



THE DEMOCRATIC REPUBLIC OF CONGO'S REVISED MINING CODE

25 April 2018 | Johannesburg
Legal Briefings

INTRODUCTION

On 9 March 2018, President Joseph Kabila signed into law significant changes to the Democratic Republic of Congo's ("**DRC**") mining code (the "**Revised Code**").¹ The Revised Code, which amends the 2002 Mining Code² (the "**2002 Mining Code**"), was adopted by both houses of Parliament on 27 January 2018 and came into force upon publication in the Official Journal on 28 March 2018. This note provides an overview of some of the key changes introduced by the Revised Code.

The promulgation of the Revised Code follows months of uncertainty during which the proposed legislation faced significant criticism from a number of the largest mining companies operating in the country. However, buoyed by a more optimistic outlook for the mining sector globally, the Revised Code was approved by the President without any material changes, despite last-minute lobbying by the mining industry.

The Revised Code reflects a shift in favour of the State, including a greater share of the proceeds from mining operations for the State, greater State ownership and increased emphasis on local development. Accordingly, the Revised Code is consistent with a wider trend in Africa towards greater resource nationalism and a re-balancing of mining regimes in favour of the State.

The detailed impact of the Revised Code will depend on how it is implemented. The Government's next steps, particularly the implementing regulations that will provide the details behind some of the headline provisions, will be particularly important to watch. However, the Revised Code will likely contribute significantly to a wider environment of uncertainty for investors in the country's mining sector. The approval of the Revised Code came only a few weeks following the announcement by the Chairman of the Gécamines that it intends to renegotiate the joint venture arrangements with its partners over the next year, all of which points to a period of continued unease for the industry.

STATE PARTICIPATION

The 2002 Mining Code included a requirement for 5 per cent State ownership in all mining companies awarded a mining licence, which has been doubled to 10 per cent. As before, the State share is free-carried and non-dilutable.³ The State interest has also been clarified in the context of a transfer of a mining right, with an explicit right of the State to a minimum 10 per cent free-carried interest in the acquiring company.⁴

Upon each renewal of a mining licence, the State will be entitled to an additional 5 per cent interest in the holder of the right, in addition to its existing shareholding.⁵

PAS DE PORTE

“*Pas de porte*” payments have been a regular feature of the mining sector in the DRC over the past 10 years and the Revised Code includes new provisions on this regime. The *pas de porte* is defined as the “non-refundable tax collected by the State, in the event of a call for tenders, as remuneration for the initial efforts provided or supplied by the State or a State mining entity in connection with the discovery of a deposit...”.⁶

Whenever a call for tenders is issued, the State will be entitled to payment of 1 per cent of the value of a mining deposit for the right to mine the deposits.⁷ The value of the mining deposit is defined as the price obtained for such deposit through the call for tenders.⁸

Note that the *pas de porte* is in addition to any signature bonus to be paid.⁹

NEW ROYALTY RATES

The Revised Code substantially increases royalty rates depending on the nature of the minerals, including:¹⁰

- an increase in the royalty for iron and ferrous metals from 0.5 per cent to 1 per cent;
- an increase in the royalty for both non-ferrous and base metals from 2 per cent to 3.5 per cent;
- an increase in the royalty for precious metals from 2.5 per cent to 3.5 per cent;

- an increase in the royalty for gemstones is increased from 4 per cent to 6 per cent; and
- the introduction of a 10 per cent royalty for strategic minerals. The Revised Code defines these as “any mineral substance which, on the basis of the Government’s appreciation of the prevailing economic environment is of special interest given the critical nature of such a mineral and the geo-strategical context”.¹¹ Although the list of strategic minerals will be confirmed by subsequent regulation, the Minister for Mines has already confirmed that it will include cobalt (of which the DRC is the largest producer globally), as well as coltan, lithium and germanium.

The Revised Code also provides for 10 per cent of royalty payments to be made to the sovereign mining fund (*Fonds minier pour les générations futures*).¹² Further details, including the management of the fund, will be set out in a subsequent decree by the Prime Minister.¹³

TAX AND CUSTOMS REGIME

The general tax on profits remains unchanged at 30 per cent.¹⁴

However, the Revised Code introduces a special 50 per cent tax on “super profits”.¹⁵ Super-profits are the profits generated by a mining company when the commodity price exceeds the price used in the project’s feasibility study by 25 per cent or more.¹⁶ The practical modalities for calculating super-profits will be set out in later regulations.

The tax and customs incentives provided for under the Revised Code may only be extended to subcontractors where such subcontractors are controlled by Congolese shareholders.¹⁷

Certain modifications and limitations have also been introduced in relation to the customs regime:

- Under the 2002 Mining Code, any imported goods and equipment necessary for mining were subject to a flat duty of 5 per cent from the start of production; this has now been limited to a period of three years from the start of production (the previous 2 per cent rate continues to apply to the period prior to the start of production).
- Intermediate goods and other consumables are subject to a rate of 10 per cent.
- Fuel and lubricants are subject to a rate of 5 per cent.¹⁸

REPARATION OF FUNDS

The Revised Code has tightened the restrictions on the maintenance of proceeds abroad and the obligation to repatriate funds. During the period of investment amortisation, a titleholder may hold up to 40 per cent of its proceeds in offshore accounts (debt service accounts, etc.) and must repatriate the remaining 60 per cent to DRC. Under the 2002 Mining Code, the ratio was inverted, with a 40 per cent repatriation requirement.¹⁹ Once the investment is fully amortised, the holder of the mining title must repatriate 100 per cent of the export proceeds.²⁰

The Revised Code also requires exploitation operations to be at least 40% equity-funded.²¹

LOCAL OWNERSHIP

The Revised Code includes a new requirement for 10 per cent of the shares in a mining company to be held by Congolese citizens.²² However, it is not clear whether the requirement applies only upon the issuance of a new mining licence (as is the case for State participation) or to existing titleholders as well.

DOMESTIC PROCESSING AND BENEFICIATION

In line with the Africa Mining Vision,²³ the Revised Code also introduces new requirements with respect to domestic processing. First, the award of a mining licence is subject to the holder demonstrating the ability to process and beneficiate minerals within the DRC and provide a written undertaking to do so.²⁴

Holders of production rights are then required to process minerals produced, or procure the processing by an approved entity within the DRC and to provide the Department of Mines (*Direction des Mines*) with an industrialisation plan setting out a programme for the domestic processing of produced minerals.²⁵

An exceptional authorisation to process minerals outside of the country may be granted for a period of one year by way of an inter-ministerial order (*arrêté*), the details of which will be set out in subsequent regulations.²⁶ Such an authorisation is subject to the applicant *inter alia*:

- demonstrating that it would be impossible to process the minerals domestically in an economically viable fashion; and
- agreeing to be subject to specific duties and taxes applicable to foreign processing of minerals.²⁷

Importantly, existing mining right holders are granted a three-year transition period to comply with the requirements of the Revised Code in relation to domestic processing and beneficiation.²⁸

CONTRIBUTIONS TO LOCAL DEVELOPMENT

The Revised Code introduces an obligation on holders of mining rights to make a contribution to development projects for mine affected communities amounting to at least 0.3 per cent of turn-over. The contribution must be made available to the local communities within a year of the end of the relevant accounting year.²⁹ The funds will be managed by a separate legal entity held by the titleholder and representatives of the local communities. The detailed provisions in relation to this management vehicle, including its legal structure and governance, will be set out in subsequent regulations.³⁰

Holders of a mining licence are also required to contribute towards projects to promote socio-economic and industrial development within affected communities. The specific contributions and support will be included in a set of specifications (*cahier de charges*).³¹

TRANSFERS AND OTHER TRANSACTIONS

The Revised Code has also introduced a number of changes in relation to transfers and other transactions, including:

- a requirement for prior State consent for any direct or indirect change of control in the holder of a mining licence or its merger with another company;³²
- the introduction of a registration fee upon the transfer of a mining right of 1 per cent of the sale price;³³ and
- an increase in the fees payable for the registration of security over mining rights ranging from 0.1 per cent to 0.5 per cent of the sum secured,³⁴ which were previously modest fixed fees.³⁵

TRANSITION AND STABILISATION

Subject to the transitional period in relation to domestic processing requirements, the Revised Code is immediately applicable, including to existing titleholders.³⁶

The 2002 Mining Code provided a stabilisation period of 10 years, under which the rights attached to any exploration permit or mining licence issued prior to any amendment of the code (or any subsequent exploitation permit issued pursuant to an earlier exploration permit) were protected.

The Revised Code replaces this with a five-year period during which existing rights will benefit from stabilisation of the tax, customs and exchange regime (as opposed to all rights attached to an exploration permit or mining licence, as under the 2002 Mining Code).

The interaction between the stabilisation provisions under the 2002 Mining Code and the Revised Code is likely to raise a number of questions, particularly for holders of existing mining licences. In light of these changes, the specific stabilisation position would need to be assessed on a case-by-case basis.

1. Law no. 18/001 of 9 March 2018, amending and supplementing law no. 007/2002 of 11 July 2002 providing for the Mining Code.
2. Law No. 007/2002 of 11 July 2002.
3. See Article 71-d of the Revised Code.
4. See Article 182 (2) of the Revised Code.
5. See Article 80 (h) of the Revised Code.
6. See Article 1 (36 bis) of the Revised Code.
7. See Article 33 bis (1) of the Revised Code.
8. See Article 33 bis (1) of the Revised Code.
9. See Article 33 of the Revised Code.
10. See Article 241 of the Revised Code.
11. See Article 1 (48 quarter) of the Revised Code.
12. See Article 242 of the Revised Code.
13. See Article 8bis of the Revised Code.
14. See Article 247 of the Revised Code.
15. See Article 251 bis of the Revised Code.
16. See Article 251 bis (1) of the Revised Code.
17. See Article 219 (2) of the Revised Code. This provision of the Revised Code cross-refers to the 2017 law on sub-contracting (law no. 2017-01 of 8 February 2017), which includes requirements for sub-contractors to be controlled by Congolese shareholders.

18. See Article 232 of the Revised Code.
19. See Article 269 (1) of the Revised Code.
20. See Article 269 bis (1) of the Revised Code.
21. See Article 71-b of the Revised Code.
22. See Article 71 bis of the Revised Code.
23. The importance of downstream linkages and the importance of developing domestic processing and beneficiation capacity is a key theme in the Africa Mining Vision adopted by the African Union in 2009.
24. See Article 71 (h) of the Revised Code.
25. See Article 108 bis (2) of the Revised Code.
26. See Article 108 ter (1) of the Revised Code.
27. See Article 108 ter (2) of the Revised Code.
28. See Article 342 ter of the Revised Code.
29. See Article 285 of the Revised Code.
30. See Article 285 octies of the Revised Code.
31. See Article 285 sexies and 285 septies of the Revised Code.
32. See Article 276 bis and 276 ter of the Revised Code.
33. See Article 185 ter of the Revised Code.
34. See Article 171 (1) of the Revised Code.
35. These ranged from \$500 to \$1,000: see decree no. 38/2003 of 26 March 2003.
36. See Article 342 bis of the Revised Code.

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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