Mining, Oil and Gas Update

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Mining, oil and gas exploration and exploitation activities in France: applicable law and planned reform

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1. BACKGROUND OF THE REFORM

On September 5, 2012, the French Prime Minister established a committee for drafting a reform of the French Mining Code, which governs mining, oil and gas exploration and exploitation activities. The purpose of this reform was mainly to bring the mining code into compliance with certain environmental principles, which, since 2005, have been incorporated in the French Constitution, and to modernize the mining law regulatory framework.

The committee consisted of elected officials, legal experts, representatives of non-government organizations and industry, as well as other experts and members of social organizations. The committee submitted the proposed reforms to the government on 10 December 2013.

Although the proposed draft of the mining code reform is currently being reviewed by the various ministries, and this review will probably bring about certain amendments, it is likely that the main principles of the reform will remain unchanged.

It is expected that a bill proposing the reforms of the mining code will submitted to Parliament in the first half of 2014. However, enactment of the new mining code by Parliament is not expected before the end of 2014 or early 2015.

The enactment of a new mining code is eagerly awaited by the industry, which has been facing the consequences of public opposition to unconventional hydrocarbons for almost three years now. This opposition has resulted not only in the ban of the hydraulic fracturing technique, but also in significant delays in the processing of all applications for new authorisations, transfer or renewal of authorisations, and has created a highly insecure legal framework for developing mining activities in France.

In addition to the proposed new mining code, the Minister for Productive Recovery announced in February 2014 that the Government plans to establish a State-owned company – the *Compagnie française des mines* ("**CFM**"). The CFM, which would be the first State-owned company to be created in 20 years, would prospect for resources - including gold, lithium, germanium and rare earths - in France, French overseas territories and elsewhere around the world, including Africa, Central Asia and South America. For the time being, it is unclear whether the CFM's activities will focus on mining resources or both mining and hydrocarbons. Moreover, it is also unclear whether the CFM will apply for licences alone and carry out the projects by itself, or whether it will create partnerships with other State-owned or privately-owned companies. The fact that the budget allocated to the CFM's investments will only be between EUR 200 and 400 million over five to seven years suggests that partnerships will be implemented.

2. CURRENT APPLICABLE LAW

The current mining code which was implemented by a governmental decree on 20 January 2011 and so was not debated in Parliament, regulates mining activities, as well as oil and gas activities. Most of the legislation of the three activities are identical. The 2011 Mining Code replaced older legislation passed in 1956 which was no longer adapted to the new regulations of pursuing mining activities. The conditions of implementing the mining code are detailed in two decrees dated 2 June 2006, Decree no. 2006-648 relating to mining permits and permits for sub-oil storage and Decree no. 2006-649 relating to mining works.

Exploration – Exploration works are carried out on the basis of an exclusive research permit (*permis exclusif de recherches* or "**PER**") that gives its holder an exclusive right to carry out exploration works within a defined perimeter and to freely make use of the deposits extracted during searches and test operations. No legal entity may obtain a PER if it does not have the technical capacities and financial resources to carry out exploration works.

A PER application must be submitted to the Minister in charge of mines and must include documentation proving the identity and the financial and technical capacities of the applicant, i.e., the applicant's technical plans for the proposed permit area, the schedule of planned work, financial commitments specifying a minimum amount to be spent for exploration, maps and environmental impact studies. While no parent company guarantee is formally required, the applicant needs to demonstrate that it has the financial capacities to carry out the works. In practice, as special purpose companies are put in place, the parent company provides a joint and several liability surety (*caution solidaire et indivisible*) in order to guarantee the commitments of their subsidiary under the PER.

Once complete, the PER application is published in the French Official Journal (for PERs related to deposits other than hydrocarbons) and in the French and European Union Official Journals for PERs related to hydrocarbons. Following the publication, the permit application for the area mentioned in the application is opened for bidding. Contending applications may be presented during a limited period of time (1 month for PERs related to deposits other than hydrocarbons and 3 months for PERs related to hydrocarbons) and are assessed by the Minister in the same way as the initial application. After reviewing the initial application and the contending applications, the Minister may propose dividing the area in question into several blocks and grant several PERs. He may also propose that the applicants have the permit jointly granted. The granting of the permit takes the form of a ministerial order ("*arrêté ministeriel*"). If no decision is rendered within two years the application is deemed rejected.

PERs are granted for a period of a maximum of five years and can be renewed twice without going through the bidding process.

PER holders' obligations – All PER holders must maintain their financial and technical capabilities in light of which the permit was granted.

Pursuant to Article 43 of Decree 2006-648, PER holders must notify the Minister in charge of mines in the following cases:

1. any substantial change to the articles of association of the company holding the PER, within three months of the entry into force of the change;

2. any planned transaction which, by a change in the distribution of shares or by any other means, would result in a change of control of the company or in a transfer to a third party of all or part of the rights resulting from the possession of the PER, including the right to transfer all or part of the present or future production; this notice must include any information required to ascertain the financial capacity of the proposed transferee;

3. if the permit was granted to companies jointly and severally, any proposed amendment to the association agreements ("*contrats d'association*") existing between the parties which relates to research and exploitation in the permit area.

The proposed changes or transactions referred to in Article 43 must not be implemented before the expiration of a period of two months from the receipt of the notification. During this period, the Minister in charge of mines may inform the PER holder that the transactions or amendments in question might be incompatible with its right to hold the mining title.

The PER holder must also inform the Minister in charge of mines of any substantial change which could alter the technical and financial capacities on the basis of which the permit was granted.

Other significant obligations of PER holders include:

- providing before 31 December of each year the works program for the next year;

- providing, at the beginning of each year, a report detailing the works carried out during the previous year;

- complying with the financial commitment indicated in the permit application and keeping their accounts in a way that allows monitoring of this compliance.

Holders of mining titles for deposits other than hydrocarbons are required to provide a financial guarantee (issued by a financial institution or an insurance company) prior to the start of exploration and exploitation for mines comprising waste management facilities. The amount of the guarantee is defined on the basis of the information given by the permit holder to the *préfet* (i.e., the State's representative at the local level) and must be sufficient in order to cover the cost of restoration of the land.

Transfer of rights held in PER(s) – Pursuant to Article 43 of Decree 2006-648, PER holders can farm out part or all of their interests in a permit to third parties. In order to do so, notification must be filed with the Minister in charge of mines. The transfer can be implemented provided that the Minister in charge of mines does not oppose the transfer within a two-month period.

Exploration works – The PER does not grant in itself the right to carry out exploration works. Depending on the nature of the works, exploration works are subject to authorization granted by the *préfet*, who may decide to impose additional requirements as to the conditions in which they are carried out. The fact that additional authorizations are needed after the granting of the PER creates legal uncertainty for PER holders, who need to apply for an authorization in respect of each exploration project they wish to carry out. In these conditions, it may take more than three years, once the PER has been applied for, to grant the works authorization.

Exploitation – Exploitation of mining deposits and hydrocarbons can only be carried out through a mining concession which is granted by decree after a public consultation. During the period of validity of the PER, the holder of the PER may only obtain a mining concession within the scope of the permit and in relation to the deposits mentioned in the permit. Bidding must be organized to grant a concession on an area for which there is no PER. No legal entity may obtain a mining concession if it does not have the technical capacities and financial resources to carry out the works. The scope and duration of a concession are set out by the decree granting the concession. General and specific conditions, also set out by decree, are applicable to concessions. The initial duration of the concession cannot exceed fifty years.

Right to renewal – **(i) *PER*:** The validity of a PER can be extended twice, each time for a maximum of five years, without bidding. The holder is entitled to automatic renewal either for a duration of at least three years, or for the same duration of validity as the previous validity period if this was less than three

years, providing that the holder fulfils its obligations and undertakes a financial commitment of at least the same value as the one undertaken during the previous validity period, proportional to the duration of validity and the area required.

Upon renewal, the surface area defined in the PER must be reduced (upon the first renewal, the relinquishment must be equal to half of the surface and on the second renewal it must be a quarter of the remaining surface).

If, at the end of the current period of validity, a decision regarding the granting or rejection of the PER renewal has not been made, the PER holder is authorized to carry out exploration works within the perimeter mentioned in the renewal application until a formal decision has been made.

(ii) ***Mining concession***: A mining concession can be renewed several times, for up to twenty-five years. The renewal has to be authorized by decree.

Assignments ("mutation") – The assignment of a PER or of a mining concession is not subject to bidding. The party who wants to become the holder of a PER as a result of the assignment must fulfil all the conditions required to obtain a PER. The assignment application must be filed with the Minister in charge of mines. If the Minister fails to respond to the assignment application within 15 months, the assignment is deemed to have been rejected.

Fee – Holders of mining concessions for oil and gas are required to pay the State an annual progressive fee calculated on production.

The level of the fee for onshore oil and gas concessions varies in accordance with the date of first commercial production. For concessions that started producing after 1 January 1980, the fee is calculated by tranche as a percentage of the value of the production at the field's limit and varies as follows:

Oil	Less than 50,000 tonnes	0%
	Between 50,000 and 100,000 tonnes	6%
	Between 100,000 and 300,000 tonnes	9%
	More than 300,000 tonnes	12%
Gas	Less than 300 million cubic meters	0%
	More than 300 million cubic meters	5%

For the offshore fields located within the limits of the continental shelf, with the exception of the offshore fields operated through onshore facilities, the holders of mining concessions for oil and gas are required to pay an annual progressive fee calculated on production. The level of the fee shall be set by tranche, by an implementing decree which is still to be adopted (the lack of implementing provisions is

due to the fact that there is currently no offshore concession in France), and will be based on the field's location, the distance between the field and the coast and the investments made during the exploration and development phase. In any case, the level of the fee shall not exceed 12% of the value of the production at the field's limit. 50% of the fee revenue shall be allocated to the State and 50% to the region which is the closest to the field.

Holders of mining concessions and of exploitation permits (see below the section on French Guiana) are also required to pay annual additional fees which are based on production to local authorities. For example, for concessions that have started producing after 1 January 1992, the additional fee was in 2013 of EUR 563.40 for one hundred net tonnes of oil and EUR 162.40 for 100,000 cubic meters of gas.

French Guiana – For French Guiana, mining exploration and exploitation is governed by the same legislative and regulatory regime applicable to the French mainland with the exception of certain provisions specific to this overseas territory, which can be summarized as follows:

- Mining activities have to be carried out in compliance with a specific mining plan (*schéma départemental d'orientation minière*). The mining plan defines the terms and conditions applicable to mining prospection, as well as the terms of the implantation and exploration of onshore mining sites. The mining plan defines, notably by zoning, the compatibility of Guiana's territory with mining activities, taking into account the necessity to protect the environment and also Guiana's economic interests. Such a plan, which is elaborated by the representative of the State, is subject to an environmental impact assessment and public consultation before enactment. The current mining plan entered into force on 1 January 2012. Any exploration and exploitation authorizations must comply with the mining plan and no authorization can be granted for the areas where mining exploitation is forbidden.

- In addition to PERs and mining concessions, specific authorizations are set out for mining operations in French Guiana:

    - An exploitation authorization, which confers to its holder an exclusive exploration right, over a maximum surface of one kilometer and which is not assignable;

    - An exploitation permit, which confers to its holder an exclusive exploitation right with respect to certain substances, which is granted following a bidding process or is available to PER holders during the validity period of a PER if extractable deposits have been discovered within the PER perimeter during its period of validity.

New Caledonia **-** In 2000, New Caledonia was granted independent authority from France over the regulation of chromium, cobalt and nickel. A new mining code has been enacted in 2009 through law no. 2009-6 dated 16 April 2009 and an implementing decree. The principles set out in this code are largely similar to the rules laid down in the French mining code. In particular, the exploration permit, like the PER, does not grant in itself the right to carry out exploration works which are subject to a different authorization.

However, some provisions of the mining code are specific to New Caledonia:

- a specific authorization is granted for prospection works, i.e., surface investigations, including geophysical investigations, for a maximum duration of five years. This authorization only gives its holder the right to prospect, while exploration and exploitation activities require additional authorizations to be granted;

- mining titles must comply with a mining resources development scheme which provides global and long term guidelines;

- some areas which are no longer covered by a mining title can be frozen upon the decision of public authorities the for a maximum period of twenty five years during which no mining title can be granted over such areas;

- financial guarantees in the form of a monetary deposit or a first demand bank guarantee have to be provided for exploitation works with a view to ensure restoration works.

3. THE MAIN LINES OF THE REFORM

Although the new mining code was expected to be revolutionary, the proposed draft is largely based on the existing code. Only 10% of the provisions are new and the rest has been somewhat simply reorganized.

The proposed new code maintains in particular the basic principle of French mining law whereby undersoil resources belong to the state.

The main substantial changes contained in the proposed new code can be summarised as follows:

Terminology – The terms "PER" and "concession" are replaced by exploration permit ("*permis d'exploration*") and exploitation permit ("*permis d'exploitation*").

Decision process – While in the current system, decisions in relation to mining titles (i.e., PERs and concessions) are taken by the Minister in charge of mines and decisions in relation to works are taken at the local level by the State's representatives, the proposed mining code provides that, as a matter of principle, all decisions in relation to mining titles and works shall be approved at the ministerial level.

Creation of a High Council for Mines ("Haut conseil des mines") – A High Council for Mines shall be established and shall be consulted by the minister in charge of mines, or by any minister who wishes to, on questions related to the scope of the mining code, proposed amendments to the mining code, or administrative decisions referring to exploration and exploitation. The scope of the competences of this new body is unclear, especially as another public body is already entrusted with the authority of providing opinions on decisions relating to mining titles.

Creation of a national mining plan – The purpose of this plan would be to develop a common body of knowledge and to list all the mining titles which have already been delivered. The committee has suggested that such a plan would notably include national guidelines for the development of known or estimated resources, geological data in relation to subsoils and resources, and a multi-annual research plan that would result in a better knowledge of the subsoil resources. It is however unclear for the time being when this plan will be implemented and how it will be used by the authorities when making decisions relating to mining titles.

Public information and participation – The proposed new code includes several measures which aim at increasing public awareness and participation within the decision-making process in relation to mining operations. Current regulations have been criticized for a lack of transparency during the granting of various authorisations, and because the public affected by some projects is not able to comment on the projects or be sufficiently informed about the decisions taken. Therefore, the proposed new code provides, as a matter of principle, that all administrative decisions taken pursuant to the mining code which have an impact on the environment shall be subject to a procedure of public participation. This should allow the public and local authorities to be informed about the authorisations that are requested by the operators, and to participate in the decision-making process. The proposed draft does not provide a list of the decisions which are deemed susceptible to have an impact on the environment, but it can be inferred from its provisions that a public participation procedure must be put in place for granting mining titles and for starting the works, but not for the decisions relating to the renewal or the assignment of the

mining titles, for example. The public participation process is not detailed at this stage, and the new proposed code only provides that the degree of consultation required shall depend on the subject matter of the authorisation in question, its duration and the potential impact of the works that are authorised on the environment.

Moreover, the issuance of a mining title or of a decision in relation to exploration works might exceptionally be subject to the prior implementation of a reinforced procedure of public information and participation. The conditions triggering the implementation of this procedure are still unclear (the proposed new code notably refers to major opposition from the public, the implementation of new techniques or a serious impact on the environment, health or public security). The reinforced procedure of public information and participation shall be led by a temporary investigation group comprised of representatives of local authorities, environmental protection associations and other economic and social stakeholders and directed by the State's representative. The investigation group will have the power to command expert assessments to be carried out in addition to those submitted by the applicant. The investigation group must submit a report within six months (or twelve months, upon approval given by the Minister in charge of mines) and give a recommendation on the decision to be taken, the obligations to be imposed on the applicant and/or the development plan and the conditions for carrying out works. The investigation group's report and recommendations have to be taken into account by the Minister when taking a decision on the application. The implementation of the reinforced procedure of public information and participation, which can only be done once for each mining title, is likely to delay the processing of the application and the issuance of the authorisations by eight to fourteen months.

Finally, the proposed new code provides that neither industrial and commercial secrecy, nor intellectual property rights, shall be opposed to the public right to consult and to obtain information relating to the substances likely to be released in the subsoil during mining operations. The conditions for implementing this provision are not detailed, and it is likely to raise concern for operators who tend to protect information about the techniques and substances they use.

Deadlines for issuance of the authorisations – One of the major issues put forward by operators in respect of the current mining code was related to the extremely lengthy process of assessment of the various applications and issuance of decisions. For example, under the current set-up, an application for a PER is deemed rejected if no explicit decision is taken by the Minister within two years, while applications for renewal and assignment of PERs are deemed rejected if no explicit decision is taken within 15 months following the submission of the application. A major change is suggested in the proposed mining code, which puts in place a mechanism whereby an application (for PER, renewal or assignment) is deemed accepted if no explicit decision is taken by the Minister within 3 months from the filing of a complete application file. A shorter deadline of two months could however be provided for certain urgent PER applications. On the contrary, deadlines of up to two years could be provided for the issuance of PERs when they are justified by the complexity of the application. This new system of implied authorisation also aims to make the applicant more responsible as it would be in charge of drafting the specific requirements contained in its own authorisation (under the current set-up, the State representative in is charge of drafting such requirements).

Environmental issues – The current mining code has been under heavy criticism for not having properly taken into account environmental concerns. The proposed changes in this respect are the following:

- mining works will be subject to the same regulations as those that apply to classified installations for the protection of the environment.

- the environmental impact of the envisaged works would be taken into account at the stage of the grant of the exploration permit. Under the current set-up, information about the forecast exploration works is only provided at the time of the issuance of the works authorisation, and

PERs have therefore been granted without the Minister in charge of mines having a clear understanding about the envisaged works and techniques. The new mechanism is designed to allow the administration to carry out a proper environmental assessment at a very early stage. This would avoid the issuance of exploration permits on the basis of which operators would not be able to carry out works, as the works authorisation application would subsequently be rejected.

Judicial clearance of the authorisations granted under the Mining Code – The proposed draft new code provides for a mechanism whereby any interested party may request an administrative court to validate the procedure in respect of the various authorisations granted to mine operators. By this procedure (called "*rescrit procédural*"), a court would be asked to confirm that the processing of an application was compliant with applicable rules. Assuming that the court takes the view that the procedure has been conducted irregularly, it would issue an injunction requiring that the breach be remediated. Conversely, once the court has taken the view that the processing of the application has been conducted correctly, no claim could be brought on this ground against the relevant authorisation. Under the current rules, claims challenging the validity of the various authorisations can, as a matter of principle, be filed within a limited period of time, i.e., two months as from the granting of an authorisation. However, the duration of the court proceeding can be extremely long, for example up to two and a half years before a court of first instance. While the filing of a claim does not legally oblige the operators to suspend the works they envisage to carry out under the relevant authorisation, such a claim may dissuade them from pursuing their activities. The judicial clearance procedure has been introduced in order to give more legal certainty to mining operators as the authorisations are most often challenged not on grounds of illegality that could be attributed to the operators, but on the grounds that the administration did not comply with the applicable rules. However, the maximum duration of the judicial clearance procedure –up to nine months – is likely to dissuade operators from deliberately applying for it and the operators might continue taking the risk of claims and lengthy court proceedings.

Liability regime for closed and exhausted mines – Under the current set-up, only the entity in charge of exploration works or the holder of the mining title can be held liable for damages caused by its activity. The proposed draft mining code aims at reinforcing the liability regime. It sets out that not only the holder of the mining title, but also the person making profits from exploration and exploitation operations or the person who has effectively carried out the works, can be held liable for a period of thirty years for the works that have been undertaken.

Reform of fees to be paid for mining operations – In order to increase local acceptability of mining operations, the proposed new code, while maintaining the current level of fees payable to the State, sets out new methods of calculation of the fees due to local authorities, that will most likely result in an increase of such fees, which are currently very low. The fees due to local authorities shall be calculated as follows:

- on the one hand, part of the fee shall be calculated on the basis of production and shall be revised annually during the entire duration of the mining title in order to take into account global price fluctuations, technological developments or any element specific to the deposit which has been exploited; and

- on the other hand, part of the fee shall be calculated on the basis of environmental, audio, visual and material damages (including damages to transportation infrastructures) caused to or produced on the territories of the authorities which are impacted by the mining operations. The amount of this second part of the fee shall be defined in a consensual manner between the holders of mining titles and the local authorities that are impacted by the mining operations. If no agreement is reached on the negotiated amount within three months from the issuance of the mining title, the amount is calculated uniquely on the basis of production.

As a matter of principle, 70% of the fee revenues shall be allocated to local authorities on whose territories the facilities of the holders of the mining titles are located. The remaining amount of the fee revenues shall be allocated to the local authorities impacted by the facilities (i.e. the authorities on whose territories no operation is located but which are within a 40 km perimeter of the operational site).