

A new mining law for the Democratic Republic of Congo

This article sets out an overview of the key changes and reveals immediate and particular concerns for both existing mining operators in DRC and new investors in the country. The analysis and content are subject to issuance of the final mining code.

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A law (the Law) amending the law No. 007/2002 dated 11 July 2002 setting out the Congolese mining code (the Code) was adopted by the Congolese Parliament on 27 January 2018 and promulgated by the President of the Democratic Republic of Congo (DRC) on 09 March 2018.

Announced and delayed for many months, this Law (the last draft of which was not subject to any real debate with the industry) is in particular aiming at correcting the proclaimed insufficient revenues of the State deriving from the mining sector and the gaps and weaknesses of the existing Code in order to set out a more competitive, fast and transparent mining legislation. Key criticisms from the DRC Government against the existing Code included the ten year legal and fiscal stabilisation clause, the low level of the State's free interest in mining companies or the lack of transparency.

The Law provides some significant changes which are of immediate and particular concerns for both existing mining operators in DRC and new investors in the country.

We set out below a brief overview of the key changes outlined in the last draft of the Law made available:

Mining rights

The requirement to use tendering procedures for the granting of mining rights is broadened to any known deposit.

The duration of exploration permits is limited to five years, renewable once for five years (formerly renewable twice for five years) and the duration of exploitation permits is limited to 25 years, renewable for 15 years periods each (formerly granted for 30 years renewable several times).

The minimum financial capability to obtain an exploration permit cannot be less than 50 times the total amount of the annual surface fees payable for the last year of the first period of validity of the exploration permit.

A registration fee of 1% of the transfer price is payable on the transfer of all mining titles.

Corporate/Assignment requirements

The State's free interest in the share capital of companies holding exploitation permit is increased from 5 to 10% and Congolese individuals must hold at least 10% of the share capital of companies holding exploitation permits.

The amount of the share capital of an applicant for an exploitation permit must correspond to at least 40% of the financial resources required for the performance of the investment/project.

The conditions for the renewal of an exploitation permit are toughened including the transfer to the State at each renewal of an additional free 5% of the share capital of the company in addition to the initial 10%.

Any transfer of shares in a company holding an exploitation permit leading to the acquisition of the control of the company by the beneficiary of the transfer is subject to prior approval from the State.

Financial and tax issues

Proportional duties are created (with no level set yet) for the approval and registration of security interests and for the assignment and transfer of mining titles.

Mining royalties rates are increased: 1% for iron and ferrous materials instead of 0.5% under the former Code and 3.5% for non-ferrous materials instead of 2%. The royalty for strategic substances (eg potentially copper and cobalt) will vary between 5% and 10%. For cobalt and coltan, it appears that the royalties paid to the Government will go up to 10% from 2% previously.

An obligation is created to build the head office of the mining company in the chef lieu (principal town) of the exploitation site which is quite unusual.

The obligation to repatriate 40% of the export sales revenues which existed in the Code is reinforced.

The repatriation of at least 60% of the export proceeds in the foreign currency account held in the DRC must be made within 15 days from the collection in the offshore account and after full depreciation of the investment 100% of the export proceeds must be made within 15 days from the collection in the offshore account. Failure to repatriate 60% of the export proceeds exposes the company to a fine of 5% of the non-repatriated sums.

For known deposits for which the titles are held by a state-owned company which conducted the study and documentation works on the deposit, an upfront payment (pas-de-porte) must be paid to that company.

The deduction of interests paid abroad in relation to external loans is subject to (i) the effective use of the loan for the implementation of the mining project and (ii) the rate of interest may not exceed the annual average of effective rates applied by the credit institution of the country where the borrower is established according to the data provided by the Central Bank of Congo.

An exchange monitoring royalty (redevance de suivi de change) of 2% over 100% of the amount of any export transaction and levied on the repatriated amount must be paid by the mining right's holder to the Central Bank of Congo.

Requirements regarding reporting and transparency are introduced by the Law in particular in accordance with the principles of the Extractive Industries Transparency Initiative (eg declaration of revenues and payments made by the State and the mining companies, production and sale statistics, amounts of taxes paid to the Public Treasury etc.). This is a positive innovation.

Stabilisation/transitional regime

Even though the mining conventions applicable at the date of entry into force of the Law remain applicable, if their duration is superior to ten years (which is mostly the case) and the related investments as set out under their feasibility studies have been amortised, they will be governed by the Law.

In the event of a change of shareholders of a mining company holding a convention after the entry into force of the Law, all the related mining rights will be governed by the Law and we assume that the mining convention will be terminated and renegotiated.

Mining rights granted prior to the Law

Rights resulting from or related to mining titles in force at the time of promulgation of a change in the mining legislation benefit from the stability of tax, custom and exchange regimes for a period of five years from the granting of such mining right. This was previously ten years.

For the mining rights granted prior to the Law, their tax, custom and exchange controls regime will remain unchanged for a ten year period from: (i) the entry into force of the Law, or (ii) the granting of an exploitation permit pursuant to the Law.

However, this stability is subject from the entry into force of the Law to the following conditions: (i) the payment of the mining royalty in accordance with the new Law, (ii) the transformation of any exploration permit into exploitation permit within two years and (iii) the project must be located in an enclaved province and evidence of investments made in non-mining infrastructures must be brought. This last condition is particularly restrictive and vague.

Arbitration

The provision on arbitration is very poorly drafted but provides for a *de facto* consent to the arbitration of the holder of mining right and its affiliated companies as a consequence of the acceptance of the delivery of the mining title by the Mining Registry (Cadastre minier).

Mining products and exportation

The holder of an exploitation permit is required to perform the treatment and transformation of mineral substances on the Congolese territory.

The treatment of raw mineral substances outside of the national territory is subject to prior authorisation and payment of a tax.

Social and environmental aspects and local content

The holder of mining rights is deemed to be liable without any need to demonstrate a fault for damage caused to persons, assets and to the environment as a result of its mining activities.

There is no statute of limitation for claims based on damage caused by mining activities on man and environment.

A new condition to maintain the validity of mining rights is compliance with commitments *vis-à-vis* social obligations in accordance with the time schedule (chronogramme) specified in the specifications (cahier des charges).

A minimum contribution of 0.3% of the turnover must be allocated to community development projects and managed by a legal entity comprised of representatives of the mining title holder and of the affected community.

Subcontracting

Subcontracting activities must be carried out in accordance with the Law No. 2017-01 dated 08 February 2017 setting out the rules applicable to subcontracting in the private sector. Such law is particularly broad and vague. However, pursuant to such law:

- subcontracting is reserved to businesses “promoted” by Congolese nationals and which have their registered office in DRC

- the subcontractor must be affiliated to the local social security and provide evidence of its tax compliance, and

- any subcontractor is also allowed to subcontract its activities subject to complying with the provisions of this law.

Comments

The Law is poorly drafted and various provisions will be subject to interpretation unless clarified in the implementation decrees or regulations including the coming mining regulation.

One major area for interpretation resides in the fact that the Law seems immediately applicable to all holders of mining rights valid at the date of its promulgation. The adoption of the mining regulation which is expected to be taken within the 6 months from the promulgation of the Law may provide clarifications but in the meantime mining companies and investors operate under great uncertainty. Meanwhile, new applications for mining rights are suspended and current applications are instructed pursuant to the Law.

Moreover, the Law carries increased risks of disputes and arbitration proceedings due to interpretation difficulties or breaches of existing rights of mining operators.

Many investors in the sector, including the largest in the country, have already expressed their concerns in relation to this Law which does not take into account the comments provided by investors solicited during the drafting of such Law initiated in 2012. President Kabila indicated that the Law will be applied on a case by case basis in order to take into account those concerns, which may give rise to even greatest interpretation issues and to corruption.

Gécamines

In furtherance to the adoption of the Law, Gécamines' Chairman, Albert Yuma, made a virulent speech during the Investing in African Mining Indaba conference on 05 February 2018 stressing Gécamines' willingness to correct the alleged "imbalance" of the existing environment in favor of Gécamines international partners.

Besides the harsh accusations towards international mining companies, Gécamines' Chairman formulated a number of measures in addition to the one already set out under the Law to better share the revenues of the mining industry between private operators and Gécamines, including that:

- a number of contractual clauses will become non-negotiable
- a new investment that exceeds a certain portion of the feasibility study's investment (FS) will require formal approval of Gécamines
- any substantial changes to the FS will require a new FS and performance requirements on the elements of the FS will be introduced
- negotiations with strategic sub-contractors will require approval by Gécamines
- tendering procedures mandatory for marketing contracts for minerals entered into by Gécamines joint-ventures
- proved and probable reserves of deposits of mining titles will be re-evaluated and dealt with as the contribution in-kind by Gécamines, which will result in a "rebalancing" of equity in the joint-venture companies with investors
- the up-front payment (pas-de-porte) payable to Gécamines' joint-venture partners will be increased from US\$35 to US\$165 per tonne of contained copper, and
- the structure of Gécamines will be modernised.

or refraining from any action as a result of the contents of this document.

Applicable law

Democratic Republic of the Congo

Services

Energy, natural resources and infrastructure

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