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Congolese Participation in the Share Capital of Mining Companies in the DRC: *Between Inclusion, Misinterpretation, and Legal Stability*

Clarifying the scope of Article **71 bis of the Mining Code** regarding the participation of natural persons of Congolese nationality in the share capital of mining companies.

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INTRODUCTION

The Minister of Mines has recently initiated discussions with mining companies to ensure the effective implementation of Article 71 bis of the Mining Code, relating to the participation of Congolese nationals in the share capital of mining companies. This process began with the moratorium granted to mining companies, which expired on July 31, 2026, requiring them to comply with the obligation to cede 10% of their shares or equity to Congolese individuals.

According to several media outlets, the government and the Chamber of Mines held joint consultations, at the end of which both parties agreed on the need to adopt an implementing decree to define the practical modalities for the application of Article 71 bis. While this initiative appears commendable in its objective of national inclusion, it nevertheless raises questions of legality. Beyond the risks of elite capture highlighted by the *Sentinel of Natural Resources,* a fundamental issue remains: what is the exact scope of Article 71 bis, and what temporal framework governs the obligation it establishes? In other words, does this provision apply indiscriminately to all mining companies, including those incorporated before the 2018 reform, or is it limited to companies created after the entry into force of the Mining Code of March 9, 2018?

This tribune seeks to contribute to the debate on this sensitive issue: the inclusion of Congolese nationals in the share capital of mining companies. Beyond economic and political considerations, this is primarily a matter of legal certainty and respect for the hierarchy of norms. The scope, temporal application, and field of Article 71 bis must be clarified to avoid misinterpretations that could undermine the stability of the mining sector and institutional credibility.

1. Legal Basis

Article 71 bis of the Mining Code provides that "the participation of Congolese nationals is required in the constitution of the share capital of mining companies. The persons referred to in the preceding paragraph shall hold at least 10% of the share capital."

Article 144 bis of the Mining Regulations defines the modalities of application: "Mining companies must reserve at least 10% of their share capital for Congolese nationals under Article 71 bis of the Mining Code. The reserved shares may be acquired as follows:
· 5% by one or more Congolese individuals capable of acquiring shares or equity;
· 5% by employees of the mining company."

This provision enshrines a legal obligation of national inclusion in the structuring of mining companies' share capital, reflecting the legislator's intent to guarantee effective Congolese participation and to strengthen economic sovereignty in the extractive sector.

2. Temporal Application

The combined reading of Articles 71 bis of the Mining Code and 144 bis of the Regulations is unequivocal. The Code circumscribes the temporal scope of the obligation to the constitution — i.e., the creation of mining companies at the One-Stop Business Creation Office. In other words, the Code limits the application of the obligation to companies incorporated after the 2018 reform, thereby protecting acquired rights and the legal stability of companies already established.

This understanding is consistent with other obligations in the Code, which are also subject to precise temporal conditions. For example, mining companies must cede to the State:

· 10% at the time of conversion of the exploration permit into an exploitation permit;
· 5% at each renewal of the exploitation permit, in addition to the shares already ceded.
In both cases, the temporal scope is clearly defined. At no time do these cessions apply to exploitation permits acquired prior to the reform.

3. Scope of the Implementing Decree

It follows from the above that Article 71 bis applies by law only to mining companies incorporated after the promulgation of the 2018 Mining Code. Consequently, the decree under consideration can only concern these companies, excluding those created earlier. Any retroactive extension of this obligation would entail significant risks.

Moreover, the government's activism reveals a visible gap between the expectations of the authorities — and, implicitly, of Congolese citizens — and the letter of the legislator. The legislator appears to have laid the foundation for a differentiated application of the provision:

· On one side, mining companies incorporated before the 2018 reform, exempted from the obligation to cede 10%;

· On the other, companies created afterwards, bound by the obligation.

This duality introduces a temporal framework which, if not clarified, could distort fair competition among mining operators.

4. Other dimensions of the share transfer that are less frequently addressed

Two other dimensions of the share transfer deserve to be highlighted, although they are less frequently addressed. The first concerns state-owned mining companies, which are required to cede 10% of their share capital to Congolese nationals. The second relates to joint-venture companies in which state-owned enterprises hold shares: in such cases, the potential transfer of 10% must be carried out proportionally to the contribution of each shareholder.

It should be recalled that, in accordance with the spirit of Article 71 bis of the Mining Code, this measure cannot be interpreted as an obligation imposed solely on foreign companies. It equally applies to state-owned mining companies and to joint ventures in which they participate, in compliance with the principles of legal certainty and fair competition among operators in the sector.

5. Legal and Reputational Risks of Retroactivity

The retroactive application of the measure entails several risks:

• **Implicit expropriation:** imposing retroactive cession could be construed as disguised nationalization, contrary to the principle of protection of acquired rights.
• **International arbitration:** such a measure could expose the State to costly proceedings before arbitral tribunals.

6. Recommendations

• The government, through the Minister of Mines, must refrain from any retroactive application of Articles 71 bis and 144 bis of the Mining Code and its Regulations, and must instead favor a consensual solution that guarantees legal certainty, protection of acquired rights, and investor confidence.

• If necessary, seek the prior opinion of the Council of Stateto clarify the temporal scope of Article 71 bis.

• The Chamber of Mines may also petition the Council of State to obtain clarity on the legal scope of this provision.

Conclusion

The participation of Congolese nationals in the share capital of mining companies represents a major step toward national inclusion. However, its application must respect the hierarchy of norms and the temporal framework established by the legislator. In other words, the 10% cession applies only to companies incorporated after the promulgation of the 2018 Mining Code. Any misinterpretation could compromise legal stability and open the door to disputes detrimental to the State and local communities.
The government must therefore adopt a consensual approach that ensures normative stability, essential for maintaining investor confidence and supporting the growth of the mining sector.