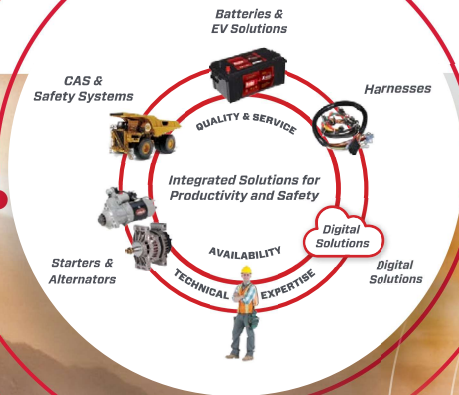


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Cutting up the Pie: Sharing Profits in the DRC

Mining legislation in the Democratic Republic of the Congo (“DRC”) has become increasingly stricter towards foreign companies since the law’s last modification in 2002. In 2018, the Congolese Mining Code was amended, notably adding provisions aiming to protect the country’s citizens and government. Changes to the mining legislation were due, in large measure, to the fact that before 2018, foreign-owned companies controlled approximately 90% of the DRC’s mining activities.

The new Mining Code makes it less attractive for foreign companies to establish their mining activities in the DRC and instead redirects mining revenues to the State. More precisely, one change to the 2018 Mining Code requires that at the moment a mining company asks the Government for the transformation of the company’s research permit (“PR”) to an exploitation permit (“PE”), the PR being a requirement to obtain a PE, not only is said company required to transfer 10% of its share capital to the State, the company must now also transfer an additional 10% of its shares to Congolese citizens. Since the law provides that the types of shares that will be assigned are essentially the same shares as those issued, each new shareholder will have the same rights as the original shareholders including, but not limited to, voting rights, participation, profits and losses. Essentially, the transferred shares are free of all restrictions. The requirement of the assignment of shares to the State comes as no surprise, as the older version of the Mining Code provided for this requirement; however, in the 2002 version of the Mining Code, a mining company was only required to transfer 5% of its shares to the State (as opposed to the current heavier burden). Furthermore, companies did not originally have to transfer 10% of their share capital to Congolese citizens. Minimizing the dilution of foreign investors’ participation in mining companies in the DRC has therefore become more challenging.

The Mining Code is not explicit as to the formalities surrounding the assignment of shares, other than specifying that the 10% of shares to be assigned to the State are non-dilutive. The rule regarding the assignment of shares to Congolese citizens is slightly more detailed in the DRC’s Mining Regulation, which provides that the shares can be transferred as follows: 5% of same to employees of the company and the remaining 5% to one or more Congolese citizens capable of acquiring the shares, which seems to imply a financial capacity to do so.

Additionally, it is important to note that the assignment of shares to the State and the Congolese people would be required once again should the entity holding a PE decide to transfer same to another entity. For example, if Company A holds a PR, it must assign 10% of its shares to the State and another 10% to the latter’s citizens when requesting that its PR be transformed into a PE. In the event that Company A wishes to thereafter transfer its PE, once obtained, to a certain Company B, Company B would then also be obligated to transfer 10% of its share capital to the State and 10% to its citizens, as it is taking assignment of the existing PE. This amendment inevitably causes concerns to the entities already established in the DRC.

As mentioned, the requirement of assigning shares applies at the moment an entity asks for the transformation of its PR to a PE, or is being assigned an already existing PE. Therefore, those companies which have been issued or assigned PEs before 2018 do not have to comply with this additional formality, as it does not apply retroactively. Nonetheless, even in the case where there is an assignment after 2018 of a PE issued prior to 2018, the assigned company must comply with the legal requirement to assign its shares to the State and its people. Foreign-owned companies should heed the following cautionary note:





“The new Mining Code makes it less attractive for foreign companies to establish their mining activities in the DRC...”

One could argue that attempting to restrict the rights of the Congolese people and the State contradicts the very essence and intention of the reformed Mining Code, as the amendment in question attempts to rebalance control and distribution of profits, something that all existing and future foreign entities should keep in mind before establishing mining operations in the DRC. A more liberal interpretation of the existing mining legislation may open the door to certain legal and practical measures and tools to circumvent the aforementioned requirements and minimize their impact on foreign investments in these mining companies.

If you are interested in learning additional information about mining in the DRC or elsewhere in the world, we invite you to consult with our law firm's Mining Group which has developed extensive knowledge of the industry and in this practice area of law:

attempting to provide otherwise in their articles of incorporation or entering into side agreements with Congolese citizens to restrict some of their rights as shareholders, could be considered a breach of Congolese Business Law. If so, a company engaged in this practice could be subject to significant fines and/or penal and civil sanctions, such as restricting the company's exploitation activities in the DRC altogether for 5 to 10 years.

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