

## [Pratique professionnelle] The application of CEMAC foreign exchange regulation to companies in the extractive sector

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### **For the french version (N° Lexbase : N9746BYM)**

On the thred. It is only a few weeks before the end of the last moratorium set for December 31<sup>st</sup>, 2021 that the Bank of Central African States (**BEAC or Central Bank**) and companies in the upstream oil and gas and mining sectors [\[1\]](#) (**Extractive Companies**), have agreed to apply - but with significant adaptation measures - the provisions of the foreign exchange regulations of the Central African Economic and Monetary Community (**CEMAC**) [\[2\]](#) as resulting mainly from the Regulation n° 02/18/CEMAC/UMAC/CM of December 21<sup>st</sup>, 2018 (the “**2018 Regulation**”) [\[3\]](#).

Following tough negotiations, several texts are expected to be adopted by the end of the year by all stakeholders to come into force on January 1<sup>st</sup>, 2022, namely (i) draft regulations on the implementation of certain provisions of the foreign exchange regulations by extractive companies (**Draft Foreign Exchange Regulations for the Extractive Sector**) and the unseizability of onshore accounts in foreign currencies of these companies ( **Draft Regulation on the Unseizability of Accounts**), in addition to (ii) the draft instructions relating to the opening and operation of foreign currency accounts of resident Extractive Companies (**Draft Instruction on Foreign Currency Accounts**), as well as to the domiciliation, settlement and clearance of imports of goods and services of resident Extractive Companies (**Draft Instruction on Imports**) and exports.

The 2018 Regulation, which came into force on March 1<sup>st</sup>, 2019, met the clearly stated objectives of its governor, Abbas Mahamat Tolli, supported by the International Monetary Fund (**IMF**) and the Extractive Industries Transparency Initiative (**EITI**), to guarantee the monetary stability of the zone by providing additional reserves and

optimising external financial transactions [4], and to ensure the traceability of currencies and, more generally, the transparency of financial flows.

However, the numerous oil and mining companies present in the CEMAC zone and accounting for a significant share of Member States [5] revenues have stood up to point out the specificities of their industry, which is still not compatible with certain provisions of the Regulation. According to these companies, the aim was to avoid exchange risks by having onshore and offshore accounts in foreign currencies inside and outside the CEMAC zone, to avoid the bureaucratic red tape associated to the domiciliation of imports and exports, to facilitate recourse to international financing and to guarantee loans or the speed of payments by avoiding the repatriation of all export earnings, to allow payment in foreign currency of other resident companies and suppliers, to be able to continue to transfer the salaries of foreign workers and finally to secure the rehabilitation funds of sites constituted in foreign currency by continuing to place them outside the CEMAC.

These concerns have been largely taken into account by the monetary institutions following a participatory process of more than a hundred working meetings which have so far resulted in a significant adjustment of certain implementation modalities of the 2018 Regulation to take into account the constraints of companies in the extractive sector (I.), while imposing on them certain obligations ensuring the strengthening of BEAC's control over foreign exchange operations in the mining and hydrocarbons sector (II.).

## **I - The development of a regime adapted to the constraints of companies in the extractive sector**

An analysis of the draft texts issued by the Central Bank and which will be applicable to Extractive Companies shows that the latter will be subject to a special regime with regard to foreign exchange regulations. More specifically, as of January 1<sup>st</sup>, 2022 - if the various draft regulations and instructions are adopted as they stand - Extractive Companies will be authorized to hold foreign currency accounts (A), will benefit from a simplified procedure for declaring, domiciling and settling imports and exports, and will be able to continue transferring the income of their expatriate workers abroad (B).

### **A - Admission of foreign currency accounts held by companies in the extractive sector**

The BEAC has taken into account the concerns of oil and mining companies regarding the ban on opening foreign currency accounts for companies resident in the CEMAC zone [6]. Under the terms of Draft Instruction on Foreign Currency Accounts, resident Extractive Companies will be able to open accounts inside and outside CEMAC and regularise the accounts they already hold (1). Moreover, the operation of these accounts has been adapted to the difficulties encountered by Extractive Companies (2).

#### **1 - Opening and regularisation of foreign currency accounts**

**Opening of foreign currency accounts.** In reality, the possibility of opening foreign currency accounts by Extractive Companies is not in itself an innovation because despite the prohibition set out in articles 41 and 42 of the 2018 Regulation, it is possible for resident companies to open foreign currency accounts onshore (within the CEMAC zone) and offshore (outside the CEMAC zone) after authorisation from the Central Bank [7]. Only with regard to Extractive Companies, the Draft Instruction on Foreign Currency Accounts standardises the procedure for authorising the opening of onshore and offshore accounts [8].

In fact, the opening of onshore and offshore foreign exchange accounts by an Extractive Company will be subject to prior authorisation by the Central Bank. To do so, the latter must send an application for authorisation electronically to the Central Services of the BEAC, which will acknowledge receipt and may, if necessary, request additional information within fourteen (14) days of receipt of the application [9].

The application file is composed, for both onshore and offshore accounts (i) of an application for authorisation specifying the name of the applicant company, the currency of the account, the reason for the application and the operations likely to be debited or credited to the account, to which are attached (ii) an extract from the Trade and Personal Property Right Register (**TPRR**) of the applicant extractive company dating back less than 3 months (iii) its articles of association in notarised form and, where applicable, those of the parent company, (iv) the identity of the directors and main shareholders of the applicant extractive company, (v) the agreements signed with the State or any other partner, (vi) recent financial statements, contracts for external loans and repayment schedules, where applicable [\[10\]](#).

According to article 6 of this draft instruction, the Central Bank has a period of thirty (30) days from the receipt of the complete file to send its reply to the applicant [\[11\]](#) which specifies, when favourable, the operations that the company is authorised to carry out on the foreign currency account.

An analysis of these provisions, which are specifically applicable to Extractive Companies, can be described as an incentive insofar as the Central Bank integrates a concern for speed in the procedure for processing the application for authorisation by limiting the period for examining the application to thirty (30) days [\[12\]](#). A simple transmission of the application by electronic means has even been provided for contrary to the silence of the provisions of the 2018 Regulation on the form of the application.

Moreover, unlike the accounts of companies operating in other sectors of activity which have a validity period of two (2) years subject to an application for renewal, the accounts of Extractive Companies may have a longer duration. In this regard, article 9 of the draft instruction provides that: "*the authorisation of the foreign currency account is valid for the duration of the purpose of the account, subject to compliance with the periodic reporting obligations of the extractive company*". The Central Bank thus lifts the constraint related to the duration of the currency account for Extractive Companies and adapts this part of the 2018 Regulation to the realities of the extractive sector, since the contracts concluded are generally of a long duration of several decades, often renewable, so that the duration of a currency account will be the same as the duration of the object or the contractual obligations for which it was created.

**Regularisation of foreign currency accounts.** As regards the regularisation formality, it concerns Extractive Companies that already hold accounts. In fact, the BEAC has taken into account the requests of holders of foreign currency accounts, authorising them to regularise their account before January 1<sup>st</sup>, 2022.

According to article 10 paragraph 2 of the draft instruction on foreign currency accounts, regularisation consists in sending to the central services of the Central Bank a complete file including, in addition to (i) the request for regularisation and the history of the account to be regularised, (ii) the information and documents required for the opening of foreign currency accounts. This regularisation formality must be completed by December 31<sup>st</sup>, 2021 at the latest, it being understood that during the period of examination of the regularisation file by the Central Bank, the accounts will be deemed compliant [\[13\]](#).

The BEAC goes further by granting a period of ten (10) months to Extractive Companies to comply with the requirements of the draft instruction. It should be noted that only foreign currency accounts for which the BEAC has been seized for regularisation purposes may continue to operate within this ten (10) month period without exposing their holders to sanctions.

The Central Bank also provides for the possibility for companies that have carried out operations that do not comply with foreign exchange regulations prior to the entry into force of the draft instruction, to take the necessary corrective actions within a period of three (3) months, which may be extended by the Central Bank at the request of the company concerned.

## 2 - Operating of foreign currency accounts

**Payment of resident suppliers in foreign currency from onshore foreign currency accounts.** As a reminder, the 2018 Regulation and Instruction n° 005/GR-2019 relating to the conditions and modalities of opening and operating foreign currency accounts of residents and non-residents (**Instruction n° 005-GR-2019**) [14], prohibit the use of foreign currencies contained in the accounts to cover local needs [15]. Thus, except for converting them into CFA francs, resident companies are prohibited from using foreign currencies in their activities within the sub-region. According to representatives of the extractive sector, this measure is not compatible with the realities of the activities of Extractive Companies, most of which make their local payments in foreign currency, particularly because of the dependence of their local suppliers on technology and expertise not available in the CEMAC zone.

The Draft Instruction on Foreign Currency Accounts lifts this prohibition with regard to Extractive Companies. Indeed, article 16 states that : *“foreign currency accounts are intended for the execution of transactions necessary for the activities of extractive companies resulting from legal or contractual obligations. They may also receive any other transaction essential to their activity in accordance with the foreign exchange regulations”*.

From this provision, it appears that Extractive Companies will be authorised to settle their transactions in the sub-region in foreign currency. The Governor of the BEAC, Abbas Mahamat Tolli, made this clear in November 2021 when he indicated that Extractive Companies would be able to continue to pay their subcontractors operating in the CEMAC in foreign currency through foreign currency accounts opened in the CEMAC [16].

It should be noted that the Draft Instruction on Foreign Exchange Accounts provides in its article 2 that transporters and subcontractors in the hydrocarbons and mining sectors of the upstream sector are subject to its provisions. As a result, they will benefit from the same advantages as companies holding a licence or contract for the exploitation of natural resources with regard to foreign currency accounts. This provision is logically justified in view of the role played by subcontractors in the extractive sector. This essential role was also noted by the Central Bank during the meeting of November 17<sup>th</sup>, 2021 in Douala in the presence of the sector's stakeholders.

However, it is important to distinguish between accounts within CEMAC and accounts outside CEMAC.

**Operation of onshore accounts.** For accounts opened within CEMAC, Extractive Companies may freely carry out debit operations for (i) the settlement of foreign trade operations inherent to their activities, (ii) the repayment of loans contracted for the needs of their activities, (iii) cash pooling operations within the CEMAC, (iv) the payment of dividends and distributions of any other nature, (v) investment operations carried out by them, (vi) crediting a foreign currency account within the CEMAC and (vii) any other operation necessary for the needs of their activities [17].

The Central Bank thus authorises the circulation of foreign currency in the CEMAC zone for transactions in the extractive sector, subject to the prohibitions set out in the foreign exchange regulation. However, not all transactions made by companies are concerned, since they are only those necessary for the activities of the companies. Moreover, payments relating to taxes and social security contributions are excluded from this provision and can only be made in CFA Francs [18].

The operation of foreign currency accounts of companies in the extractive sector will be all the more different from that of foreign currency accounts of other companies as the operations carried out on onshore accounts will be free subject to verification by the credit institutions [19]. The Central Bank has thus diversified the source of funds that can credit these accounts. These include export earnings of the extractive company, foreign currency financing operations carried out by the extractive company and interest on investments or any other earnings.

**Operation of offshore accounts.** For accounts located outside the CEMAC, they are subject to the same regime as onshore accounts. However, the latter cannot be used to settle transactions between resident Extractive Companies, which must automatically be settled from an onshore account [20]. Conversely, they may be freely debited for the settlement of external transactions of the extractive company.

## **B - Simplification of procedures for declaration, domiciliation and settlement of imports and the possibility of transferring the income of expatriates working in the extractive sector**

The meetings between the BEAC and the Extractive Companies have shown that the procedures for declaration, domiciliation and payment of imports and exports will be simplified for the extractive sector (1). In addition, they will be able to continue to transfer the income of their expatriate workers to accounts located abroad (2).

### **1 - Simplification of procedures for declaration, domiciliation and payment of imports**

Extractive Companies have raised some concerns about the obligation to declare and direct debit imports and exports, in terms of administrative burdens resulting in particular from the number of invoices they are required to pay per month.

To this end, the BEAC is clarifying the conditions and modalities for the declaration, domiciliation, settlement and clearance of imports and exports of goods and services by mining and oil companies through a new draft instruction. However, as the instructions relating to the domiciliation of exports are still being finalised, this analysis will therefore be limited to the procedure relating to imports provided for in the present draft instruction specifying the conditions and modalities for the declaration, domiciliation, settlement and clearance of imports of goods and services by resident upstream oil and gas companies.

In this regard, the latter does not distinguish the procedure for declaration and domiciliation of imports of goods from those of services as is the case in Instruction n° 007/GVR/2019 of June 10<sup>th</sup>, 2019 specifying the conditions and modalities for declaration, domiciliation and settlement of imports of goods and services (**Instruction n° 007GVR/2019**). It innovates by distinguishing (i) the declaration and domiciliation of imports settled from an account within CEMAC from (ii) those of imports settled from an account outside CEMAC. This is actually the result of the new possibility offered by the Central Bank to Extractive Companies to settle their imports from an offshore account [21], which is not provided for by the 2018 Regulation and its implementing instructions. In fact, they will be able to declare and direct their imports every three (3) months to the National Directorate of the Central Bank when these are settled from their offshore accounts.

This is therefore a different regime from that applied to other sectors of activity, which must make a declaration and domiciliation for each import of goods and services.

One point needs to be raised regarding the draft instruction on imports is that it excludes subcontractors and transporters in the extractive sector from its scope. As the latter are excluded from the scope of the draft instruction, they will remain subject to the existing regulations.

### **2 - The possibility of transferring expatriates' work income in the extractive sector**

**Application of the Circular Letter n° 018/GVR/2019.** As announced during the meeting of November 17<sup>th</sup>, 2021 by the Governor of the BEAC, the implementation of the foreign exchange regulations to the extractive sector will not hinder the transfer of the income of their expatriate workers outside the CEMAC. In this regard, Circular Letter n° 018/GVR/2019 of August 14<sup>th</sup>, 2019 on transfers of employment income of non-residents and foreign residents outside CEMAC (**Circular Letter n° 018/GVR/2019**) [22] will remain applicable to Extractive Companies.

In general, the Circular Letter states that the non-resident or foreign resident may delegate the transfer of his or her working income to the entity that paid the income provided that the transfer is made directly to the non-resident's or foreign resident's foreign account. The transfer by Extractive Companies is therefore not automatic and is only possible if they present a certificate of delegation of transfer of work income signed by the non-resident or foreign resident and provided that the transfer is made directly to the employee's account abroad.

**Transfers of income from offshore accounts.** As regards income transfers themselves, they are free upon presentation of the documents specified in Annex 1 of the Circular Letter and concern all types of income [23]. The BEAC has also recalled that Extractive Companies will be authorised to make transfers from accounts located outside the CEMAC [24]. Let us hope that this measure announced by the BEAC at the meeting of November 17<sup>th</sup>, 2021 will be clearly reflected in the texts that will be adopted.

Indeed, this measure appears to be a special measure for Extractive Companies as neither the Circular Letter n° 018/GVR/2019 nor the 2018 Regulation provide for such a possibility. This proves that in many respects the extractive sector enjoys a privileged regime with regard to foreign exchange regulations.

However, as the application of foreign exchange regulations to Extractive Companies is the result of a compromise between the latter and the Central Bank, the BEAC's control over their foreign exchange operations will be strengthened by the implementation of foreign exchange regulations.

## **II - Strengthening the central bank's control over foreign exchange operations in the extractive sector**

Foreign exchange operations in the sub-region are subject to the control of the BEAC. Through these draft texts, the Central Bank aims to strengthen its control over foreign exchange transactions carried out by Extractive Companies (A) and to have them contribute to the consolidation of foreign exchange reserves (B).

### **A - Control over foreign exchange transactions carried out by Extractive Companies**

This control concerns both operations on foreign currency accounts (1) and import and export operations (2).

#### **1 - With regard to operations on foreign currency accounts**

Through the draft instructions that will come into force on January 1<sup>st</sup>, 2022, the Central Bank has strengthened its means of control over the foreign exchange operations of Extractive Companies' resident in the CEMAC zone, whether they hold foreign exchange accounts within the CEMAC zone or outside the CEMAC zone.

**Onshore currency accounts.** With regard to foreign currency accounts held within the CEMAC zone by Extractive Companies, the Draft Instruction on foreign currency accounts provides that all transactions on foreign currency accounts in the CEMAC zone must be reported to the Central Bank on a monthly basis by the credit institutions holding these accounts [25]. This measure was not included in the instruction n° 005/GR/2019 of the Central Bank relating to the conditions and modalities of opening and operating foreign currency accounts of residents and non-residents. With this measure, the Central Bank affirms its will to strengthen its control over foreign exchange operations of actors resident in the CEMAC zone.

In addition, article 19 of this draft instruction clearly defines the cases in which foreign currency accounts held by Extractive Companies in the CEMAC zone may be debited and credited. This is a step forward compared to the 2019 instruction, which provided that the grounds for debiting and crediting in foreign currency were defined in the authorisation granted by the Central Bank for the opening of foreign currency accounts of residents in the CEMAC [26].



Furthermore, concerning the modalities for closing foreign currency accounts in CEMAC, article 17 of Instruction n° 005/GR/2019 provides that in the event of closing a foreign currency account in CEMAC, the credit balance shall be transferred within 30 days to the credit institution in exchange for CFA Francs for the benefit of the holder. However, the Draft Instruction on foreign currency accounts modifies this provision by allowing resident companies in the extractive sector to transfer this credit balance to another active foreign currency account in the CEMAC, subject to the information of the Central Bank [27].

**Offshore currency accounts.** Concerning foreign currency accounts held outside the CEMAC zone by resident companies in the extractive sector, article 21 of the draft instruction on foreign currency accounts also defines all the cases in which foreign currency accounts held by Extractive Companies outside the CEMAC zone could be debited and credited, unlike instruction n° 005/GR/2019 which stipulated that these reasons for debiting and crediting in foreign currencies were specified in the authorisation granted by the Central Bank for the opening of foreign currency accounts of residents outside the CEMAC zone.

Furthermore, companies in the extractive sector are required to report monthly debit and credit transactions on accounts held outside the CEMAC zone, as provided for in article 21 paragraph 3 of the same Draft Instruction, contrary to Instruction n° 005/GR/2019 of June 10<sup>th</sup>, 2019 which only provided for the quarterly transmission to the Central Bank of the statement of the foreign exchange account held outside the CEMAC by Extractive Companies. This monthly reporting obligation requires additional organisation of Extractive Companies in order for them to comply with their reporting obligations.

In addition, regarding the modalities for closing foreign currency accounts held outside CEMAC by Extractive Companies' resident in the CEMAC zone, article 10 of Instruction n° 005/GR/2019 of June 10<sup>th</sup>, 2019 provided that the applicant must close the account and repatriate in a CEMAC Member State and within thirty (30) days, the assets held abroad. However, the 2021 Draft Instruction modifies this provision by allowing resident companies in the extractive sector to transfer this credit balance to another active account within or outside CEMAC, subject to the authorisation of the Central Bank [28].

**Transfer of labour income.** Finally, with regard to the modalities for the transfer of work income outside the CEMAC zone by the credit institution holding the account of the extractive company, the circular letter n° 018/GVR/2019 stipulates that Extractive Companies responsible for transferring workers' income outside the CEMAC zone "*declare to their credit institution every six months [by January 15<sup>th</sup> and July 15<sup>th</sup> at the latest], a detailed statement of the beneficiaries of the work income for which they are responsible for transferring outside the CEMAC. This statement shall include, for each beneficiary of salaries, fees and other work income [per diem, various allowances and social benefits] to be paid by the delegated entity, the amounts to be transferred outside CEMAC, the bank references [IBAN code] of the beneficiaries of work income abroad*". Credit institutions are required to declare quarterly to the Central Bank a statement of work income transferred outside CEMAC during the month. This is another new reporting obligation that must be respected by Extractive Companies at the risk of being sanctioned by the Central Bank.

## 2 - With regard to imports of goods and services

The Draft Instruction on Imports provides new details concerning ( i) the declaration and domiciliation of imports of goods and services, whether they are paid from an account located in the CEMAC zone or from an account located outside the CEMAC zone, (ii) the modalities of payment of imports in and outside the CEMAC zone, as well as ( iii) the conditions relating to the discharge of the domiciliation files of goods and services.

**i. Declaration and domiciliation of imports of goods and services.** Imports of goods and services made by Extractive Companies and settled from an account in the CEMAC must be domiciled with the credit institution holding the said account, at the latest on the day of settlement [29].

The operation of direct debit of goods and services in the CEMAC zone is carried out by transmitting to the credit institution holding the said account, a set of documents provided for by instruction n° 007/GR/2019 of June 10<sup>th</sup>, 2019, in its article 11 [30]. However, the Draft Instruction on Imports for 2021 introduces an innovation concerning imports of services, by specifying that if the service contract is not registered at the time of direct debit, the extractive company concerned must proceed to register it before the service clearance period set at three (3) months, as from the date of final settlement of the import of the service concerned [31]. Thus, this obligation of declaration of the domiciliation of imports of goods and services of companies in the extractive sector to credit institutions is part of the strengthening of the control of the Central Bank on the operations of imports of goods and services, as well as through the collection of declarations of imports of goods and services of companies by credit institutions on behalf of the Central Bank [32]. The latter thus considers that credit institutions have a role to play in the implementation of these provisions even if it limits these declarations to operations settled in the CEMAC zone.

Concerning the declaration and domiciliation of imports of goods and services paid for from an account outside the CEMAC, it is planned that imports of goods and services by Extractive Companies be declared and domiciled quarterly with the National Directorate of the Central Bank of the country in which the extractive company concerned is located [33].

**ii. Import settlement procedures.** In addition, new provisions have been included in the drafts concerning the settlement of imports of goods and services, whether they are settled from an account within or outside the CEMAC zone.

In fact, the draft instruction on imports provides that the modalities for the settlement of imports of goods and services from an account located in the CEMAC zone will remain identical to those provided for in articles 15, 16 and 17 of the Instruction n° 007/GR/2019 of 2019. Concerning imports of goods and services by Extractive Companies from an account outside the CEMAC, the same draft instruction provides, in article 15, that settlement will be carried out in accordance with the provisions of the decision to authorise the opening of the said account granted by the Central Bank, which also specifies the operations that may be debited or credited to the said account [34].

**iii. Clearance of direct debit files.** In addition, regarding the settlement of direct debit files for goods and services, the 2021 draft instruction provides that credit institutions will be responsible for monitoring the settlement of direct debits for goods and services opened in their books in the CEMAC zone [35]. The Central Bank will only follow up on direct debits settled from an account outside the CEMAC zone [36]. Finally, the same draft instruction of 2021 sets in its article 18 the time limit for discharging files on imports of goods and services at three (3) months -as mentioned above-, contrary to instruction n° 007/GR/2019 of June 10<sup>th</sup>, 2019 which set in its article 21 this time limit at three (3) months for imported goods and related services and at one (1) month for the importation of services.

Furthermore, an innovation is to be noted in article 19 of the new draft instruction, which states that " *Goods whose actual import duration into CEMAC is longer than the discharge period set in article 18 of this Instruction shall be reported to : - the domiciliary credit institution, if the payment of the goods is made from an account in the CEMAC ; - the Central Bank if the payment of the goods is made from an account domiciled outside the CEMAC*". Similarly, article 23 of the new draft instruction sets at fifteen (15) days the deadline from which Extractive Companies subject to a formal notice from the Central Bank or the domiciliary credit institution must send the missing proof of clearance or a reasoned response justifying the absence of the required documents.

These obligations placed on credit institutions and Extractive Companies will require the mobilisation of additional resources in order to avoid any sanction by the Central Bank. Let us hope that the latter will be flexible when these texts come into force in order to give the actors time to set up qualified teams in charge of respecting these measures.



## **B - Increasing the participation of Extractive Companies in the consolidation of CEMAC's foreign exchange reserves**

The consolidation of CEMAC's external assets is one of the imperatives pursued by the 2018 Regulation. To this end, the BEAC is keen to involve Extractive Companies in increasing foreign exchange reserves, in particular by maintaining the obligation to repatriate foreign exchange generated by their activities (1) and the repatriation of funds for site rehabilitation (2).

### **1 - The obligation to repatriate 35 % of foreign currency from extractive activities**

Extractive Companies will be subject to the obligation to repatriate foreign currency assets held outside the CEMAC as of January 1<sup>st</sup>, 2022. To this end, the Central Bank has announced the adoption by the end of December 2021 of a regulation that will govern the repatriation of foreign exchange held in accounts outside CEMAC by these companies.

As from January 1<sup>st</sup>, 2022, Extractive Companies will be required to repatriate at least thirty-five (35) % of the foreign exchange generated by their activities into onshore accounts [37]. This is in line with what has been stated above regarding the preferential regime for Extractive Companies.

Unlike the 2018 Regulation which do not set a minimum repatriation rate and advocate for full repatriation of foreign exchange, the Draft Repatriation Regulations allow companies in the extractive sector to hold sixty-five (65) % of the foreign exchange generated from their operations in offshore accounts. This measure is intended to allow companies to continue to secure access to external finance and to make payments to suppliers and contractors in real time.

The companies will have to repatriate these currencies within one hundred and fifty (150) days from the date of removal. The Central Bank has specified that for this measure, an evaluation phase of ten (10) months will be observed as from January 1<sup>st</sup>, 2022 during which time, infringements will be noted but no penalty will be imposed on companies within this period in case of non-repatriation of currencies [38].

However, some companies are excluded from the scope of this measure. Thus, companies in the exploration phase, which do not generate profits as such, and those whose contracts are backed by RBL (*Reserves Based Landing*) financing [39] will not be required to repatriate the foreign exchange generated by their activities.

The minimum repatriation rate set at thirty-five (35) % may be increased by the Central Bank, after an evaluation of its implementation and taking into account the economic situation of the CEMAC. The BEAC thus reserves the right to increase this rate in future years if the economic situation of the sub-region so justifies, according to a periodicity and under the conditions and modalities determined by the Governor of the Central Bank.

### **2 - Obligation to repatriate site rehabilitation funds**

Still on the subject of the repatriation of foreign currency held outside CEMAC, and concerning an obligation to rehabilitate and restore sites that are now essential for extractive projects [40], article 2 paragraph 4 of the Draft Regulation on Repatriation requires the companies concerned to repatriate all the funds for the rehabilitation of sites after exploitation, into foreign currency escrow accounts opened in the books of the Central Bank. This repatriation will take place within three (3) years from January 1<sup>st</sup>, 2022.

To oppose this repatriation, the mining and oil companies raised the concern of protecting these funds against possible seizures in the sub-region. However, the BEAC has provided for a draft regulation on the unseizability of

foreign currency accounts in the CEMAC in order to guarantee the security of these funds.

With regard to this unseizability, the Draft Regulation on the Unseizability of Accounts provides that "*the foreign currency accounts of resident upstream oil and gas and mining companies domiciled in the books of CEMAC credit institutions are unseizable*".

The BEAC is to be commended for its diligence in ensuring the repatriation of site rehabilitation funds and their security by allowing them to be unseizable, contrary to the norm when they are held in offshore accounts. In doing so, the Central Bank will strengthen its control over the currencies derived from extractive activities.

- The above analysis shows that the Central Bank wanted to give a privileged place to companies in the extractive sector by allowing the establishment of a special regime adapted to the inherent constraints of this sector, even if some Extractive Companies believe that these measures are still insufficient.

However, the implementation of the announced measures will probably not be without friction, despite the prior consultation undertaken.

On the one hand, the application of these new provisions will require a significant involvement of companies in the extractive sector as well as credit institutions in order to comply with the new obligations imposed by the Central Bank. Let us hope that in return, the Central Bank will be as responsive as the constraints of the extractive sector require and that it will be able to meet the expectations of the stakeholders.

On the other hand, the draft Community texts contain numerous provisions that are likely to derogate from or contravene both certain national legal obligations resulting in particular from mining or petroleum codes or international treaties, but also the provisions resulting from long-term mining and petroleum contracts concluded by Extractive Companies and States. It will be interesting to see in practice what the consequences will be, particularly with regard to the new provisions that will be less favorable to Extractive Companies, in terms of international investment law on the one hand and stabilization clauses contained in mining and oil contracts on the other, which may lead to compensation for the investor or a rebalancing of the contract when they do not freeze the law generally applicable at the time of signing the contract.

It is therefore advisable to wait until the end of December 2021, the planned date of entry into force of these texts, to observe whether they contain all the provisions analyzed above. To be continued.

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[1] The upstream sector refers to exploration and production activities; the downstream sector mainly covers refining, trading and distribution activities.

[2] The CEMAC member states are Cameroon, the Republic of Congo, Gabon, Chad, the Central African Republic and Equatorial Guinea.

[3] BEAC Instruction n° 005/GR/2019 of June 10<sup>th</sup>, 2019 on the conditions and modalities of operation of foreign currency accounts of residents and non-residents. BEAC Instruction n° 007/GR/2019 of June 10<sup>th</sup>, 2019, on the conditions and modalities of declaration, domiciliation and payment of imports of goods and services. BEAC circular letter n° 018/GVR/2019 on the transfer of work income of non-residents and foreign residents outside CEMAC.

[4] Cumulative retrocessions increased from CFAF 3,277.8 bn in 2018 to CFAF 7,914 bn in 2020, an increase of 141 %.

[5] According to the World Bank, oil profits in the CEMAC countries in 2019 represented 17.5 % of GDP on average, with significant differences (2.8 % for Cameroon and 43.4 % for Congo).

[6] In fact, the latter has raised the need to protect themselves against the exchange rate risk given that the majority of transactions in the field are made in dollars.

[7] Articles 41, paragraph 2 and 43 paragraph 3 of the 2018 Regulation.

- [8] Contrary to instruction n° 005-GR-2019 on the terms and conditions for opening and operating foreign currency accounts of residents and non-residents, which distinguishes between authorisation to open an onshore account and an offshore account.
- [9] Article 5 of the draft instruction n° /GR/2021 specifying the conditions et modalities for opening and operating foreign currency accounts of resident companies operating in the hydrocarbons and upstream mining sectors.
- [10] Article 4 of the draft instruction n° /GR/2021 specifying the conditions and modalities for opening and operating foreign currency accounts of resident companies operating in the hydrocarbons and upstream mining sectors.
- [11] Failure by the BEAC to reply within this period shall constitute authorisation to open the foreign currency account, subject to acknowledgement of the tacit authorisation to open the account by correspondence to BEAC.
- [12] Indeed, the 2018 Regulation and instruction n° 005-GR-2019 did not provide for any deadline for the Central Bank to respond to a request for authorisation to open.
- [13] Article 11 of the draft instruction n° /GR/2021 specifying the conditions and modalities for opening and operating foreign currency accounts of resident companies operating in the hydrocarbons and upstream mining sectors.
- [14] Instruction n° 005/GR/2019 on the conditions and modalities for opening and operating foreign currency accounts of residents and non-residents which came into force on June 10<sup>th</sup>, 2019
- [15] Article 45 of the 2018 Regulation and Article 15 paragraph 2 of Instruction n° 005-GR-2019.
- [16] Extract from the speech of the governor of the BEAC dated November 15, 2021
- [17] Article 19 of the draft instruction n° /GR/2021 specifying the conditions and modalities for opening and operating foreign currency accounts of resident companies operating in the hydrocarbons and upstream mining sectors.
- [18] Article 18 paragraph 4 of the draft instruction n° /GR/2021 specifying the conditions and modalities for opening and operating foreign currency accounts of resident companies operating in the hydrocarbons and upstream mining sectors.
- [19] Article 18 paragraph 2 of the draft instruction n° /GR/2021 specifying the conditions and modalities for opening and operating foreign currency accounts of resident companies operating in the hydrocarbons and upstream mining sectors.
- [20] Article 30 of the 2018 Regulation.
- [21] In fact, in accordance with article 15 of Instruction n° 007GVR/2019 of June 10<sup>th</sup>, 2019, the settlement of imports could only be made by the domiciliary credit institution that is to say from an onshore account.
- [22] Circular letter n° 018/GVR/2019 of August 14<sup>th</sup>, 2019 on transfers of work income of non-residents and foreign residents outside CEMAC effective on August 14<sup>th</sup>, 2019.
- [23] Salaries, fees, *per diem*, various allowance, etc.
- [24] BEAC Power Point presentation at the meeting of November 17<sup>th</sup>, 2021, page 9, slide n° 18.
- [25] Article 18, paragraph 5 of the draft instruction n° /GR/2021 specifying the conditions and modalities for opening and operating foreign currency accounts of resident companies operating in the hydrocarbons and upstream mining sectors.
- [26] Article 13 of Instruction n° 005/GR/2019, relating to the conditions and modalities of opening and operating foreign currency accounts of residents and non-residents of the CEMAC zone.
- [27] Article 25 paragraph 1 of the draft instruction n° /GR/2021 specifying the conditions and modalities for opening and operating foreign currency accounts of resident companies operating in the hydrocarbons and upstream mining sectors.
- [28] Article 25 paragraph 2 of the draft instruction n° /GR/2021 specifying the conditions and modalities for opening and operating foreign currency accounts of resident companies operating in the hydrocarbons and upstream mining sectors.
- [29] According to article 7 of the draft Instruction n° /GR/2021 specifying the conditions and modalities of declaration of domiciliation, settlement and discharge of imports of goods and services of resident hydrocarbon and mining companies of the upstream sector.
- [30] According to article 11 of Instruction n° 007/GR/2019 specifying the conditions and modalities of declaration, domiciliation and importation of goods and services.
- [31] According to article 8 of the draft instruction n° /GR/2021 specifying the conditions and modalities for opening and operating foreign currency accounts of resident companies operating in the hydrocarbons and upstream mining sectors.

**[32]** According to article 5 paragraph 2 of the draft Instruction n° /GR/2021 specifying the conditions and modalities of declaration, domiciliation and importation of goods and services of resident hydrocarbon and mining companies of the upstream sector.

**[33]** According to article 11 of the draft instruction n° /GR/2021 specifying the conditions and modalities for opening and operating foreign currency accounts of resident companies operating in the hydrocarbons and upstream mining sectors.

34 Article 8 of Instruction n° 005/GR/2019 relating to the conditions and modalities of opening and operating foreign currency accounts for residents and non-residents of the CEMAC zone.

35 Article 16 of the draft instruction n° /GR/2021 specifying the conditions and modalities of declaration, domiciliation and imports of goods and services of resident hydrocarbon and upstream mining companies.

**[36]** Article 17 of the draft instruction n° /GR/2021 specifying the conditions and modalities of declaration, domiciliation and imports of goods and services of resident hydrocarbon and upstream mining companies.

**[37]** Article 2 of the draft Regulation n° /CEMAC/UMAC/CM on the modalities of implementation of certain provisions of the foreign exchange regulations by resident upstream oil and gas companies.

**[38]** Power point presentation of the Central Bank on November 17<sup>th</sup>, 2021, page 9, slide n° 16

**[39]** Resource-Backed Loans are loans made to a company whereby (i) repayment is made either directly in natural resources or from revenues generated from those resources; (ii) repayment is secured by future revenues from the natural resources, or the natural resource reserves serve as collateral for the loan.

**[40]** Gabon's Hydrocarbons Code resulting from Law n° 002/2019 of July 16<sup>th</sup> 2019 regulating the hydrocarbons sector in the Gabonese Republic, article 176.

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