

## Update on the Mining Code of The Democratic Republic of Congo

Over the past decade, a number of West African countries have amended their mining laws and regulations in order to (officially) better allocate the revenues of the mining industry between the states and the mining operators.

The Democratic Republic of Congo (“**DRC**” or the “**State**”), which has one of the richest subsoil in Africa and in the world (45% of the worldwide cobalt reserves and 80% of the world’s coltan production), has recently amended its mining code amid strong resistance from the major mining companies operating in DRC (such as Randgold Resources, AngloGold Ashanti, Glencore, Ivanhoe Mines, Gold Mountain International/Zijin, MMG and China Molybdenum).

The previous mining code was adopted in 2002 (the “**2002 Mining Code**”) and was regarded by the State as too investor-friendly. A revision process started in 2012 and a new mining code (the “**New Mining Code**”) was adopted by the National Assembly on 8 December 2017 and by the Senate on 24 January 2018. In spite of months of lobbying from the mining companies, it was promulgated by President Joseph Kabila on 9 March 2018.

The New Mining Code not only introduces major legal changes by creating additional duties and obligations for future operators (see below), but might also be read as immediately impacting current operations and existing rights of mining titles holders, jeopardizing in particular the “stability” provisions of the 2002 Mining Code and the existing mining conventions.

In addition, as the implementing regulations of the New Mining Code have not yet been adopted<sup>2</sup>, a number of legal issues remain unsettled or unclear.

The Government assured mining operators that a number of issues would be resolved on a case-by-case basis through transitional arrangements as well as new mining regulations and agreements. Mining companies were requested to meet with government officials for a 30 day period starting March 14, 2018 to try to resolve these issues. However, the State’s promises to remain open to dialogue and to take into account the mining operators’ concerns prolongs the uncertainty on the effectiveness of such changes.

One of the major changes<sup>3</sup> brought by the New Mining Code is the increase of mining royalties payable by the mining companies. The New Mining Code raises royalties on minerals: non ferrous royalties are raised from 2% to 3.5% and precious metals from 2.5% to 3.5%, both calculated on the gross market value of the products. It also creates a special 10% royalty on minerals deemed by the State to be “strategic substances”. The concept of “strategic substance” refers to substance declared as being strategic by the Council of Ministers in the event of national or international economic downturn, but the list of such substances is determined by implementing regulations which are yet to be passed. According to the latest information available, a strategic substance include at least cobalt and coltan.

The New Mining Code significantly increases the non-dilutable State free-carried interest in the exploitation companies applying for an exploitation license from 5% to 10% (and is increased by 5% on

<sup>1</sup> *N.B: on the date hereof, the New Mining Code has not yet been published at the Official Gazette (Journal Officiel) but the New Mining Code provides that it shall enter into force on the date of its execution (9 March 2018). Certain legal practitioners are of the view that it has entered into on 23 February, as it had to be promulgated within 1 month of its adoption. Doubt also remains as to whether the changes are implemented immediately or postponed until the implementing decrees are passed.*

<sup>2</sup> *The implementing regulations should be adopted within ninety-day of the promulgation of the New Mining Code.*

<sup>3</sup> *We have highlighted some of the major changes but a number of other major or significant changes have been brought by the New Mining Code which description would require a more detailed analysis.*

each renewal of a mining license). The New Mining Code also introduces a 50 % tax on exceptional profits in the case where profits are 25 % higher than the projections made in the bank feasibility study provided for the purposes of the issuance of the exploitation license.

Another major change is the duration of the exploitation license which is reduced from 30 to 25 years (and renewable for 15-years periods), while the exploration licences are renewable once only.

It should also be noted that direct and indirect change of control of an exploitation title holder is now subject to the prior approval of the State and in case of any transfer of mining titles a 1% registration fee based on the price of the mining assets/titles is payable. This could also affect lenders in case of enforcement of the share security over the exploitation company.

The other changes that may have an impact for operators and lenders include new registration fees for mortgages based on a percentage of the secured amount (instead of a flat fee) and a debt-to-equity ratio of the exploitation company which shall not exceed 60/40. Mining title holders are also required to repatriate 40% of the export proceeds in DRC during the investment amortization period and 100% after full repayment of investments, with no possibility of using repatriated funds to pay external debt.

Finally, the New Mining Code contains a number of obligations from the exploitation company around social responsibility undertakings, actions in favour of local communities or local preference (including for mineral processing and subcontractors).

Several provisions of the New Mining Code remain unclear as the relevant implementing decrees have not been enacted. For example, the New Mining Code seems to require that 10% of the share capital of a mining company that is created be held by Congolese citizens. It is unclear as to whether this requirement affects only newly created mining companies. In any case such requirement will be difficult to implement in practice.

As mentioned above, one of the main concerns of the mining companies currently operating in DRC relates to the possible disregard of their tax stabilization provisions. Indeed, the 2002 Mining Code granted mining title holders a stabilization right of 10 years (included in the mining convention) as from the relevant change of law. While certain provisions of the New Mining Code suggest that certain tax, custom and royalty provisions apply immediately, others suggest a moratorium for existing projects. In any case, any immediate effectiveness of the changes would contradict the stabilization rights granted to the mining companies and a violation of the stabilization provisions would likely lead to international arbitration.

It remains to be seen how the massive lobbying of the major mining operators in DRC will temper the effects of the New Mining Code on existing and new projects. It is likely that the State and the mining operators will eventually find common ground to continue cooperation but in the meantime the current legal uncertainty is a challenge to the mining industry.

Note that the DRC is a member of the Organization for the Harmonization of Business Law in Africa (OHADA) since 2012 and has voluntarily adhered to the Extractive Industries Transparency Initiative in 2014. This, as well as the execution of several bilateral investment treaties, has bolstered the investment climate in DRC and it is hoped that the latest developments will not affect this positive trend.

If you have any questions or comments in relation to the above, please contact the authors or your usual Mayer Brown contact.

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