

THE CURRENT MINING ACT AND THE NEW BILL

The current **Mining Act**, enacted by Law 14/2002, of 26 June (the “Mining Act”), has the core objective of regulating the terms of exercise of the rights and duties related to the use and benefit of mineral resources bearing in mind the environment, with a view to their rational use for the benefit of the national economy. However, with a view to a credible process for obtaining rights and duties in the mining sector and taking into account the current economic status of the country, as well as the latest developments seen in the mining sector, the new Mining Bill (the “Bill”) which was until very recently under discussion, for subsequent submission to the Parliament, brings some amendments to the legal framework on which we shall focus our approach.

1. MINING PERMITS AND AUTHORISATIONS

Article 5 of the Mining Act provides for five different kinds of mining permits and authorisations to engage in mining activity; it is worth mentioning that Article 5 of the Bill includes another three additional kinds of permits, which are: (i) the mining treatment licence, which covers the treatment of minerals

and radioactive minerals¹; (ii) the mining processing licence for processing mineral ore and radioactive minerals²; and (iii) the sales licence for mineral products, which permits the purchase and sale of mineral products, which do not result from mining, including the definition of mineral products³. The remaining licences are those which are currently included in the Mining Act, namely: (i) the Prospecting and Research Licence; (ii) the Mining Certificate; (iii) the Mining Pass; (iv) the Mining Concession; and (v) the Mining Contract. The Survey Licence which was included in the Mining Act and which allowed the holder to obtain access or entry to or the possibility of overflying to conduct surveys, on a non-exclusive basis, has been dropped from the Bill.

¹ All holders of a Mining Concession, Mining Certificate or Mining Pass may engage in mining treatment activities and are dispensed from holding a Mining Treatment Licence, according to Article 29(2) of the Bill.

² For processing radioactive mineral, it is necessary to have an authorisation in accordance with the legislation governing atomic energy and radioactive materials.

³ Only national, individuals or companies are permitted to sell mineral products and under Article 31, n°2 of the Bill, the sale of mineral products which derive from a mining activity conducted under a Mining Concession, Mining Certificate or Mining Pass does not require a Sales Licence.

It should be noted that the new amendments have also created types of authorisations for extracting mineral resources for the construction of public interest works⁴, geological research and removal of fossils or archaeological finds.

2. THE MINING CONTRACT

As to the Mining Contract, new compulsory clauses have been introduced in addition to those previously provided for in the Mining Act (Article 7, n° 2) whereby compulsory provision is made for the contract to contain clauses which assure given ratios of local employment and professional training (“Local Content”), of incentives for the mining project owner resulting from the addition of the value of the mineral ore, and of work to be done by the holder within the scope of the social responsibility of the implementing company.

⁴ Mining extraction for these purposes does not require a mining permit or authorisation when the requirements of Article 26 of the Bill have been met and provision is made for an exemption from the obligation to obtain a Mining Certificate for the mining extraction activity (despite being subject to authorisation) when the company in question is in the situation provided for in Article 27, n° 1 and n°2, of the Bill, that is to say, when it has a contract that is duly approved by the competent bodies for carrying out public works in the public interest of construction, renovation or maintenance of roads, railroads, dams and other engineering or infrastructure work in available areas.

Another amendment concerns the Mining Pass which will now have a longer validity period, of five years, which may be extended for equal periods, as opposed to the time limit in the current Mining Act, which is for twelve months and may also be extended for equal periods.

Further, the mining permits and the mining contract are subject to publication in the Official Gazette (*Boletim da República*), albeit respecting the confidentiality of strategic commercial information.

The Bill makes provision for tenders to be held by the Government – a feature which is not present in the current Mining Act – for mining activities and operations in areas: (i) that have been the subject to geological studies; (ii) that have potential for mineral resources; (iii) which have previously been mined; (iv) which are reserved for mining; and (v) of total and partial protection.

3. RULES ON MINING PERMITS

With regard to the rules on mining permits, two different time limits are stipulated for the validity of the Prospecting and Research Licence: one of two years, renewable once for the same period, for the exploitation of mineral resources and for construction, and another of five years, renewable once for another three years, as opposed to the stipulation in the current Mining Act, where the time limit for this licence is five years, renewable at the maximum for the same period.

In relation to small-scale and craft mining work, the Bill provides for a validity period of ten years for the Mining Certificate, renewable for identical periods, as opposed to the current Mining Act, where the validity period is a maximum period of two years, renewable for successive periods of not more than two years. The Bill attributes to the holder of a Mining Certificate the possibility of applying

for the permit to be converted into a Mining Concession, as long as the legally established requirements have been met, a feature which does not exist in the current Mining Act.

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4. REVOCATION AND TRANSFER OF MINING PERMITS

The revocation of the Mining Permits by the competent body has also been reviewed and extended within the scope of the Bill, and worthy of note is the possibility of revocation when the holder of a mining permit is in debt to the State. The Bill further establishes that the Mining Pass may be revoked upon the occurrence of three (new) situations: a) breach of environmental rules; b) illegal sale of mineral products; and c) smuggling or covering up the smuggling of mineral products.

Similarly to the laws in other jurisdictions, the Bill further establishes a legal rule to regulate *inter vivos* transfers of mining permits, which is now defined as “mining permit transfer” so as to envisage broader situations, not just the form of direct transfer from the holder to a third party, but also cases where the certificate is transferred indirectly by transferring participatory interests in mining permits or rights, or transfers of shares in the share capital of the permit holder, and in any case, the transfer may only take place after two years of the pursuit of the mining activity for which it was issued. The application must be submitted along with a report on the activities conducted, as well as a tax clearance certificate, in order for the transfer to have the due effects in the national territory.

5. DIRECT NATIONAL AND FOREIGN INVESTMENT

As to the form of investment to be chosen by implementing companies in this sector, in obtaining the rights and duties related to the use and benefit of mineral resources, it is provided that, as long as its pecuniary value can be calculated, the amount spent on geological studies, promoted and carried out by the State, constitutes single or cumulative adoption of the form of national and foreign direct investment. With regard to investment guarantees, the time limit for the payment of compensation deriving from the expropriation of goods or private

property rights under a mining permit has been extended in the Bill to one hundred and ninety days, whereas the time limit established in the Mining Act is only ninety days.

The notion of the proceeds from compensation owing to the expropriation of goods and private property rights as a fund capable of being transferred abroad has been dropped from the Bill, unlike in the current Mining Act, where the proceeds from compensation owing to the expropriation of goods and private property rights is a fund capable of being transferred abroad.

6. OTHER ISSUES

The Bill sets up the Mineral Resources General Inspectorate which will have the power to control compliance with the legal provisions that govern mining and technical safety in geological and mining activities. It establishes the primacy of local development by allocating a percentage of the revenue generated by mining extraction to the local community, which will be fixed in the State Budget Act.

In drafting the Bill, the State predicted the usefulness of mineral resources as raw material for the transformation industry and the State may therefore requisition the purchase of mining products at market price for use in local industry. Another innovation concerns the protection of the acquisition process of goods and services by the implementing companies in this sector, where the Bill provides that mining permit holders that intend to acquire goods and services worth more than a given value, in regulatory terms, must do so by public tender, which must be published through the usual communication media, particularly in top-selling national newspapers.

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In this process of acquiring goods and services by tender, the factors to be taken into consideration are quality of the services, price, delivery period and the warranties provided. In addition, the Bill affords preference to local goods and services so as to drive the local business sector, provided that quality, quantity, price and taxes are taken into consideration, on comparable terms, which must not be more than ten percent of the prices of the available imported goods.

As a whole, the review of the Mining Act to be brought into play through the Bill stems from the need to equip the national mining sector with effective rules for the exercise of the rights and duties related to the use and benefit of mineral resources and accordingly with the enactment of the Bill as the new Mining Act, it is predicted that mining sector regulation will offer greater protection, efficiency and legal certainty, taking into account the current economic status of the country. The Bill also seeks to improve control of the pursuit of the mining activity, the obtaining of revenue for the State, and the preservation of the environment and social responsibility for the development of the community and of the country.

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