

## **Comments on the January 2013 proposed amendments to DRC Code Minier**

Set out below are our comments on the following specific aspects of the proposed amendments to the DRC's Code Minier, as requested.

- Obligatory open and competitive tenders for allocation of mining rights
- Transparency on contracts, beneficial ownership, revenues and production volumes
- Prohibitions on the handling and trading of conflict minerals
- Adequate environmental and social standards

Our comments relate only to the proposed amendments sent to us, we have not reviewed the 2002 Mining Code (or the environmental or any other laws).

### **1. Obligatory open and competitive tenders for allocation of mining rights**

There is not much detail provided in the amendments with respect to tender procedures for allocation of mining rights. The requirements in the amendments are not strong or detailed enough to ensure open and competitive tenders.

The amendments (Article 21) provide only that the central government will call for tenders for all open or restricted mining rights of deposits studied, documented or worked by the state or state companies, that such tender must be completed within 9 months and must comply with DRC public procurement laws and generally accepted international mining practice (to our knowledge, there is no such generally accepted international mining practice for the carrying out of tenders so this requirement does not add any guidance).

There is no procedure set out in the amendments for how tenders will be undertaken, no list of biddable factors and no elaboration of the criteria on which tenders will be evaluated (although this may be set out in the DRC procurement laws, which we have not reviewed). Given the context of conflict-minerals, DRC could require as a criteria for evaluation (amongst others), the company's plan for supply chain due diligence according to OECD standards.

These should all be known in advance of calling for any tenders. The Code should also specify that information relating to all steps in the tender

procedure must be made public, and there should be clear and public pre-qualification requirements for participants, including with respect to the financial status and technical expertise of the applicant as well as its holding of other mining rights in the DRC, its chain of beneficial ownership, its record with respect to exploration and exploitation and its record with respect to supply chain due diligence if the company has already operated in DRC.

## **2. Transparency on contracts, beneficial ownership, revenues and production volumes**

The amendment in Article 132 deals with transparency, but is not comprehensive. It is positive in that it requires monthly publication by the rights holder of its production volumes, volumes sold and exported and their value, as well as amounts of payments made to the treasury and state bodies.

However, although full disclosure of all mining contracts (to which companies entirely or partly-owned by the state are a signatory) is already required under decree (of May 20, 2011), this is not referred to in the Code and consideration should be given to specifically including this requirement. A decree provides more discretion to the Minister, as it can be introduced, amended or repealed solely by a Minister rather than requiring the approval of parliament (as for a law).

Disclosure of the chain of beneficial ownership of the applicant should be required at the time of the application for the rights as well, with the beneficial owners to be understood as a party or parties that directly or indirectly own more than 5% of the shares of the project.

## **3. Prohibitions on the handling and trading of conflict minerals**

The amendments introduce some further restrictions on supply chains for products of artisanal mining, with respect to who can hold, carry and trade these products in the DRC. While these amendments may assist, they do not appear in themselves to provide comprehensive prohibition on the handling and trading of conflict minerals. For example, Article 60 laying out the conditions for the renewal of a mining license should add as a requirement the approval of the company's systems for due diligence of the supply chain.

With respect to dealing with products of ASM, the amendments introduce a provision under which mining cooperatives must comply with certain requirements in order to be approved to exploit artisanal mining products, by SAESSCAM, the Mining Registry and the Mining Administration (Article 81). There are also amendments made to the restrictions on transport of artisanal mining products, such that no person can hold or carry artisanal mining products unless they are registered as artisanal miners or within the cooperative, hold a trader's card or are registered as a buyer from an

authorized transformation or processing entity (Article 83). Only traders authorized by the Central Bank and the Ministry may buy and sell artisanal mining products on the stock markets (Article 93).

Trader's cards are issued by the provincial authority to Congolese citizens, and may be cancelled (for a period of three years minimum) if the holder does not comply with the Code, which gives some force to the requirements on the card holder – though these requirements are set out in an Article of the Code which has not been subject to amendment (Articles 84 and 85). The authority to buy and sell artisanal products may also be cancelled by the Minister if the authority holder does not comply with its obligations under the Code (Article 92). The ability to cancel rights such as these gives some weight to the obligations.

#### **4. Adequate environmental and social standards**

There is very little in the amendments dealing with environmental and social standards. The main addition has been to include as a condition of the grant and renewal of a research permit and the grant and renewal of an exploitation permit (and, it seems, also in relation to the grant of a quarry permit), a written undertaking to comply with the specifications defining social responsibility to communities (Article 60, 105 and 124). It is not clear what these specifications are – though they may be included in the 2002 Mining Code, or alternatively there may be intent to create such specifications through regulations – and it also remains unclear what the Code means by “Cahier des charges” of social obligations.

In any event, “social responsibility” requirements should be clearly defined for each project. This should be done through a consultative process involving the rights holder, the government (national, local) and the communities. This helps to ensure that any projects undertaken by the company for the benefit of the community are appropriate for the particular communities' needs, not determined by the company alone in line with its own priorities. It also can help ensure that the government has planned for and even supports any company initiatives in order to ensure their sustainability (for example, after completion of the mining project).

Beyond this requirement for an undertaking, there are no other amendments dealing with social safeguards, such as requirements for social impact assessment, social management plan, consultative processes or any other such requirements.

In respect of environmental standards, there are not many additions and there is no comprehensive new or amended section on environmental regulation. There is now a provision which states that non-compliance with environmental and social obligations are considered to be breaches of

administrative obligations and setting out a process for action to be taken by the mining administration in these circumstances (Articles 179 and 182 of the amendments). This may lead to forfeiture of the mining rights, which gives some weight to the environmental and social obligations set out in the Mining Code.

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