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Recent developments applicable to oil and gas concessions in Portugal

PORTUGAL

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Summary

The country is at an advanced stage of the exploration phases of concession agreements, with certain concessionaires now preparing to carry out their first exploration surveys within their concession areas.

This goes hand-in-hand with concerns of the environmental impacts of exploration and production (E&P) activities in general and an out-of-date E&P legislation. As such, new legislation was enacted to address such concerns and to harmonise Portuguese legislation with European Union regulations.

Thus, the scope of this paper is to address the more recent legislative developments on upstream activities in Portugal.

Introduction

Several of the E&P existing concessions in Portugal are at an advanced stage of their exploration phases, several concessionaires now preparing for their first research surveys. The results of these research surveys will ascertain the existence, or otherwise, of commercially viable petroleum deposits.

Due to this new scenario, the reform of the existing legislation became a priority, not only to harmonise it with the legislation of more mature oil-producing countries and EU regulations and guidelines, but also to compel concessionaires to perform their activities in accordance with the industry's best practices.

The main legislation in force regarding the upstream petroleum sector is more than 20 years old, from the 1990s, and is vast and very widespread, including without limitation: Decree-Law no 109/90, of 26 April 1990, governing petroleum activities (DL 109/90); Ministerial Order no 790/94, of 5 September 1994, establishing the general foundations of concession contracts (MO 790/94); Joint Order A-87/94-XII, of 17 January 1995, setting out the annual payments for surface rentals (JO A-87/94); and Order no 82/94, of 24 August 1994, establishing the fees payable for the issuance of a preliminary evaluation licence, for executing a concession contract and for the assignment of contractual rights.

Thus, the purpose of this article is to provide a general overview of the most recent developments in Portuguese oil and gas (O&G) legislation with regard to upstream activities and analyse its applicability in the concession contracts currently in force in the country.

Recent developments

As stated above, this need to reform and harmonise the existing legal framework applicable to petroleum E&P activities, and mainly to protect the environment from possible negative impacts, resulted in the preparation of two main pieces of legislation, as follows: Decree-Law no 13/2016, of 9 March, on safety of offshore O&G activities (DL 13/2016), which transposes Directive 2013/30/EU, of 12 June, of the EU Parliament and of the Council; and Law no 37/2017 of 2 June, that amends Decree-Law no 151-B/2013, of 31 October, which governs the environmental impact assessment (EIA) procedure (DL 151-B/2013). The latter will come into force in the coming weeks.

The aforesaid pieces of legislation set out the following:

DL 13/2016

The preamble of this DL 13/2016 establishes that it was enacted mainly to address concerns regarding possible accidents resulting from offshore activities and the possible associated impact on the environment.

Thus, certain rules on the safety of offshore installations or vessels used for carrying out O&G activities were enacted; giving the concessionaires or the operators the duty to implement them:

- prior to the commencement of such activities; and
- after approval by the two competent public agencies: the General Directorate

of Maritime Resources (DGRM)[1] and National Authority for Fuel Market (ENMC)[2] of the so-called major hazards report to be submitted by the operator.[3]

This report must identify the concession, the operator, as well as the activities to be carried out, which also have to be described. It should also include the following documents:

1. concessionaires' policy documentation on the prevention of major hazards;
2. installations' environmental and safety management system;
3. internal emergency reactivity plans;
4. independent verification mechanisms in place with regard to the installations and the notices of prospection activities;
5. among other documents.

Finally, it is also important to note that onshore activities are also covered by this DL 13/2016, at least until specific regulation applicable to said activities is enacted.[4]

Law no 37/2017 of 2 June, amending DL 151-B/2013 on the EIA procedure

At the time of writing, a new and relevant diploma, Law no 37/2017, of 2 June, was enacted and it mainly addresses the growing environmental concerns associated with E&P activities. This new Law no 37/2017 is the third amendment to the EIA regime in Portugal and sets forth several relevant changes when compared to the former regime.

First, as a rule, public and private E&P onshore and offshore petroleum activities are now subject to an EIA. That will be specifically the case of:

- production;
- exploration using non-conventional methods (eg, hydraulic fracking);
- exploration in sensitive areas; and
- exploration using conventional methods, where the Portuguese Environmental Agency (APA) decides that an EIA must be carried out.

Thus, while in the first three points above it is mandatory to carry out an EIA, in the last point, the APA decides on a case-by-case scenario the need to carry out said EIA or not.

In the case of exploration activities using conventional methods, the procedure starts by filing with the ENMC the application for licensing or authorising the relevant E&P exploration activity. ENMC will then request from APA the assessment of said application and the documents submitted to determine whether the relevant E&P activity is subject to an EIA. Also within this prior assessment, a mandatory public consultation procedure must be complied with so that the population and municipalities that may be affected by these activities can be informed and be heard. After said prior assessment and the public consultation procedure, the need or not for an EIA shall be notified to the concessionaire.

This new law also creates a technical committee[5] with powers to supervise the execution of E&P concession contracts, ensure the exchange of information and oversee the implementation of the existing legal framework applicable to E&P activities, as well as issue certain recommendations.

Finally, it also establishes a set of rules applicable to existing concessions (and the relevant concession contracts) determining that approvals regarding annual work plans, field work plans and general development and production plans[6] must not be granted without full compliance with the procedures and obligations provided for therein.

Application of the new rules to existing contracts

Despite recent developments in the legislation applicable to the O&G sector, the existing framework of concession contracts, which are deemed under the Portuguese law general framework as administrative or public law contracts, remains very simple.[7] In fact, their provisions correspond mainly to what is established in DL 109/94 and in MO 790/94 and cover all phases of petroleum E&P in relation to a specific concession area.[8]

Since petroleum E&P activities and their respective contracts have a very wide and long cycle of duration, it is common practice for said contracts to have a stabilisation clause in order to ensure the contractual balance in case of an unfavourable law being enacted during their term. However, in Portugal, very few concession contracts in force in the E&P sector have such stabilisation clause.

As a matter of fact, only two of the existing concession contracts, awarded for the 'Pombal' area and the 'Batalha' area (both of which correspond to onshore concessions) entered into on 30 September 2015, have the so-called 'middle' ground stabilisation clauses expressly forseen. These state that whenever there is a change of law or regulation applicable to such concession contracts, which materially affects their respective economical balance, the concessionaire has

the right to notify the ENMC that there has been such a material change to the prior existing contractual balance for the purposes of negotiating the necessary amendments to the concession contract in order to maintain the initial economic balance of said contract.

The remaining concession contracts do not have such clauses, but it is interesting to note that they provide for the need of the concessionaire to apply for and obtain the mandatory administrative permits, licences, approvals or favourable opinions from the relevant entities in case the performance of their rights and discharge of their obligations (to carry out the E&P activities encompassed by the concession contract) is or may be prohibited, limited or conditioned by specific legislation.[9]

It is worth mentioning that Portuguese doctrine, or at least a substantial part of it, is of the opinion that such principle – that the economic balance of the concession should be kept throughout its duration – is deemed applicable to all administrative law concessions, and therefore it should apply to all E&P concessions governed by DL 109/94, even though there is no express 'stabilisation' clause expressly set forth in those agreements.

This means that, even in the absence of such a clause, the concessionaire would be entitled to notify the ENMC as if such clause was expressly provided for.

There are nonetheless differences between having a stabilisation clause, and not having one. In the first case, the concessionaire will be able to request the rebalance and, if such rebalance is not achieved or it is not even possible, then the concessionaire could be in a position to resolve the agreement.

Such right to resolve the agreement would not be available whenever the stabilisation clause is not provided for.[10] It is nonetheless a grey and controversial area and there is no relevant jurisprudence to rely upon.

The applicability of these recent legislative developments to existing concession contracts should be clarified with the need to balance between:

- the Portuguese and standard international ground principle and the rule of non-retroactivity of the law;
- the non-existence of stabilisation clauses;
- the fact that concession contracts usually have a long duration; and
- the fact that the reality is constantly changing and the law has to be prepared to address said changes.

Practice has shown that, with regard to the enactment of DL 13/2016, since it transposed an EU Directive, most E&P players in Portugal (which are IOCs) were aware of the methods and procedures to be implemented and already familiar from other jurisdictions with the documentation necessary to be submitted to the authorities.

In spite of the above, Law no 37/2017 on the EIA procedure is going to raise more difficulties, which need to be analysed and discussed between the petroleum sector players, since it goes beyond the provisions and obligations set out by said EU Directive, and also because it does not clarify the procedures associated to its provisions. It is likely to complicate matters even further. These difficulties concern mainly the new article on concessions already mentioned above and, more particularly, its application to petroleum exploration activities.

As aforesaid, it is stated that the provisions of this law are applicable to existing concession contracts and that annual work plans, field work plans and general development and production plans submitted[11] will not be approved by the competent authorities without full compliance by the concessionaires with the procedures and obligations provided for in this law.

Thus, with regard to ongoing exploration works, we expect that the following shall occur.

Annual work plans already approved

In the case of already approved annual work plans connected with the execution of a minimum obligation set out in the concession contract which, in turn, is encompassed by this new law, we believe that the Portuguese non-retroactivity ground rule should prevail. As such, an EIA procedure cannot be imposed in this case and the E&P operation at hand may be carried out as previously scheduled.

Annual work plans for the following years (and respective field work plans)

In the case of annual work plans to be submitted for approval for the following years, as well as the respective field work plans[12] which include the execution of a minimum obligation encompassed by this new law, the competent authorities shall have to decide to apply the non-retroactivity ground rule or adopt the following procedure: the ENMC will request from the concessionaires documentation and

information on the activities to be carried out and respective environmental impact studies[13] (when possible) jointly with the annual work plan in order to consult APA. Afterwards, while the ENMC considers the annual work plan, the APA promotes the prior assessment procedure (and respective public consultation) associated with an EIA and the new legislation. As soon as the APA comes to a decision, both the ENMC and the concessionaire are notified.

Finally, as regards the transition from exploration into a production phase, more particularly to the approval of the general development and production plans submitted, an EIA procedure must be carried out. In this case, the EIA procedure shall be initiated immediately after the concessionaire submits the general development and production plan with the ENMC. After the EIA procedure is completed, the ENMC will be able to approve the aforementioned plan. Thereafter, the concession contract shall enter into the respective production phase.

Conclusion

Nowadays, with all the information available to the general public, E&P activities are under additional scrutiny, including without limitation regarding environmental hazards.

Thus, the authorities have to balance both the indisputable public interest of promoting petroleum E&P in Portugal and the need to address such concerns of the general public.

In light of the above, new laws are being enacted to harmonise the existing legislation with EU regulations and that of more mature oil-producing countries. On top of that, it will also be necessary to train the public officers and other players that are now treading their first steps in this field, so that the legislation enacted duly balances all interests; its implementation should be clear and fair to all the interested parties; and, finally, the settlement of disputes regarding said legislation should be transparent and fast.

Notes

1 The General Directorate of Maritime Resources or *Direção-Geral de Recursos Marítimos*.
2 The National Authority for Fuel Market or *Entidade Nacional para o Mercado de Combustíveis*, which is in the process of being extinguished, following which the powers regarding these activities entrusted to it will be transferred to the General Directorate for Energy or DGEG.
3 In addition, please note that the application of this procedure to concession areas where the respective granting instruments came into force after 18 July 2013 will also include a public consultation process which may be replaced by the public consultation to be carried out in case the E&P activity is subject to EIA.
4 As per Article 35.1 of DL 13/2016.
5 This technical committee includes representatives from APA, ENMC, DGRM, among others.
6 Respectively, Articles 32, 33 and 39 of DL 109/94.
7 Do note that the existing Portuguese concession contracts are very similar to one another.
8 As per DL 109/94, a concession block is defined as one or more lots with one common side in the concession area. A concession contract can encompass up to 16 lots (ca 1,300 km^2). This number may be exceeded in deep-offshore concessions.
9 Article 1.5 of all existing concession contracts.
10 The Portuguese Public Procurement Code (Decree-Law no 18/2008, of 29 January, as last amended by Decree-Law no 214-G/2015, of 2 October), applicable to the case at hand – since, as stated above, these contracts have an administrative nature – establishes that the private contracting party shall only be able to terminate the contract due to an abnormal or unexpected modification of circumstances (for instance, change of law) however, only if said termination does not entail a serious damage to the pursuit of public interest, and in this case, if the (i) maintenance of the contract manifestly threatens the private party's economic and financial viability, or if it (ii) is proven that the modification will be highly costly for said private contracting party.
11 Respectively, Articles 32, 33 and 39 of DL 109/94.
12 Which, in accordance with Article 33.2 of DL 109/94, detail the activities encompassed by the respective annual work plans.
13 As per the information that is required to be submitted with the APA by DL 151-B/2013, as amended, to carry out the prior assessment.