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Ivory Coast Mining Code Update: Adoption of the Implementing Legislation

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As highlighted in our client alert of March 7, 2014, the Ivorian Parliament approved a new mining code (the “New Mining Code”) on March 5 which aimed at modernizing the mining sector and increasing its transparency.

However, in the absence of any implementing legislation, operators have been unable to assess exactly the extent of the changes brought by the New Mining Code as its main provisions appeared broad enough to leave a certain degree of flexibility to the government.

Many of these missing key details were recently supplemented with the adoption of (i) order no. 2014 148 (the “New Order”) published on May 29, 2014 which introduces revised ad valorem and land royalties and (ii) decree no. 2014-660 (the “New Decree”) adopted on June 25, 2014 (to be published soon) which provides clear answers on some, if not all, of the questions that were left open in the New Mining Code (together with the New Mining Code, the “New Mining Legislation”).

The major highlights of this New Mining Legislation are in line with the current trends observed in West Africa which emphasize local community development and environment protection. Thus, the New Order and the New Decree introduce additional contributions and/or obligations such as the mandatory creation of several development funds.

This New Mining Legislation also introduces increased financial obligations and commitments for operators with higher rates and fees applicable to mining activities and the new obligation for title holders to provide a bank guarantee. However, taking into account changing market conditions, the government has not attempted to reinstate the additional profit tax or introduce a production sharing mechanism.

This New Mining Legislation also aims at clarifying and modernizing the legal framework applicable to mining activities. The requirements for mining permits application, renewal and perimeter as well as the provisions regarding the size and terms of State's stake in the share capital of the project company to which a mining title is issued have been made more specific. Furthermore, title holders are now allowed to grant security interests over their title to guarantee amounts borrowed to finance mining exploitation activities. The New Mining Legislation also codifies existing local practices by requiring mining companies to enter into a mining convention governing the exploitation phase and it now guarantees the stability of the convention's tax and customs regime provided it is compliant with the New Mining Legislation.

Accordingly, whilst it is true that this New Mining Legislation is more burdensome and is likely to financially impact mining activities (especially given the creation of apparently at least three mandatory development funds), the overall legal framework also appears to be more transparent and sounder for operators.

Grey areas nonetheless still remain due to the provisions governing the entry into force of such implementing regulation: by only broadly stating that the New Decree and the New Order repeal all contrary provisions found in previous legislation (including decree no. 96-634 dated August 9, 1996 in application of law no. 95-553 dated July 18, 1995), this new regulation leaves a substantial degree of uncertainty regarding which provisions continue to be in force since only those that are clearly contradictory can be safely considered as repealed. As a result important issues could be left open to interpretation such as whether the obligation to employ at least 80% of Ivorian nationals is still mandatory or whether the fixed duties provided by ordinance no. 96-600 dated August 9, 1996 are still payable and at which rate.

Major Changes to Mining Titles

The New Mining Code introduces several major changes to the regime governing mining titles:

- All title holders must now be of Ivorian nationality - exploitation permit holders must additionally be incorporated as a company. The New Decree further develops the obligations borne by title holders as follows:
 - The New Decree requires any title holder to notify the Department in charge of mining of any change in their by-laws, corporate form, or in the identity of their managers or members of the board no later than thirty (30) days from the occurrence of such event. The New Decree further specifies that any acquisition of interest exceeding 5% of the share capital of any title holder shall be notified to the Department in charge of mining. The approval of the Ministry in charge of mining shall be sought for any majority stake acquisition; and
 - The share capital of any applicant of an exploration permit must be at least equal to 20,000,000 FCFA. Furthermore, the applicant for an exploration permit must submit to the Department in charge of mining a work program aiming at identifying and enhancing the mineral content of the covered area associated with a research budget for the first four (4) years at least equal to 1,600,000 FCFA per square kilometer.
- Under the New Mining Code, the State can impose the participation of a local partner in the share capital of the company holding an exploitation permit. The New Decree specifies that such participating interest must be at least 5% and can only be imposed where:
 - The research permit was granted in accordance with a tender offer as set forth in the New Mining Code; and
 - The State has contributed to the financing of the research phase.
- Exploitation permit holders are now allowed to grant security over their title (*hypothèque*) subject to prior approval of the Ministry of Mines (mortgages and pledges over exploration permits remain prohibited). The New Decree further specifies that such pledge can only be granted to guarantee amounts borrowed to finance mining exploitation activities.
- Previous drafts of the New Mining Code required title holders to provide a bank guarantee. The New Mining Code only requires them to keep funds (*réserve bancaire*) with an Ivorian bank prior to applying for an exploration permit and within 6 months following the grant of an exploitation permit. The New Decree supplements these provisions with the following:
 - The applicant for an exploration permit must demonstrate that he maintains funds in an Ivorian bank that are equal to at least 10% of the research budget for the first year. Such evidence may be presented by any shareholder with at least a 35% share in the capital of the applicant company. If the applicant company is unable to provide such evidence, it will still have the option of providing a bank guarantee instead; and
 - However, the New Decree gives no further indication about the requirement to maintain funds within six months after the grant of an exploitation permit.
- Exploration permit's duration is increased up to twelve (12) years divided as follows:
 - initial duration of four (4) years;
 - renewable twice for three (3) years under strict conditions: (i) relinquishment of $\frac{1}{4}$ of the exploration area, unless the operator proves work is executed on the entire perimeter and (ii) administrative fees; and
 - additionally, an exceptional renewal for 2 years can be granted to finalize the feasibility study.

- The area covered by an exploration permit is now limited to a maximum of 400 km² (1000 km² under the current legislation) and works must be initiated within six (6) months following the grant of the exploration permit.
- Exploitation permits remain valid for the duration of the life of the mine, with an initial duration of up to 20 years (unchanged), but subsequent renewals are now limited to consecutive periods of up to ten (10) years (previously of up to 20 years).
- Exploitation permit holders must, within 60 days of the grant, enter into a 12-year mining convention (renewable for periods up to ten (10) years). The New Decree further details the scope of the mining convention. In particular, the convention will set out:
 - The rights and obligations of the permit holder;
 - The obligations of the State;
 - Duration of the convention (up to a maximum of twelve (12) years);
 - The works / investment commitments for the duration of the convention;
 - The tax and custom stabilization regime (but which must be compliant with the tax and custom provisions of the New Mining Code);
 - The conditions of termination of the convention;
 - The obligations of the permit holder relating to employment and training of Ivorian personnel;
 - The obligations of the permit holder relating to protection and restoration of the environment; and
 - The convention is renewable for maximum periods of ten (10) years. In the event that the convention is renewed, the applicable tax and customs regime will be that which is in place on the date of renewal.
- One of the most notable changes relates to the State participation in the share capital of companies holding an exploitation permit. In addition to its 10% free-carried and non-dilutable participation, the State is entitled to an additional participation for value now limited to 15 % of the share capital of the company. However:
 - the valuation of such participation is broadly defined as it is based on “market price” (*conditions du marché*) but we note that, perhaps following comments of mining industry representatives, the reference to Abidjan local market price has at least been removed; and
 - the level of such participation remains uncertain as this 15% capped additional participation (i) does not include the shares held by companies fully- or majority-owned by the State and (ii) does not apply when the State has financially contributed to the project since the beginning of the exploration stage.

Major Changes to the Tax and Royalty Regime

While previous drafts had envisaged the use of production-sharing agreement mechanisms, the New Mining Code maintains the royalty system comprising taxes based both on surface rent and turnover of the project company (after deducting freight costs). Profits made on the sale of mining titles are now subject to taxation in accordance with the Tax Code although the New Mining Code does not state which specific provisions should be applied. The New Mining Code however has not sought to re-introduce the additional profit tax previously repealed by the 2013 Amended Finance Law.

Furthermore, the New Order introduced changes concerning annual land royalties which include:

- Increased rates for exploration permits and exploitation permits (rates for the issuance or renewal of exploitation permits have increased fivefold); and
- Exploitation permits for geothermal resources and mineral water are now subject to specific rates.

The New Order also introduced changes concerning the ad valorem tax which include:

- Moderate increases in the ad valorem rates for most resources;
- The ad valorem rate for gold is now indexed to gold's market price (however, specifics on how this market rate is determined are not provided);
- New rates are set for specific resources such as iron and manganese; and
- Holders of industrial or semi-industrial exploitation permits for rough diamonds are exempted.

The New Mining Code also provides new tax incentives for title holders during both the exploration and the exploitation phases such as:

- VAT and customs for a broader range of imported goods;
- income tax exemption for the first five years following production; or
- various tax exemptions such as property tax on specific land, water tax.

Profits from ore sales must now be repatriated in accordance with exchange control regulations.

New Rights and Obligations

Additionally, the New Mining Code contains numerous new obligations imposed on title holders which are further detailed in the New Decree:

- Title holders must comply with the ITIE requirements (Initiative pour la Transparence des Industries Extractives) and the Equator Principles - concept of corporate social responsibility is introduced. The New Decree specifies that the title holder must provide to the Department in charge of Mining, an annual report on all payments made to the State, including social contributions for the benefit of local communities. This report must be submitted within three months from granting of the permit;
- Exploitation permit holders must create a Mining Local Development Fund (*Fonds de Développement Local Minier*) to support local communities and implement social and economic projects as set out in a Community Development Plan (*Plan de Développement Communautaire*) developed with local administrative authorities. The New Decree specifies that the Mining Local Development Fund will be for the benefit of local villages affected by the mining activity as determined by the Environmental and Social Impact Study. The projects to be funded from this development fund will be approved by a Local Development Committee. These funds are to be located at an Ivorian bank and any use of the funds must be co-signed by the exploitation company and the President of the Local Development Committee;
- Exploitation permit holders must (i) establish and finance a training program for the local population under the terms of its mining convention and (ii) financially contribute to the training of governmental agents, engineers and geologists. The New Decree specifies that a fund will be created and managed by the Ministry of Mining and the exploitation company for the purpose of making these financial contributions. Amounts to be paid into the fund annually by the exploitation company will be specified in a separate decree;

- Exploitation permit holders must comply with specific provisions on decommissioning and environmental rehabilitation of the site including a mandatory escrow account in an Ivorian bank to finance the related costs. The New Decree specifies that amounts to be paid into the escrow account are determined by the Environmental and Social Impact Study. Furthermore, a committee (composed of representatives from the Ministry of Mining, Finances, Budget, Environment, and the exploitation company) is established to monitor the use of funds destined to decommissioning and environmental rehabilitation;
- Exploitation permit holders must give priority to (i) local companies for subcontracts related to mining operation, construction, supply and services when offered on equivalent conditions (quality, price and quantities) as foreign suppliers and (ii) Ivorian staff; and
- The New Mining Code states that subcontracts must be communicated to the Department in charge of Mining. The New Decree specifies the conditions under which subcontractors will be approved by the Minister of Mining and the Minister of the Budget. Approval is granted for a period of three years to companies (i) whose technical and financial capabilities will allow them to undertake mining activities, (ii) whose activities are exclusively limited to subcontracting in the field of mining or companies who provide sufficient guarantees of the distinction between their mining activities and their other activities. Renewal of subcontract approval is granted for a period of three years to all subcontractors in compliance under the initial approval. The subcontractor must submit to the Department in charge of Mining an annual report of its activities.

The New Mining Code also creates additional causes for title withdrawal to reflect these new obligations and increases existing penalties, now including prison sentences up to five (5) years.

Entry into Force

As regards the New Mining Code, current mining titles will be valid for their remaining term but their renewals will be subject to the provisions of the New Mining Code. The New Order and the New Decree take effect immediately upon their publication in the *Journal Officiel* of Ivory Coast, i.e May 29th, 2014 for the New Order and a date still to be announced for the New Decree.

Nonetheless, grey areas remain as both the New Order and the New Decree only repeal the previous provisions of legislation that are inconsistent. Accordingly, a strict interpretation must find that all provisions included in the decree dated August 9th 1996 in application of law no. 95-553 dated July 18th 1995 and the ordinance no. 96-600 dated August 9th 1996 that are not clearly contradictory are still in force.

For example, the New Order addresses only ad valorem and land royalties to be paid for mining activities. Operators should therefore presume that other duties (including the fixed duties under Art. 149 of the New Mining Code) are still governed by order no. 96-600 and may also be modified by additional decrees.

The New Order also requires mining companies to contribute 0.5% of their annual turnover to funds for local socio-economic development. This contribution seems to be in addition to the mandatory contribution, found in order no. 96-600, of up to 1% of annual turnover to the environmental fund (*Caisse Autonome d'Amortissement*). Since the purpose of each fund is different, the contribution to the environmental fund does not contradict the New Order and thus the environmental fund is apparently meant to remain unrepealed. However, the New Decree specifically provides for the creation of Mining Local Development Fund (*Fonds de Développement Local Minier*) and requires the operator to maintain an escrow account in an Ivorian bank in order to finance decommissioning and environmental rehabilitation. It is unclear whether these various funds are to be deemed redundant and/or contradictory and lacking further explanation from the Government, operators are left to assume that four different contributions are now required. In contrast, the New Order does, however, make it clear that holders of exploitation permits are now exempt from paying the regional development tax found in law no. 2003-489 of December 26, 2003.

Similarly, the New Decree is silent as regards provisions that were found in decree dated August 9th 1996 such as the obligation to employ at least 80% of Ivorian nationals and the right of title holders to compute training expenditures as operation costs up to 0.5%. Whether these rights and obligations survived the enactment of the New Decree still needs to be clarified.

Please feel free to contact us if you would like to discuss the New Mining Code or your investments in Africa.

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