidance is on the way in the form of cross-sectoral guidance for banks, mining and oil & gas on approaches to aim for no net loss of biodiversity, water management and the BAT document on managing waste facilities from the extractive industry which is currently being revised and should be available within 3 years.

The weak part is different levels of capacity (quantitative and qualitative) amongst the parties concerned:

- The industry's managers,
- The permitting authorities,
- The mine and quarry inspectors,
- The EU and foreign investors.

All of these need up-to-date knowledge and retraining in different aspects of mineral project development.

It is time that the EU took to its role of providing leadership in this area and fostered the innovation by tackling this jointly. Due to the limited number of people and their often relative isolation across the EU, there would be a real added benefit for dealing with this at EU level, and even maybe at an international level in a second tier. Several of the EIP Commitments go in this direction.

Conclusion

We highly recommend to have a well in advance announced and prepared discussion with the Member States in the RMSG with high-level representatives about where the deficiencies are and to scrutinize whether and what type of EU initiative could address the existing issues. Whilst in some Member States activities by the EU might be perceived as assistance it is certainly also perceived as interference in others. In times of growing regionalism and base democracy, centralization might alienate more people than win their hearts and minds. Maybe the EC also needs to consider new ways of addressing issues and this would be an excellent opportunity to explore ways to accommodate regional and national differences and still achieve the overall common goal: growth in the EU.

Amongst the 87 commitments of the EIP on Raw Materials not one has proposed an EU regulation; however, many have provided proposals how to go new ways. Harmonizing and improving standards of knowledge and availability of information and know-how across the EU is a challenging task, but would be a very rewarding one in the longer run.

This way the EU could also export not only technology, but also managerial innovation and improvement of a sustainable supply of raw materials.