

Senegal

A new mining decree to complete the 2016 mining code

Briefing

May 2017

Executive Summary

Concluding a process initiated 4 years ago with the intention of modernizing the Senegalese mining sector, President Macky Sall signed, on 20 March 2017, a decree supplementing the new mining code that had been published on 24 November 2016.

A combined reading of the new mining code and the decree reveals a reform of the mining sector in line with the trends generally observed in the region: increase in transparency and control by the State, increased taxes, reduced scope of exemption and advantages for investors.

Although more stringent than the previous Senegalese mining law, the reform does not contain certain local requirements adopted elsewhere in the region, such as the obligation to process part of the production locally or to include quotas, or give priority to the local workforce or subcontractors.

Client Alert

On 30 October 2016, the Parliament of Senegal adopted Law no. 2016-32 relating to the new mining code (the “**New Mining Code**”). The New Mining Code was published in the Official Journal on 24 November 2016. It was recently supplemented by a Decree no. 2017-459 signed on 20 March 2017 (the “**New Mining Decree**”). This concludes a revision process initiated by President Macky Sall in November 2012 at the same time as the review of certain mining contracts.

The New Mining Code follows the regional trend of giving greater control and a bigger share of profits to the State. It will apply to new applications for mining permits, while previous mining law (Law no. 2003-36 of 24 November 2003 as amended, the “**2003 Mining Code**”) will remain applicable to existing permits until their expiry. Subject to the terms of stability provisions which may be included in existing mining conventions, applications for the renewal of existing mining permits are likely to be governed by the New Mining Code.

We highlight below the main changes implemented by the combination of the New Mining Code and Decree compared to the regime of the 2003 Mining Code.

01 | Mining titles

Exploration permits: Limited to 2 per applicants (for the same minerals), they will now be granted for up to 4 years (as opposed to 3 years under the 2003 Mining Code) and still renewable twice by maximum 3-year periods. However, exploration permits may no longer be transferred during their initial validity period. Expressly-provided withdrawal events are amended. Exploration permits may now be withdrawn for (i) suspension of works for more than 6 months without cause (as opposed to 1 year under the 2003 Mining Code) or (ii) failure to apply for an exploitation permit within 6 months following confirmation of the existence of commercial deposit (as opposed to 1 year under the 2003 Mining Code). The New Mining Code also provides that the commercial nature of a deposit must be assessed within 1 year of its discovery. Although this is not expressly listed as a withdrawal event, exploration permits may still be withdrawn in the event of a breach of the mining code and the permit holder’s obligations.

Exploitation regime has been unified with the deletion of the previous concession regime and the issuance of a single title for exploitation for a duration between 5 and 20 years (note though that the previous concession regime could be granted for up to 25 years). Between 10% and 15% of anticipated investment amount (as, we understand, such investment program has been approved as part of the application for the exploitation

permit) must be disbursed within 1 year of the issuance of the permit for the exploitation works to be deemed started. Failing to start the exploitation works on time may give rise to a fine of CFA francs 50 million (USD80,000) per month of delay, increasing by 15% per month from month four to month twelve. Exploitation permits may be withdrawn if the works have not started within 2 years.

Areas of particular interest: With respect to areas of particular interest (*zones promotionnelles*), the New Mining Code introduces the ability of the State to:

- launch competitive tenders for the issuance of mining titles – both the New Mining Code and the New Mining Decree are silent as to whether the State may launch a tender offer over an area in which an exploration permit holder has already discovered a commercial deposit (thereby undermining the rights of such permit holder to be granted an exploitation permit). Implementing regulations in this respect should be closely monitored; or
- conclude production sharing agreements (“PSA”) approved by decrees (exempted from mining royalties) – whilst the New Mining Decree provides that a template PSA will be issued by the mining administration (including the main topics that are to be set out therein), there is no additional information as to how these should work, or which entity will be in charge of such PSAs. The introduction of production sharing agreements is a frequently discussed topic in the region but has been generally rejected in part due to industry concerns but also to the lack of resources within the administration and the difficulty for governments to market their production share (such as for instance in Ivory Coast where it was eventually withdrawn from the draft of the 2014 mining code).

02 | Increase of transparency/control over mining activities

By increasing transparency requirements, the New Mining Code follows the position taken by most countries in the region at the insistence of international institutions, including the World Bank and the African Development Bank.

Publication and compliance of mining convention: The mining convention must now be negotiated with the mining administration within 3 months. Failing which, the application for the underlying mining permit is automatically deemed rejected. Also, it is now an express requirement for mining conventions to be entirely compliant with the New Mining Code. Once executed, all mining conventions must be published in the Official Journal.

Prior authorisation for certain transactions: Prior authorisation from the Minister of Mines is now required for (i) any merger, demerger, placement under management or winding-up of a mining company, (ii) transfer by a mining company of more than 10% of its assets (pertaining to its mining operations in Senegal) and (iii) any relevant transaction with respect to the share capital of the mining company (including the acquiring or transfer of a blocking minority or majority of voting rights).

03 | State participation in mining activities

Whilst the free-carried participation of the State remains at 10% of the share capital of the project company, the State is entitled to acquire for consideration additional shares up to 25% of the share capital.

04 | Increase in taxes and mining fees

The New Mining Code also follows the general trend of increasing (or creating) taxes and mine fees:

Increased royalties: The New Mining Code now distinguishes various royalty rates depending on the ore (e.g. 5% for raw/offshore-refined gold and concentrated iron, 3.5% for onshore-refined gold and concentrated base metals other than iron) instead of a single 3% rate applicable to any product. Basis for royalties has also changed being now the market value for locally traded products or FOB value for exported products (as opposed to the pithead value (*valeur carreau mine*) under the 2003 Mining Code).

Increased fixed fees: Fixed entry fees (paid on issuance, renewal, extension, prorogation or conversion, transfer or leasing (*amodiation*) of mining permits) have increased significantly from CFA francs 500,000 to CFA francs 2.5 million (approximately USD800 to USD4,100) for exploration permits and CFA francs 1.5 million to CFA francs 10 million (approximately USD2,500 to USD16,300) for exploitation permits.

New surface rent: A new surface rent is introduced, amounting to CFA francs 5,000 to 8,000 per km² per year (approximately USD8 to USD13) during the exploration phase and CFA francs 250,000 per km² per year (approximately USD400) during the exploitation phase.

Reimbursement of historical costs: The grant of a mining permit or the execution of a PSA may now be subject to the reimbursement of historical costs incurred by the State or the relevant public entity, if any.

05 | **Reduced stabilization and tax exemption**

Reduced scope for stabilization: Stabilization is now limited to the tax and customs regime during the exploitation phase (to be included in the mining convention) and no longer covers the legal, administrative, financial and tax conditions as was the case under the 2003 Mining Code.

Prior approval for customs duties and taxes exemptions: Permit holders and their subcontractors are still exempted from customs duties and taxes¹ on (i) goods (including spare parts), (ii) fuel and lubricant and (iii) oil products used to generate energy, to the extent they are required for mining activities. This exemption applies to exploration phase and to exploitation phase until the earlier of first commercial production date or 3 years after the grant of exploitation permit. However, goods to be imported are now required to be listed and submitted for prior approval of the Minister of Mines and the Minister of Finances.

Reinstatement of VAT exemption for exploration permit holders: The New Mining Code reinstates for exploration permit holders a VAT exemption for certain goods (referred to above) which had been deleted in 2012.

No corporate tax exemption: The 2003 Mining Code was amended in 2012 with the repeal of the 7-year corporate tax exemption for concession holders. The absence of exemption from, or reduction of, corporate tax in the New Mining Code is inconsistent with (i) the trend generally observed in neighbouring jurisdictions (such as Mali, Burkina Faso and Ivory Coast) and (ii) the UEMOA mining code, which provides a full corporate tax exemption during the exploration phase and the first 3 years of the exploitation phase. The New Mining Code unfortunately does not address this issue.

06 | **Local content**

Title holders must now create, in cooperation with administrative and local authorities, a dedicated fund to support projects for the benefit of local communities and contribute (i) an amount to be negotiated with the State for the exploration/development phase and (ii) 0.5% of the annual turnover (excluding taxes) for the exploitation phase.

Mining permit holders and their subcontractors are also required to give preference to employing local citizens with the same qualifications and to implement a training plan for Senegalese employees. However, the New Mining Code does not impose quotas for Senegalese employees, nor any obligation for part of the production to be processed locally.

07 | **Rehabilitation obligation**

The New Mining Code still requires all title holders to open a dedicated rehabilitation account. Operating conditions and payments to this account are to be set out in a separate regulation. Pending enactment of a new decree however, Decree no. 2009-1335 of 30 November 2009 would still apply and provides that the rehabilitation account must be opened by the mining permit holder with the *Caisse des Dépôts et Consignations* and credited annually with an amount as set out in its environmental management plan.

¹ Including COSEC contribution but excluding statistical royalty and community levies.

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