

Chapter 9

FRANCE

Yves Lepage, Olivier Mélédo and Tanguy Bardet¹

I INTRODUCTION

Located in more than 60 fields mainly in the Paris region and in the south west (Aquitaine Basin), French hydrocarbon deposits produced 790 tonnes of oil and 0.3 tonnes of oil equivalent (Mtoe) of natural gas in 2013, representing roughly 2 per cent of France's annual consumption.

Major recent developments in the French E&P sector involve the continuing debate around shale gas which started with the French parliament's ban on the use of hydraulic fracturing in 2011. Other adjustments include an extensive reshaping of the French New Mining Code currently in force (NMC), which was announced in 2012, but remains under review and is expected to enter into force in 2015 at the earliest; and the publication of a Decree No. 2014-479 dated 14 May 2014 extending the French state's control of foreign investments in certain strategic sectors, now including energy.

II LEGAL AND REGULATORY FRAMEWORK

i Domestic oil and gas regulation

Established in 1810 and revised in 2006, the NMC serves as the primary regulatory framework regarding oil and gas licensing, though publication of a new code is expected in 2015.

Pursuant to Article L. 111-1 of the NMC, the exploration and production of gaseous or liquid hydrocarbons reserves are submitted to the legal regime applicable to the development of mines. The legal regimes for both oil and gas are therefore identical

¹ Yves Lepage is a partner, Olivier Mélédo is of counsel and Tanguy Bardet is an associate at Orrick, Herrington & Sutcliffe.

with respect to the issuance of mining titles, the rights granted to the holders of such titles, the completion of works and the control measures applicable.

Other pieces of the legal and regulatory framework applying to hydrocarbons exploration–production activities include environmental provisions (Article L. 161-1 of the NMC, cross-referencing the Environmental Code and the Estate Code) and decommissioning procedures (Articles L. 163-1 et seq. of the NMC).

In France, the operation of LNG terminals does not fall within production activities and the relevant regulation applying to LNG facilities is included in the French Energy Code which notably imposes certain public service obligations to the operators to guarantee the continuity and security of gas supply, and also provide for a tariff setting mechanism monitored by the Energy Regulatory Commission.

ii Treaties

France is a signatory to, and has duly ratified the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, the 1965 International Convention on the Settlement of Investment Disputes between States and nationals of other States, the 1994 Energy Charter Treaty and the 2004 Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean (formerly known as the Barcelona Convention).

France is also a party to more than 120 bilateral tax treaties.

iii Regulatory authorities

The minister responsible for mines (currently, the Minister of Ecology, Sustainable Development and Energy) is the relevant French governmental authority responsible for the hydrocarbon sector. Pursuant to Article L. 171-1 of the NMC, a ‘police in charge of the mines’ controls and monitors all exploration and production works. Article 24 of Decree No. 2006-649 dated 2 June 2006 (as amended from time to time, the 2006-649 Decree) specifically entrusts the prefects (i.e., the French state’s representatives in a department or region) with the performance of such tasks at a local level.

Within the Ministry for Mines, the Department of Energy and Climate (DGEC) is responsible for defining and implementing the French energy policy. Within the DGEC, the Hydrocarbons Exploration–Production Bureau (BEPH) manages and promotes the French mining (hydrocarbon) sector. As such, the BEPH is associated with the award and renewal process of exploration (research) and exploitation permits. Within the DGEC, the Geological and Mining Research Bureau (BRGM), is a public industrial and commercial institution, acting under the joint supervision of the Ministry for Higher Education and Research and the Ministry for Ecology, Sustainable Development and Energy, in charge of collecting, classifying and keeping data on the French subsurface.

Disputes related to the mining sector, including breaches of the provisions of the NMC are settled before the French administrative or civil courts. Criminal offences are settled before the criminal courts. Certain disputes involving the midstream and downstream sectors may be submitted to a specific dispute resolution forum for the energy sector within the Energy Regulatory Commission.

III LICENSING

i Exploration

Article L. 121-1 of the NMC identifies three exploration regimes, depending on whether the landowner is conducting or consented to the exploration works, the administration authorised the exploration works to be carried out without the consent of the landowner, or exploration works are carried out following the issuance of an exclusive exploration permit.

The landowner prospecting its own property may freely dispose of the proceeds of its exploration works, without requiring any authorisation from an administrative authority, which derives from his right of normal use of the land. However, should the land fall within the scope of a concession, a state exploitation, or an exclusive exploration permit, the rights of the landowner will be trumped by the rights of the holders of such titles or permits.

The administrative authorisation without the consent of the landowner entitles the prospector to collect the proceeds of its exploration works, despite the landowner conducting exploration on the land, or contemplating the same. This authorisation does not grant the prospector any exclusivity on the land within the scope of the authorisation, as two prospectors may conduct exploration works on the same land. In practice, exploration works are rarely conducted under such regime, and are usually undertaken either with the consent of the landowner or under an exclusive exploration permit (H permit).

The holder of an H permit is vested with an exclusive right to undertake exploration works within the area defined in the permit, and may freely dispose of the products that might be extracted as a result of these exploration works. This is the most favourable regime for a prospector, due to its exclusivity and preferential status over the other two regimes.

An H permit is granted for a maximum initial five-year period, after a competitive bidding process. It may be renewed twice, each for an additional minimum three-year period (or, if the initial period was for less than three years, for the same minimum period) and a maximum five-year period, without any requirement to resort to another bidding procedure but subject to the permit holder's compliance with its obligations and a financial commitment at least equal to the commitment assumed during the initial period of validity of the permit.

The application must be submitted to the Minister for Mines, and must include documents identifying the applicant, a technical memorandum, the contemplated work programme, a minimum financial commitment, and cartographic documents. Financial and technical capacities of the applicant, as well as the quality of the studies conducted in the development of the work programme, are key elements to be considered in the application process.

As of 1 January 1 2013, the application for an H permit must be made available to the public by electronic means prior to the issuance of the permit by the administrative authority. Once the application file is received, the Minister will publish a call for competition in both French and European official gazettes. Potential bidders then have 90 days to submit a competing application.

The H permit ensures the prospector that the right to develop the land will not be awarded to a competitor while he or she still holds the exclusive exploration right. Pursuant to Article L. 132-6 of the NMC, upon request and before its expiration, the holder of an H permit can obtain a concession right over the workable deposits discovered pursuant to the exploration works conducted under the permit. This right extends to the perimeter of this permit and the substances mentioned therein, though the area covered by the permit is reduced by half at the first renewal and again at the second renewal.

The application for an extension must be filed at least four months prior to the expiry of the mining title with the Ministry responsible for Mines (Article 46 of Decree No. 2006-648 dated 2 June 2006 (as amended from time to time, the 2006-648 Decree)). The Ministry is required to respond to such renewal request within 15 months from the date of filing. However, if the Ministry does not respond within such period, the mining title shall remain in place. This has been recently confirmed by the highest French administrative court, the Council of State (CE, 17 July 2013, *Société Hess Oil France*, No. 365671), which ruled that the withdrawal of a mining title requires an explicit decision from the French administration. Therefore, the silence of the Ministry at the end of the 15-month period will not result in the termination of the mining title and the mining title holder may continue to operate as long as no explicit denial has been notified to it.

ii Development and production

Natural gas and oil reserves may only be developed under a concession granted by decree of the Council of State if the developer has sufficient technical and financial capacities. If the developer is not yet the holder of an H permit on the contemplated perimeter, the concession will be subject to a competitive bidding process.

The concession is granted for a maximum 50-year period and may be extended for additional periods of time that may not exceed 25 years each.

The concession agreement generates a real estate right, distinct from the property right of the owner of the surface where the reserve is developed, which nevertheless may not be mortgaged. It vests its holder with both the right to develop the reserves and the exclusive right to conduct exploration works within the perimeter of the concession.

The concession request must be filed with the Minister for Mines, together with a certificate providing information related to the applicant, a technical memorandum, a description of the development works, cartographic documents and a commitment to fulfil the terms and conditions of the concession.

The application for a concession is publicly disclosed, in accordance with the provisions of the French Environmental Code. The public may be informed through all appropriate means, by public display, local publication or electronic means. A public enquiry may last for 30 days.

IV PRODUCTION RESTRICTIONS

French public service requirements may result in restrictions to oil and gas supplies and sales. In accordance with Article L. 143-1 of the Energy Code, the French government may, for a specified period, impose a control and allocate energy resources in order to

remedy an energy shortage or when the French external trade balance is threatened. National defence requirements, as defined by the Code of Defence, may also trigger the control and allocation of resources.

V ASSIGNMENT OF INTERESTS

Interests in a permit or a concession may be transferred through either the assignment or leasing of mining titles. Pursuant to Articles L. 143-1 et seq. and L. 143-9 et seq. of the NMC, transfers require the prior authorisation of the Minister for Mines (Article 52 of the 2006-648 Decree) but is not subject to competitive bidding or specific publicity.

Pursuant to article L. 143-2 of the NMC, the transferee of a mining title must meet the following technical and financial requirements:

- a* in accordance with Article 4 of the 2006-648 Decree, the prospective transferee must produce its credentials (such as the background of its officers and technical team), its significant mining references and an outline of the human and technical resources budgeted for the performance of the work; and
- b* in accordance with Article 5 of the 2006-648 Decree, the prospective transferee must also produce balance sheets, income statements and any proposed guarantees.

The 2006-648 Decree specifically allows the attribution of mining titles to several companies, acting jointly and severally (Article 43-3°) which makes the execution of joint operating agreements possible. Similarly, the 2006-648 Decree authorises share deals pursuant to which the control of the mining title holder is transferred and deals resulting in a third party enjoying all or part of the production. However, transfers of interests, shares or rights to production under such deals require a prior ‘non-opposition’ from the Minister for Mines, who will essentially consider the financial and technical capabilities of the prospective transferee(s). Under Article 43-4° of the 2006-648 Decree, opposition from the Minister must be notified to the transferor within two months from receipt of the comprehensive file.

The transaction documentation usually includes, as a condition precedent to closing, the approval of the Minister for Mines.

Other events requiring mining title holders to request a ‘non-opposition’ pursuant to Article 43 of the 2006-648 Decree include material modification of the mining title holder’s articles of association and the occurrence of any material event that may result in the mining title holder’s technical and financial capacities (as determined at the time the mining title was awarded) being altered.

VI TAX AND ROYALTIES

i Royalties on production from onshore deposits

Production of gaseous and liquid hydrocarbons gives rise to the payment of various royalties:

- a* A royalty due by the holder of the title to the owner of the surface, as provided in the relevant concession agreement. However, this amount has become symbolic and is now barely used.

- b A royalty paid to departments or cities and calculated based on each net ton of product extracted by the holders of concessions of mines, lessees or sub-lessees of such concessions, holders of exploitation permits of mines and explorers of oil and combustible gas mines.
- c A progressive royalty paid to the state for onshore operations by holders of a concession covering onshore gaseous or liquid hydrocarbons, at a rate based on the volume of the production (Article L. 132-16 of the NMC).

Article L. 132-16 differentiates between recent and old productions in the computation of this progressive royalty. Old productions include all wells in operation before 1 January 1980, through classical means of production. Any other production is deemed a recent production.

With regard to crude oil, the rate per annual tranche of production, in tons, is as follows:

<i>Production</i>	<i>Old production royalty rate</i>	<i>Recent production royalty rate</i>
Under 50,000	8%	0%
Between 50,000 and 100,000	20%	6%
Between 100,000 and 300,000	30%	9%
Over 300,000	30%	12%

With regard to gas, the rate per annual tranche of production, in millions cubic metres, is as follows:

<i>Production</i>	<i>Old production royalty rate</i>	<i>Recent production royalty rate</i>
Under 300	0%	0%
Over 300	30%	5%

Under Decree No. 81-373 of 15 April 1981, the progressive royalty is based on the value of the extracted products, its value set at a price corresponding to the price of hydrocarbons of similar quality (determined pursuant to standard practice in the petroleum industry) on the French hydrocarbons market.

ii Royalty on production from offshore deposits

Article L. 132-16-1 of the NMC contains specific provisions with respect to the calculation of the progressive royalty applicable to gaseous or liquid hydrocarbons extracted from offshore deposits. As from 1 January 2014, sales of gaseous or liquid hydrocarbons extracted from offshore deposits are subject to a progressive royalty that is calculated by applying a specific rate to several annual production tranches, all further determined in a decree that has not yet been published.

Article L. 132-16-1, however, provides that, in order to determine the various tranches and associated rates for such royalty, such decree shall take into account the nature of the products, the continent next to the deposits, the depth of the deposits, the minimum financial commitments subscribed by the operator for the exploration and development phase. Fifty per cent of the proceeds deriving from the levy of that royalty

will be allocated to the French state and the remaining 50 per cent will be allocated to the French region that is closest to the offshore deposits.

The parliamentary works relating to such new provisions show a clear intention of the French government to further enhance the development of the hydrocarbon resources in French Guiana, still seen as one of the most promising French offshore area, and to promote economic development in this overseas region bordering Brazil.

iii Other taxes

In addition to the royalty regime, operators are subject to the standard French corporate income tax due on French-source taxable profits at the rate of 33.3 per cent. A social surtax of 3.3 per cent applies if (1) the company's turnover exceeds €7.63 million and (2) the company's corporate income tax expense exceeds €763,000 (i.e., with a net taxable profit exceeding €2.289 million), giving rise to an effective tax rate of 34.43 per cent. In addition, a temporary 10.7 per cent surtax may also apply to the fiscal year that closes on 30 December 2015 if the company's turnover exceeds €250 million, giving rise to an effective tax rate of 38 per cent.

Several other specific taxes regarding consumption also apply, such as the domestic consumption tax on petroleum products (Article 265 of the Customs Code), the domestic consumption tax on natural gas (Article 266 of the Customs Code) and VAT on oil products (Article 298 of the General Tax Code). Those taxes are mainly governed by European law (Directive 2003/96/EC dated 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity).

VII ENVIRONMENTAL IMPACT AND DECOMMISSIONING

As mentioned above, operators must comply with the environmental provisions specified under Article L. 161-1 of the NMC, which set forth general environmental objectives that shall be fulfilled, and cross references various sections of the Environmental Code and the Estate Code for further details.

As provided under Articles L. 163-1 et seq. of the NMC, decommissioning occurs when a particular infrastructure ceases to be used for the purpose of exploitation and applies to all installations and related works at the end of a specific work programme; and all installations and related works that have not been subject to a specific decommissioning procedure at the expiry of the exploitation period.

The mining title holder shall file a declaration of cessation of works no less than six months prior to the termination of the exploration or development works (Article 43 of the 2006-649 Decree) and inform the authorities as to how it intends to comply with the requirements of Article L. 161-1 of the NMC. This provision relates to safety and the environment, remediation of any nuisance triggered as a result of said activities or its prevention, and if necessary arrangements for a possible restarting of the activity.

Following those declarations, the administrative authority may prescribe appropriate additional measures in the event that the proposed measures are deemed inadequate, as well as the time frame for implementation of such measures. Pursuant to Article L. 163-7 of the NMC, in the event of a failure by the explorer or developer to satisfactorily implement the prescribed measures, the administrative authority may

carry out or request a third party to carry these measures at the expense of the explorer or developer.

Upon satisfaction of the measures that have either been proposed by the explorer or the developer or prescribed by the administrative authority, a specific notification to that effect will be sent to the explorer or the developer.

VIII FOREIGN INVESTMENT CONSIDERATIONS

French law does not contain any nationality requirement in connection with bids for exclusive exploration permits or concessions or in connection with a transfer of interests in a permit or concession.

However, Decree No. 2014-479 dated 14 May 2014, which modified article R. 153-2 of the French Monetary and Financial Code (CMF), subjects certain foreign (i.e., non-EU) investors to prior approval of the Minister of Economy for certain types of investments. This applies where an activity is essential to guarantee the interests of the state with regard to public policy and security or national defence, including the supply of electricity, gas, hydrocarbons or other sources of energy.

Such foreign investment will fall within this approval requirement if it consists of (1) the acquisition of a controlling interest in a French company whose main activity is subject to Decree No. 2014-479, (2) the acquisition of all or part of a branch of activity of the French company or (3) the acquisition of more than 33.33 per cent of the shares of such French company.

Strictly speaking, the acquisition of interest in a French company holding one or more mining title(s) for the purposes of carrying out exploration-production works only should not trigger the application of the above-mentioned provisions that restrict the prior approval procedure to any such companies involved in activities that are essential to guarantee the country's public order, public safety or national defence interests, such as the integrity, security and continuity of supply of gas and hydrocarbons. If in doubt, Article R. 153-7 of the CMF expressly provides that the Minister for Economy may be asked to determine within two months whether a specific investment may fall within the scope of Decree No. 2014-479.

IX CURRENT DEVELOPMENTS

A reform of the NMC is currently ongoing. At this stage, the main features of this reform are:

- a* the prefect would no longer grant works authorisations, leaving the Minister for Mines as the sole authority responsible for making decisions relating to mines;
- b* all mining decisions having an environmental impact would first require an environmental assessment involving the public;
- c* the legal regime applicable to facilities classified for the protection of environment – pursuant to which the state has extra rights in this area – would apply to mining works and installations;
- d* mining procedure would be simplified by shortening existing deadlines;

- e* the liability of the operator of the mine for post-mining damages would be clarified. In the event that the French-registered operator disappears, the party for which the works have been completed could be held liable, no matter its nationality or ties with the French operator; and
- f* revised tax regime under which the mining title holder and local authorities benefiting from the royalty could contract for part of the royalty.

This ongoing reform process does not intend to revisit the provisions of Law No. 2011-835, dated 13 July 2011, which banned the use of hydraulic fracturing for the exploration and production of liquid or gaseous hydrocarbons and repealed all H permits using this method. The French Constitutional Council confirmed in 2013 that this ban was compliant with the French Constitution (Decision 2013-346 QPC, 11 October 2013). However, it should be noted that the 2011 law specifically acknowledges that the technology in that sector is constantly evolving and requests the French government to provide, on an annual basis, a report to the French parliament outlining the progress made at international, European and national levels. Further reform to these regulations could therefore be considered by France in the near future.