Subsoil use legislation in Kazakhstan is soon to undergo a major overhaul. It is planned that the current Law “On Subsoil and Subsoil Use” will be replaced with a new Code “On Subsoil and Subsoil Use” (Subsoil Code) by the end of this year. Currently a special working group under the Kazakhstan Ministry of Industry and New Technologies is preparing the Concept of the Subsoil Code to be submitted to the Government by 1 June 2014. Currently, the draft Concept is still underdeveloped and contains some apparent discrepancies and gaps. Most likely, the draft Concept would be further amended, however we comment on some key provisions of the Concept below.

A code occupies a higher position in the hierarchy of sources of law in Kazakhstan, which will mean that the Subsoil Code will be capable of taking precedence over potentially conflicting ordinary laws. Codification of subsoil use legislation should consolidate the various regulations relevant to subsoil use that are currently spread over more than 70 legal acts. Adoption of the Code should also improve the stability of the subsoil use legislation, since the procedure for introduction of amendments to a code is more complicated than amendment of a law.

According to the draft Concept, subsoil use rights will continue to be granted on the basis of contracts between the subsoil user and the competent authority of the state. The drafters of the Concept intend to settle the frequent debates on the nature of the subsoil use contract: as to whether the contract is a civil law contract, or a public act, or whether it combines elements of them both.

According to the draft Concept, subsoil use contracts would be recognized as civil contracts. However, such contracts would not include provisions which are (or are to be) the subject of public law – e.g. taxation, protection of the subsoil and the environment, safety of population and personnel, stability guarantees, the state’s right to acquisition and requisition, terms of conservation and liquidation, local content regulation, etc. Presumably, this is intended to ensure a level playing field for subsoil users, and to avoid the danger of conflict between the terms of a subsoil use contract and relevant legislation. The drafters of the Concept also explain that a civil contract cannot regulate public relationships; therefore, such relationships should be regulated by respective laws.

The Code would recognize various models of subsoil use contracts, including (a) concession agreements; (b) service agreements, e.g. production sharing agreements, service agreements with risk, and simple service agreements.

The draft Concept proposes that the regulation of industrial mineral formations be improved. It is also planned that the procedure for the grant of exploration rights will be simplified.

It is worth highlighting the following potential problems, inconsistencies, and gaps in the current draft Concept:

- The Concept provides arguments for recognizing of the subsoil use contract as a civil law contract. At the same time, it is planned to establish a hierarchy of laws regulating the relationships arising out of subsoil use contract. Under such hierarchy, the basic principles of civil law would apply. However, the specific provisions of the Subsoil Code would prevail over the Civil Code provisions relevant to civil contracts. So subsoil use contracts would still
have some special status distinct from that of ordinary civil contracts. Besides, if the Subsoil Code is adopted, its status in the hierarchy of legislation would be equal to that of the Civil Code. In practice, therefore, there may be difficulties in resolving potential conflicts between the Subsoil Code and Civil Code.

- Narrowing of the issues which will be regulated under a subsoil use contract, and therefore a reduction in the opportunity to individualize certain terms of a subsoil use contract effectively introduces a licensing regime (albeit still described as a contract).

- It is also possible that a licensing regime (rather than a contractual one) would apply to granting of exploration rights. In the course of earlier discussions of the Subsoil Code it was suggested that the procedure for the grant of exploration rights be simplified - in particular, not to conduct a tender this purpose and to grant exploration rights to the first applicant at fixed payment rates. However, the current draft Concept does not reflect these ideas so far.

- Although exclusion of public law provisions from subsoil use contracts would help to avoid complicated procedures for introduction of frequent amendments to subsoil use contracts to accord with changes in legislation, which has been the case during the past 5 years. In a sense, it has been convenient for investors to have all their obligations set out in the contract. Under the proposed new regime, investors’ obligations connected with subsoil use activity will be regulated under various areas of law, and investors may be misguided on the volume of their obligations. When making a decision on entering into a subsoil use contract, investors will need to be well advised in order to avoid underestimating their risks, costs, and other obligations.

- The draft Concept repeatedly highlights the importance of stability of legislation for the improvement of Kazakhstan’s investment climate. On the other hand, according to the Concept stability guarantees would be excluded from subsoil use contracts. In most subsoil use contracts the subsoil users make payments for subsoil use in the form of taxes. Thus, the prevailing tax rates have a determining significance when entering into a subsoil use contract, and the issue of tax stability is of utmost importance in determining the stability of an investor’s financial model. However, the draft Concept does not address this issue at all, transferring this whole issue to regulation by tax laws. It appears that the question of stability will need to be addressed in the Subsoil Code.

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