



Amendments to the Guinean Mining Code

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Introduction

On 8 April 2013, the *Conseil National de Transition* (CNT) acting as parliament in the Republic of Guinea adopted Law L/2013/053/CNT (the **2013 Bill**) containing amendments to Law L/2011/006/CNT setting the Mining Code of the Republic of Guinea (the **2011 Mining Code**). The 2013 Bill was promulgated shortly thereafter by Presidential Decree D/2013/075/PRG/SGG dated 17 April 2013. By way of background, the 2011 Mining Code, which was meant to replace the previous Guinean mining code of 1995, was met with widespread criticism, resulting in the authorities almost immediately ‘suspending’ the application of its tax and customs rules and in effect not enforcing the

remaining provisions. Following this move, which became the source of legal uncertainty for Guinea's mining industry, the authorities worked on the elaboration of amendments to the 2011 Mining Code, aiming at addressing some of the concerns expressed by mining companies. The 2013 Bill appears to be the result of this process, as some of the proposed amendments do provide a level of relief in respect to certain provisions of the 2011 Mining Code. However, new restrictive rules are also introduced and many of the industry concerns remain unaddressed.

The following summarizes some of the main and substantive amendments introduced by the 2013 Bill. These are presented in the order of the provisions of the 2013 Bill.

For the purposes of this paper, '**Mining Code**' means the 2011 Mining Code as amended by the 2013 Bill.

Land package

In response to concerns expressed by the industry on the restrictive size of Guinea's exploration land package, the 2013 Bill provides for an increase in the maximum area of exploration licences, namely from 350 km² to 500 km² in respect of bauxite and iron ore, and from 50 km² to 100 km² in respect of other substances, including gold. However, the maximum number of exploration licences that any one person can hold for any one substance remains limited to three for bauxite and iron ore and to five for other substances.

Technical partnership during the exploration phase

The 2013 Bill has maintained the 'non transferable' character of exploration licences, but has opened the door to exploration title holders concluding technical partnerships in order to secure funds necessary for the financing of exploration activities. However, such technical partnerships remain subject to the approval of the Minister of Mines and cannot constitute a direct or indirect assignment of the relevant exploration licence.

Larger application of the concession regime

Under the 2013 Bill, the level of investments required for a project to qualify as a mining concession has been maintained at USD 1 billion in respect of bauxite, iron ore and radioactive substances, but has been reduced to USD 500 million for projects covering other substances. This distinction better reflects the economic reality in terms of the size of investments required for non bauxite and iron ore projects. It will thus allow a larger number of projects to qualify for the mining concession regime, thus benefiting from longer term and renewal periods.

Penalties for delays in beginning development and exploitation works

The 2013 Bill has amended some of the obligations pertaining to commencement of development and exploitation works under an exploitation licence or mining concession and has increased the corresponding penalties.

First, the penalty applicable when the development work has not commenced after one year from the award of the title has been increased from USD 250,000 per month for the first 3 months to USD 2,000,000 per month during the same period for mining concessions, and from GNF 5,000,000 (approximately USD 710) to GNF 10,000,000 (approximately USD 1420) for semi-industrial exploitation permits. The corresponding penalty has however been maintained at USD 100,000 per month for the first 3 months in respect of industrial exploitation licenses. Similarly, the 2013 Bill has maintained the concept of a 10% monthly increase of penalty amounts from the fourth month and until the twelfth month of delay.

Also, in relation to the timeframe within which operators are required to reach the exploitation phase, the 2013 Bill has introduced a distinction between (a) exploitation activities which aim at the extraction and exportation of raw minerals and (b) exploitation activities which aim at the transformation of raw minerals in Guinea. For projects entailing extraction and exportation of raw minerals, the period to reach exploitation cannot exceed four years for holders of industrial exploitation licences and five years for holders of mining concessions. In respect to projects where in-country transformation is envisaged, the maximum delay is set at five years for holders of industrial exploitation licences and six years for mining concessions holders.

Failure to reach the exploitation phase within the prescribed period no longer leads to the monthly payment of a fixed fine but rather to penalties calculated on the basis of the difference between the expenditures actually incurred and the agreed minimum expenditure for a one year period. However, these penalties will not apply if such difference is less than 10% or if an adjusted work programme has been approved by the Minister of Mines, following prior favourable opinion of the National Commission of Mines.

Finally, the 2013 Bill has amended the definition of 'commencement of development works' by increasing the level of minimum expenditures from 8% to between 10% and 15% of the total amount of investment for preparatory, development and construction works.

Withdrawal of mining titles

The 2013 Bill has expanded the scope of article 88 of the 2011 Mining Code, so that withdrawal cases apply not only to mining titles but also to authorisations (covering rights pertaining to prospecting, artisanal mining and quarry projects). In addition, to take into account changes made to article 91 of the 2011 Mining Code (please refer to section 7 'Registration fees and capital gain' below), the 2013 Bill has introduced new circumstances which may lead to the withdrawal of a mining title or an authorisation, namely the failure to withhold and remit the capital gains tax due in case of assignment of shares in a Guinean title holder or of assignment of a participation entailing an indirect change of control.

Finally, pursuant to amendments introduced by the 2013 Bill, failure to spend at least 25% of the agreed minimum expenditure over two years may lead to title withdrawal; this provision is more onerous for investors than the 2011 Mining Code which provided for a 20% threshold.

Transfer of licences and shares (failure to amend)

Despite the level of concern expressed by the industry and promises made for amendments and clarification, article 90 of the 2011 Mining Code, dealing with the transfer of mining titles and shares in title holders has remained entirely un-amended. Thus, the requirement for a ministerial 'validation' of a direct or indirect, partial or aggregate acquisition of five percent (5%) in the capital of a title holder has been maintained, together with the lack of clarity caused by the indistinct use of the terms 'approval' and 'validation'. Similarly, any contract by which rights arising under a title are entrusted, assigned or transferred partially or totally, or any option which is granted with respect to any of the foregoing, remains subject to the consent of the Minister of Mines.

Registration fees and capital gains

While article 90 has remained unchanged, the 2013 Bill has entirely overhauled article 91 of the 2011 Mining Code which is now divided into four different provisions (articles 91-I, 91-II, 91-III and 91-IV) detailing the various fees and taxes payable upon the transfer of mining titles as well as shares of companies holding such titles. In summary, the new provisions have removed the reference to the much contested concept of 'conditions of approval under article 90 being negotiated with shareholders'. In exchange, the rate of the applicable capital gains tax has been changed from the fixed rate of 10% to the standard rate, which is also currently at 10% but subject to change. Also, a series of detailed rules have been introduced, providing for:

- the application of the capital gains tax on (a) the transfer of a mining title, (b) the transfer of shares in an entity holding the mining title, and (c) the acquisition of a participation leading to an indirect change of control in the entity holding the mining title, bearing in mind that when such indirect change of control results from a series of transfers of shares which have occurred over a period of 12 months, then all such transfers are subject to taxation. It is also noteworthy that the concept of 'indirect change of control' is given a rather wide scope; the mere fact for an individual or legal entity to have become able to exercise influence effectively by taking part in decisions relating to the management and financial policy of the company may be considered as an indirect change of control in that company;
- the basis of the capital gains tax is essentially calculated by the difference between the sales price and the net book value of the transferred mining title or shares, except however when the assets of the entity whose shares are transferred are located in several jurisdictions, in which case the capital gain is only calculated on the value of the assets belonging to the Guinean subsidiary;
- the Tax Administration being entitled to question the price of the transfer of an exploitation licence or a mining concession in case of price concealment or if the price is below arm's length price;
- the entity holding the mining title being liable to withhold at source the amount of capital gains taxes that may be due on the sale of its own shares or the shares of its parent company;
- the failure to withhold and remit capital gains tax being sanctioned by the withdrawal of the relevant mining title.

Overall, despite a few welcome clarifications, the changes proposed to article 91 of the 2011 Mining Code have made the rules both more restrictive and more onerous for mining companies. It is also noteworthy that neither article 90 - which has remained unchanged – nor article 91, make any exceptions for the transfer of mining titles or shares in the title holder to an affiliate or in the context of a corporate re-organisation. These two provisions are likely to cause challenges to the smooth

running of good faith transactions, whether internal or not, typically required to secure the much needed funds and/or technical capacity to develop the high potential assets found in Guinea's sub-soil.

Joint and several liability

The 2013 Bill has introduced some alleviation to the rather wide scope of the joint and several liability which the 2011 Mining Code imposed on title holders with respect to their subcontractors and lessees (*amodiataire*). Under the newly amended provision, title holders are jointly and severally liable with their sub-contractors and lessees in respect of activities that are the object of the subcontract or lease agreement (*amodiation*). The joint and several liability also applies to customs obligations, but not to domestic taxation (please also refer to section 14 'Direct sub-contractors' below).

Employment

The 2013 Bill has maintained the quota system created by the 2011 Mining Code imposing a certain percentage of Guinean nationals which a mining company is required to employ, depending on the type of position and the stage of the project; however, it has introduced minor changes, notably by providing that:

- mining companies are no longer required to give priority to residents of local communities for positions not requiring qualification, although the management may reserve them certain positions;
- while the obligation to appoint a Guinean deputy general manager is maintained, it is now required to be satisfied as at the 'date of first commercial production', rather than the 'launch of the exploitation company' which was a rather vague concept. Similarly, a Guinean general manager is now required to be appointed within five years of such date of first commercial production;
- the 2013 Bill has also clarified that the Guinean general manager as well as deputy general manager are to be hired by the mining company in compliance with its own procedures;
- finally, the three year restriction on the term of employment for expatriate personnel has been removed. Instead, the 2013 Bill provides that their term of employment must correspond to the initial term provided by the Law on the entry and residence of foreigners and the Labour Code; and such term is only renewable once.

Infrastructure

The 2013 Bill has also alleviated the rules pertaining to the transfer, to the State, of the ownership of infrastructure built and financed by a mining title holder. The 2011 Mining Code required such transfer of ownership to occur after the amortisation of the relevant infrastructure and within a maximum of 20 years. The 2013 Bill now provides that the transfer of ownership will take place 'after the time necessary for a fair return on investment' to which a grace period of five years is added. The 2013 Bill has also addressed some of the concerns expressed by investors, by allowing mining companies to maintain a priority right on the use of the infrastructure, even after its transfer to the State. Despite this modification, the concept of 'a time necessary for a fair return on investment' remains unclear and may lead to adverse interpretation if not adequately clarified through the Mining Regulations.

State marketing and pre-emption rights

The 2013 Bill has introduced some clarification in respect of the exercise of the State marketing right created under the 2011 Mining Code. More precisely, the distinction between the percentage of production over which the marketing right could be exercised during the investment depreciation phase and the subsequent phase has been removed and such right can now only cover a percentage of the production which corresponds to the State's participation in the capital of the company. The new law also clarifies that in addition to being set annually for the production of the following year, the State may exercise its marketing right at the time the title holder enters into long term sale contracts. Of course, the State's right must be exercised at conditions at least equivalent to those offered by other buyers, and the 2013 Bill has also added that such exercise may not affect the provisions of sales agreements already in force. Finally, the 2013 Bill provides that the other shareholders of the mining company benefit from a pre-emption right on the minerals sold by the State to third parties.

In addition to the above, the 2013 Bill has introduced a State pre-emption right – which did not exist under the 2011 Code. This is to apply when transactions are concluded off-market or between affiliated companies. Indeed, the State may exercise a right of pre-emption over a maximum of 50% of the company's raw or transformed production if it considers, based on reliable and concrete data, that production has been sold below arms length's prices for more than three consecutive months. In that case, the State may purchase such production at a price equal to 105% of the current FOB price.

To complete the State's pre-emption right, the 2013 Bill has also introduced a requirement for title holders to obtain approval from the Ministers of Mines and Finances on the prices established in any agreement setting long term prices (such as offtake agreements). The authorities have a one month period to react, failing which they are deemed to have approved the proposed prices. Once such approval is obtained (or deemed obtained), the State becomes precluded from exercising its pre-emption right during the term of the relevant agreement.

Finally, the 2013 Bill has also introduced provisions entitling the State to readjust the taxable income of the title holder who has agreed to a trade price lower than the market price, without prejudice to tax and criminal sanctions under the General Tax Code.

State participation

In respect to the State's right to a 15% free carry participation in the capital of mining companies, the 2013 Bill has introduced a number of clarifications which are likely to be welcomed by the investor community. First, the requirement to grant the 15% free carry interest only applies to titles issued as of the entry into force of the Code (although it is not clear whether this applies to the promulgation date of the 2011 Mining Code or to the 2013 Bill). More particularly, this requirement does not apply to the holders of mining conventions which were signed and ratified prior to the adoption of the 2011 Mining Code. The 2013 Bill has also clarified that the State may not assign, pledge or mortgage its free carried participation.

Unfortunately, the amendments introduced regarding the State's option to acquire an additional cash participation (allowing its equity stake in mining companies to reach a maximum level of 35%), remain relatively unclear and fail to address the concerns expressed by the industry. For example, the 2013 Bill specifies that this option 'may be spread out in the time but can only be exercised once'. This may

mean that the State's option will be open for a period of time but cannot be exercised partially and in several instances. The 2013 Bill also clarifies that only the title holder can request a reduction of the State's right to acquire such cash participation in exchange for an increase 'for an equivalent amount' in the extraction or production taxes and that such 'equivalent amount increase' must be determined by an independent expert. However, those concepts remain rather unclear and the framework within which the title holder's option can be exercised or in which the expert's determination is to be carried out is yet to be clarified.

The 2013 Bill has also given mandatory provisions to the shareholders' agreement which is to be signed by the shareholders of the mining company to define, among others, consultation rights granted to the State.

Finally, the 2013 Bill has failed to address the industry claim for a right of pre-emption for the benefit of other shareholders in case of a sale, by the State, of its cash participation.

Tax and customs regime

As expected, the tax and customs provisions of the 2011 Mining Code have been entirely overhauled. This paper does not purport to set out a detailed analysis of the changes introduced by the 2013 Bill, nor of their impact on the taxation and customs regime; rather it highlights some of the main changes as follows:

- a. The mining taxes previously set out under article 161 of the 2011 Mining Code have been replaced by (i) a tax on extraction which applies to mineral substances other than precious metals (the **Extraction Tax**) – set at 3% for iron ore, 0.075% for bauxite, 3% for base metals, at rates varying between 3.5% and 5% for diamonds and at rates varying between 1.5% and 5% for other precious stones and other gemstones; and (ii) a tax on the production of precious metals (the **Production Tax**) – set at 5% for silver, gold, platinum, palladium and rhodium.
- b. The event giving rise to the Production Tax is the extraction of the precious metals rather than their sale, with the tax being due on the date the ingots are weighed at the Central Bank of Guinea.
- c. Both the Extraction Tax and the Production Tax remain deductible in the calculation of taxable profits.
- d. Any delay of more than 30 days in the payment of either the Extraction Tax or the Production Tax is subject to sanctions extending, in case of prolonged and repeated delays, to the withdrawal of the mining title as well as the closure of the facilities.
- e. New export taxes are introduced and apply to the export of mineral substances – other than precious substances (the **Mineral Substance Export Tax**), which are exported as raw minerals without having been processed in Guinea beforehand, with the tax rate ranging from 0.075% for bauxite to 2% for iron ore, base metals, and radioactive substances, other than concentrated uranium for which the rate is set at 3%.
- f. In addition, the export tax on the industrial or semi-industrial production of diamonds previously covered by article 164 of the 2011 Mining Code has been replaced by a tax on the export of precious stones and other gemstones (the **Precious Stone Export Tax**) exported raw, with tax rates being set at 3% for diamonds, 1.5% for precious stones other than diamonds and other gems and 5% for any stone having a unit value equal or greater than USD 500,000. The rate of the Precious Stone Export Tax is reduced if the precious stones or gemstones are exported after having been cut in Guinea.

- g. The Mineral Substance Export Tax and the Precious Stone Export Tax are due at the time of export of the mineral or stone, with the exporter being the main payer and any customs applicant acting under a representation mandate being jointly and severally liable for payment.
- h. The export tax on the artisanal production of gold and diamonds has been extended to cover all precious stones and other gemstones, and the rates have been set at 1% for gold, 3% for diamonds, 1.5% for precious stones (other than diamonds) as well as other gemstones and 5% for any stones or gems having a unit value of more than USD 500,000.
- i. New provisions dealing with the mining list and its content, notably in respect of each activity phase have been introduced and amendments have been proposed to the various categories of goods that can be included on a mining list.
- j. The withholding tax on non-wage income is now set at the standard rate rather than the fixed rate of 10% and it remains non-deductible for the calculation of the tax on profits.
- k. The tax and customs regime during each of the exploration phase, construction phase and the exploitation phase have also been amended, with some of the main changes comprising: (a) a reduction of the corporate tax from the standard rate (currently at 35%) to 30%; (b) the reduction from 6% to 5% of the rate of customs duties payable, during the exploitation phase, with respect to goods appearing on the first and third categories of mining lists, provided these goods are intended for on-site processing of mined substances into finished or semi-finished products; and (c) the reduction from 8% to 6.5% of the rate of customs duties applicable, during the exploitation phase, with respect to goods appearing on the first and second categories of the mining list, provided they aim at the extraction and processing of raw mineral substances.

Direct subcontractors

The 2013 Bill introduces new provisions specifically dealing with direct subcontractors, which exclusively include entities directly providing goods and services to mining title holders in relation to activities covering exploration, construction of mining facilities or extraction. In respect of the import of their goods, direct subcontractors benefit from the tax and customs regime applicable to mining title holders during each of the exploration, construction and exploitation phases, provided they have established a mining list in accordance with the provisions of the law. However, subcontractors of direct subcontractors are explicitly excluded from this benefit.

The 2013 Bill also specifies that exploitation title holders are jointly and severally liable with direct subcontractors for the payment of all duties and taxes, and related penalties due by such subcontractors. This liability may however be intended to be limited to import taxes due by subcontractors, as article 94 provides that the title holders' joint liability with their sub-contractors applies to 'customs obligations' but does not extend to domestic taxation (please refer to section 8 'Joint and several liability' above).

Deconsolidation regime

The 2013 Bill has introduced a "ring fencing" regime whereby title holders may not accumulate at a given moment, and for the same title, the advantages of tax benefits granted to different activity phases. According to the new article 181-IV, a legal entity holding several mining titles is required to obtain a separate tax identification number and maintain a separate accounting for activities related to each mining title as well as for activities not specifically covered by the mining title. Consequently no set off or deductions can be made among expenses incurred and taxes, duties and similar charges

due in relation to activities carried out by the same entity, but relating to different mining titles. No exception is provided for mining titles covering contiguous areas which typically can be explored together. The same would apply to ancillary activities that do not specifically relate to a mining title.

Tax stabilisation

The 2013 Bill has introduced a number of significant amendments to the tax stabilisation regime. On the positive side, the distinction between the length of stabilisation available to exploitation title holders as opposed to concession holders has been removed, and a fixed maximum stability period of 15 years is granted to title holders which have executed a mining convention. In addition, the requirement to pay for an annual stabilisation premium has been deleted.

However, the 2013 Bill has also introduced new limitations to the scope of the stabilisation, in some instances to such extent as to deprive the regime of most of its benefits. For example, while article 182 still provides that during the stabilisation period, no new tax or charge of any kind may be imposed on the relevant title holders, it also specifies the following new rules:

- other than for the Extraction Tax, Production Tax, Mineral Substance Export Tax and Precious Stone Export Taxes, the stabilisation only covers the 'rates' and does not extend to the base of the taxes, duties and charges;
- the stabilisation is stated to be limited - in an exhaustive manner - to the following:
- the rates for (a) the tax on industrial and commercial profits and the corporate tax; (b) the contribution to the local development; and (c) the unique entrance duty (*droit d'entrée unique*); and
- the rate and base of the Extraction Tax, Production Tax, Mineral Substance Export Tax and Precious Stone Export Taxes;
- are expressly excluded from stabilisation: fixed duties, annual royalties and surface fees, as well as excise duties and environmental taxes.

Penal regime

The penal provisions existing under the 2011 Mining Code have remained substantially unchanged, but the amounts of the fines have, in certain instances, been substantially increased, up to five times their initial amounts. Such increased penalties notably apply to delays in beginning development works (please refer to section 4 'Penalties for delays in beginning development and exploitation works' above), the mining of diamond or gems without proper title or authorisation, the failure to declare to or inform the Minister of Mines or the National Direction of Mines as required, any violation of closed, forbidden, protected or security zones as well as breaches of provisions relating to radioactive substances, hazards and dangers, hygiene and safety at work.

Transitory provisions

Investors are likely to welcome the changes introduced by the 2013 Bill with regard to transitory rules. First, guarantees of mining titles existing before the adoption of the 2011 Mining Code have been extended and cover, in addition to ownership, the validity of the relevant title. Also, the 2013 Bill provides for a different set of rules in respect of the application of the new legislation to the holders of

mining conventions signed and ratified before the adoption of the 2011 Mining Code. More specifically, convention holders are required to negotiate with the State and sign an addendum providing for amendments to their mining convention, such amendments being of threefold:

- amendments providing for full and immediate compliance with and immediate application of the provisions of the Mining Code concerning transparency, the fight against corruption, the transfer of interest in a mining title and capital gains tax, protection of the environment, relations with local communities, health, hygiene and security at work;
- amendments providing for full but progressive - over a period not exceeding eight years - compliance with the provisions of the Mining Code concerning training, employment, and preference to Guinean companies;
- in regard to all other provisions of the Mining Code, including tax and customs regimes, State participation in the capital of mining companies, State transport and marketing rights, obligations to comply with the insurance code and exchange control rules, the amendments to be contained in the addendum may be freely negotiated between the State and the relevant title holder.

Any amendments agreed between the parties become effective on the date of ratification of the addendum by Parliament, such ratification to be preceded by the approval of the Council of Ministers, the signature of the Minister of Mines, and a legal opinion of the Supreme Court. These amendments will apply to subsequent mining activities, while prior activities continue to be governed by the provisions of the existing mining convention.

Should the parties fail to reach an agreement on the content of the addendum within 24 months of the 2013 Bill's publication, the parties must meet to agree on an addendum which is adapted to the economic terms of the project or mining exploitation. It is however unclear which regime will apply if, after such meetings, the parties still fail to reach an agreement.

Conclusion

The above changes to the mining legislation may have stemmed from the Guinean legislator's intention to provide a stable environment as well as incentives for new investments. Indeed, several of the proposed changes have the effect of improving the legal framework for the mining sector. It is regrettable that several of the industry's concerns have not been addressed and also that the occasion of this amendment was not used to bring more clarity and certainty and to correct inconsistencies and errors which can still be found in the legislation.

The Guinean legal framework still remains to be completed as neither the Mining Regulations nor the various application texts to which the Mining Code regularly refers have been made public. A full view on the legal framework will only be possible when this documentation can be reviewed. It should however be expected that the authorities will nevertheless look to implement and enforce the Mining Code. Mining companies are thus required to invest in gathering an understanding of the new provisions and how they will impact their business.

