A new mining code for the DRC

After a lengthy reform process that was initiated in 2012, the Democratic Republic of Congo's new mining code was signed into law by President Joseph Kabila on 9 March 2018.

The new code was introduced by law n° 18/001 and modifies, rather than replaces, the former mining code which was introduced at the end of the country's long civil war in 2002. While many of the modifications are consistent with the regimes introduced in other African countries, others are more ambitious and have attracted concern from investors.

The following is a snapshot of the key changes introduced by the new mining code.

Available mining rights

Mining rights available under the new code include:

- an exploration permit, standardized to all minerals and granted for five years, renewable once for the same term; and
- a mining permit granted for 25 years, renewable for periods of up to 15 years.

These mining rights can now only be granted to legal entities and not to natural persons.

Royalties and taxes

The increase in the royalties and taxes is among the principal innovations of the new mining code.

These include taxes varying from 2 to 10 percent on certain "*strategic substances*" which are defined as minerals which "*on the basis of the Government's opinion of the prevailing economic environment, are of special interest given the critical nature of such mineral and the geo-strategical context*".

Although the strategic substances have not yet been designated by regulation, the Government has suggested that cobalt, coltan, lithium and germanium would be included. This comes as perhaps no surprise given the DRC is a major global producer of these substances which have become hot mining commodities with the increased demand for electric vehicles and grid storage technology.

Other royalty rates under the new code include the following: for non-ferrous metals, from 2 percent to 3.5 percent; for precious metals, from 2.5 percent to 3.5 percent; and for precious stones from 4 percent to 6 percent.

In addition, 10 percent of royalty payments must now be paid to a fund dedicated to future generations.

While Corporate Income Tax remains at a reduced rate of 30 percent for miners, a new 'super profits' tax of 50 percent tax has been introduced on profits exceeding 25 percent of those forecast in the mine feasibility study.

Furthermore, miners must now contribute a minimum of 0.3 per cent of turn-over to development projects for communities affected by the mine's activities.

Contracting requirements

The new code requires mining companies to comply with local law 17/001 of February 2017 requiring contractors to be Congolese and owned by Congolese shareholders. While unclear, it is generally accepted that this means the Congolese contractor must be majority owned by Congolese shareholders. Furthermore, in concluding services contracts for mining activities (not including contracts for the sale of goods), priority must also be given to Congolese companies. In this regard, any services contracts concluded with a foreign company are subject to a 14 percent tax on amounts paid under such contract.

Other notable amendments

- The State's free-carry shareholding in the mining company is increased from 5 percent to 10 percent, increased by 5 percent each time the permit is renewed. Furthermore, at least 10 percent of the capital must be owned by Congolese citizens which is a development that has attracted industry concern.
- The exportation of raw minerals is forbidden and mining permit holders must now present a plan for the refinement of their minerals to the mining authorities. A one-year derogation may be obtained if a company shows it is impossible to transform the minerals locally.
- The requirements relating to State approvals for transfers, farm-outs and option contracts are expanded, including a new requirement that changes-of-control (including certain share transfers) in companies holding a mining permit are subject to State approval.
- Access to a documented state-studied deposit, secured by tender, will be subject to the payment to the State of a doorstep (*pas de porte*) amounting to 1 percent of the price paid for the tendered deposit.
- The stability period during which taxes and customs cannot be modified is reduced from 10 to 5 years. While existing mining rights are subject to the provisions of the new law, it is unclear to what extent existing mining agreements with stabilization provisions will be affected.
- Companies must now establish a provision 0.5 percent of turnover for mine rehabilitation.

Conclusion

While many of the changes have stemmed from the State’s intent to improve the mining sector's legal framework, with greater benefits for State coffers and local communities, it is regrettable that many industry concerns were not addressed, particularly those relating to the local contracting requirements, the reduced stability regime and the Congolese shareholding requirements.

Foreign companies feeling aggrieved by the changes could consider protections offered by bilateral investment treaties which allow foreign investors to seek compensation where a government has breached protections offered to a foreign investment.

With the recent publication of the regulations accompanying the new code, only time will tell whether the new regime will ultimately increase the sector's benefits for the DRC.