On 27 December 2017 Kazakhstan adopted a new Code “On Subsoil and Subsoil Use” (the Subsoil Code). The Subsoil Code replaced the previous statute regulating oil and gas and mining activities, ie, the Law “On Subsoil and Subsoil Use” of 24 June 2010 (the Old Law).

The Subsoil Code introduces a number of amendments including the following:

- different regulation for mining and petroleum industries;
- new rules on the grant/award of subsoil use rights;
- reinstatement of the license as the main title document for the mining activity (except for uranium mining, which will remain subject to the "contractual system" - the same as the oil and gas industry);
- new allocation of powers between the various state authorities involved in the award, suspension and termination of subsoil use rights, and monitoring compliance with the terms/requirements of relevant contracts and licenses; and
- changes in the regulatory clearance procedures applicable to the transfers of subsoil use rights/assets.

Some of the changes are described in more detail below.

**Regulatory Framework**

The Subsoil Code as a code will have priority over laws and will remain the main statute for both petroleum (oil and gas) and mining industries. At the same time, the Subsoil Code introduces quite a different legal framework for the mining industry. Among other things, mining rights will now be granted on the basis of a license. Except for mining contracts executed prior to the enactment of the Subsoil Code (which will continue to govern relevant operations unless the relevant operators decide to switch to the new "licensing system"), there will be no subsoil use contracts in the mining industry (except for the uranium industry, which will remain subject to the "contractual system" - the same as the oil and gas industry).

By way of background, we note that prior to August 1999, subsoil use rights in Kazakhstan were granted on the basis of both licenses and subsoil use contracts. In August 1999, the previous subsoil use legislation was amended and the licensing regime was eliminated. Since then, the only documents that formalized the grant of subsoil use rights were subsoil use contracts.

The Subsoil Code now reinstates the licensing regime (for the mining industry only). It reintroduces subsoil use licenses as the main title documents confirming mining rights (except for uranium mining).

While the rationale behind this development is the intent to boost the mining industry by simplifying procedures for granting subsoil use rights, in practice, this may not necessarily be viewed as an advantage since it could be argued that, by making the mining activity subject to the general statutory regime, the legislators undermined the relevant projects' stability and gave less flexibility to the operators in terms of the opportunities to negotiate.

**State Authorities in Subsoil Use Areas**
Currently, there are two main state authorities who act as the so-called “competent authorities” (i.e., the authorities vested with the right to represent the state in mining and oil and gas projects). The Ministry of Energy is responsible for overseeing the oil and gas, uranium and coal industries, and the Ministry of Investments and Development is responsible for overseeing other mining activities.

The Subsoil Code envisages that there will now be one competent authority which will, among other things, be responsible for granting and terminating subsoil use rights with regard to all natural resources. However, to assist the aforementioned authority with the regulation of day-to-day activities, there will also be separate industry-specific regulators in oil and gas, mining and uranium areas.

It is yet to be seen which state authorities will be created/reorganized for the purposes of the new regulation and how the relevant powers will be vested with (allocated between) the different authorities.

Grant of Subsoil Use Rights

A number of changes have been introduced to procedures relating to the grant of subsoil use rights. Among other things, the Subsoil Code envisages the development of the so-called “program on management of the state subsoil fund” (which will, among other things, contain information about territories available for granting and methods by which the subsoil use rights can be granted). The way by which subsoil use rights can be granted depends on the type of minerals:

Mining Rights. The Subsoil Code envisages that mining rights (except for uranium) will be issued on a first-come, first-served basis (subject to the applicant’s compliance with the requirements set forth in the Subsoil Code and with certain limited exceptions).

Oil & Gas. Subsoil use rights with regard to oil and gas deposits will be granted through two ways: (i) auction; or (ii) direct negotiations with the national company in the oil and gas area (acting individually or jointly with a strategic partner).

Uranium. Subsoil use rights with regard to uranium deposits will be granted only to the national company in the uranium area on the basis of direct negotiations. Subsequent transfers can be done only to companies where the national uranium company has more than 50% share.

Transfer of Subsoil Use Rights

The Subsoil Code introduces some new elements into the regulation applicable to the transfer of subsoil use rights and shares in subsoil users and entities that can control the activity of subsoil users. In particular:

- strategic deposits (the transfer of which is subject to the state’s pre-emptive purchase right) will include major oil and gas deposits, deposits located in the Kazakhstan sector of the Caspian Sea and uranium deposits. The list of strategic deposits should be approved by the Government;
- the Subsoil Code expanded the list of cases where consent of the competent body for the transfer is not necessary;
- the burden of applying for the waiver and consent was removed from the seller to the purchaser;
- the Subsoil Code introduces a new procedure for notification of changes of control over a subsoil user.

The main intent of these developments, as we understand, is to limit the application of the state’s pre-emptive purchase right to large and important deposits that are significant for the state’s strategic interests. At the same time, given that the competent body’s consent will still apply to all deposits, it is not likely that the administrative burden will be considerably less than before.

Others

The Subsoil Code introduces a number of new concepts that did not exist under the Old Law (retention period, prospecting right, etc.). Also, it introduces a number of substantial changes to other rules regulating subsoil users’ operational activity (e.g., procurement rules, liquidation of subsoil use operations, extension of subsoil use rights, introduction of the Kazakhstan Code on Reporting of Exploration Results, Mineral Resources and Ore Reserves, public access to geological information, etc.).

Conclusion

The Subsoil Code envisages that previously executed/issued subsoil use contracts/licenses will remain in force. At the same time, it provides that a number of its provisions will have a retrospective effect and apply to subsoil use contracts/licenses issued/executed prior to its effective date (among other things, the retrospective

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effect will have provisions containing general principles and definitions, provisions regulating the transfer of subsoil use rights, provisions regulating the liquidation of subsoil use operations, provisions regulating the extension of subsoil use rights, the purchase of goods, works and services by subsoil users, mandatory supplies to the local market, etc.). Certain exemptions from the otherwise applicable retrospective effect will be provided to subsoil users acting on the basis of production sharing agreements approved by the Government and contract approved by the President.

Also, the Subsoil Code envisages that subsoil users acting on the basis of previously executed/issued subsoil use contracts/licenses may transfer to the new regime envisaged by the Subsoil Code. This provision may generally be used as a tool for making all subsoil users transfer to the new arrangements despite the general stability principle.

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Generally, the rationale behind the adoption of the Subsoil Code is the intent to, among other things, simplify administrative procedures and increase the attractiveness of this area for investors. However, it is yet to be seen how the Subsoil Code will be implemented in practice and whether it will have the desired effect. It is necessary to monitor how the actual implementation practice will develop.