
THE OIL & GAS LAW REVIEW

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CHRISTOPHER B STRONG

LAW BUSINESS RESEARCH

THE OIL & GAS LAW REVIEW

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EDITOR'S PREFACE

2016 has been a year of flux for the international oil and gas industry.

With the industry enduring a second straight year of low oil prices, and with no prospects for a significant increase in sight, participants in the industry have been forced to adapt. Capital projects have been delayed or abandoned, staffing levels have been reduced, and oil companies have been seeking to sell off parts of their portfolios to focus on their best prospects and raise capital.

Oil producing countries have been in a similar pinch. Having become accustomed to triple digit oil prices, the 'new normal' of US\$50 oil has produced a grim budgetary reality. Although some producers with a relatively large ratio of reserves to population such as Kuwait, Qatar and the UAE have been able to get by without making drastic changes, others, such as Venezuela, have been brought to the brink of national bankruptcy as years of economic mismanagement enabled by high oil prices have finally taken their toll.

Yet amidst the ongoing turbulence there are opportunities. The necessity for existing companies (many of which are over-leveraged and cash strapped) to offload parts of their portfolios will create opportunities for new, leaner competitors to arise. US shale producers, whom many were prepared to write off in the low oil price environment, have managed to drastically improve the efficiency of their operations to survive, and even thrive, in the new price environment. And among the major oil-exporting countries, low oil prices have provided the impetus for long-needed structural reforms to diversify their economies beyond the extraction of petroleum. Nowhere is this more evident than in the world's leading exporter, Saudi Arabia, where the recently announced Vision 2030 Plan commits to reforms that would have been unimaginable just a few years ago. Not the least of which would be the potential public flotation of Saudi Aramco, the world's largest company. Long considered to be the best-managed and most professional of the national oil companies, the additional rigour and transparency that would come from being publicly traded would bring significant changes and set an example for other national oil companies to follow.

The international oil and gas industry has always been cyclical. Although the last two years have been eventful, it is by no means the first downturn the industry has faced nor the last. I have no doubt that the years ahead will continue to present challenges and opportunities for practitioners in this most dynamic of industries.

As always, I would like to thank our contributing authors for their outstanding contributions to this year's edition of *The Oil and Gas Law Review* and also the publishers at Law Business Research for their tireless work in bringing this all together.

Christopher B Strong

Vinson & Elkins LLP

London

November 2016

Chapter 22

PORTUGAL

*Rui Mayer, Diogo Ortigão Ramos, Ana Isabel Marques
and Berta de March¹*

I INTRODUCTION

The first oil and gas exploration and production operations in Portugal were carried out in the early 20th century. In the 1970s, after drill stem tests produced small quantities of crude oil, several wells were drilled. However, the petroleum potential of the country – including its exclusive economic area – is still under-evaluated, with an average of 2.4 wells drilled per 1,000 square kilometres,² and no proven reserves.

Major efforts in the 1970s and 1980s aimed to locate commercial reserves, following the ‘oil shocks’ of the time and the discovery of crude oil in the Grand Banks, of which the offshore areas of Portugal are considered a geological continuation. However, the results of these efforts were disappointing and the industry’s interest in the country declined.

In 1994, the government adopted new legislation in the sector, simplifying procedures and providing more favourable fiscal terms aimed at reigniting the interest of international companies and attracting new investment. In line with classical western European tradition, this new legislation continued to follow the concession model, but instituted more flexible terms for the basic framework of contracts. For instance:

- a* the definition of concession areas is based on a small unit (lot) measuring 6’ longitude by 5’ latitude, allowing the concessionaire to apply for the area it wants to explore, grouping these lots into ‘blocks’ of up to 16 contiguous lots;
- b* it extends the exploration period to 10 years;
- c* production rights, following the discovery and final delineation of an oilfield, are granted for at least 25 years, which can be extended to 40 years; and

1 Rui Mayer and Diogo Ortigão Ramos are partners, Ana Isabel Marques is a senior associate and Berta de March is an associate at Cuatrecasas, Gonçalves Pereira.

2 See www.enmc.pt/en-GB/activities/exploration-and-production-of-petroleum-resources/contracts-and-concessions/petroleum-exploration-in-portugal/.

- d* minimum exploration commitment requirements are of one well per block from the fourth year, with the rest being left for agreement in negotiations.

Deep offshore areas will not be subject to these terms until a specific regulation is published (which is not expected anytime soon), an incentive to attract companies interested in exploring these areas, which will enjoy even greater flexibility when submitting their proposals.

Shortly after the 1994 law was enacted, and to prepare for a public tender for the award of exploration and production rights, the authorities contracted TGS-NOPEC to conduct a seismic and gravimetric study of the deep offshore areas, which only then became available to exploration thanks to technological advances. The tender was organised in 2002, leading to the award, in 2005, of one concession covering two deep offshore blocks. Later, new rights were awarded following direct negotiations with several companies that approached the authorities. Onshore, one company has been active since 2001, having registered 'strong indications' of gas in two wells in the Alcobaça region. Oil shows have also been registered, although production tests were inconclusive.

From 31 August 2015, exploration activities were pursued under concession agreements in nine deep offshore areas and one onshore area, which was the same as in the previous year. Direct negotiations were held regarding five onshore and four deep offshore concession areas. As a result, concession rights were granted covering deep offshore areas off the southern coast and onshore areas in the centre of the country.³

The government is still keen to attract new investment in oil exploration but, understandably, does not consider the sector a major priority for public policy and spending. The authorities' attitude has been relatively passive, responding to the initiative of interested companies rather than embarking on promotion. This, coupled with the perception that the country presents a high exploration risk, has resulted in a low level of activity over the past few years. Nevertheless, a task force has been appointed to prepare guidelines and recommended practices regarding shale oil and shale gas exploration (fracking), which seems to indicate that some interest has been shown in assessing the potential of the country's unconventional reserves.

The applicable tax system is relatively simple. A royalty is levied on production in excess of 10,000 barrels of crude oil per year, set at 9 per cent in the case of onshore areas and 10 per cent in the case of shallow offshore areas (water less than 200 metres deep). Deep offshore and natural gas production, as well as annual onshore production below 6,000 barrels of crude oil and annual offshore production below 10,000 barrels of crude oil are not subject to royalties. Oil companies are also subject to corporate income tax (plus a municipal surcharge), which is levied on their profits. Imports and exports must comply with EU law.

Conflicting interests with other activities that are seen as having a greater short-term social and economic impact may affect exploration operations: in at least one case, the formal signature of the concession agreement was delayed when activities scheduled to be started in the areas off the southern coast raised concerns in the press that tourism could be negatively affected by these oil exploration operations. This situation is now resolved and operations are expected to begin shortly.

3 For further details, see <http://www.enmc.pt/en-GB/activities/exploration-and-production-of-petroleum-resources/licences-and-concessions/contracts-in-execution/>.

However, the combination of technological advances that enable exploration and production operations at ever greater depths, with the development of geological knowledge (and further discoveries made in the Grand Banks area), and a flexible and overall favourable legal and tax regime could justify a fresh look at the country's petroleum potential.

Under Decree-Law No. 165/2013, of 16 December, as amended on 29 August 2014 by Decree-Law No. 130/2014, the former EGREP (Managing Authority of Petroleum Products Strategic Reserves) changed its name to the National Authority for the Fuel Market (ENMC), keeping its specific role as the entity responsible for constituting and maintaining the strategic portion of the national emergency stocks of crude oil and petroleum products. However, the new text of the law allocates to the ENMC new responsibilities concerning: (1) the supervision and monitoring of the markets for crude oil, petroleum products, piped liquefied petroleum gas (LPG), biofuels, promotion of technical safety and fuel quality; (2) the supervision of exploration, development and exploitation of oil resources; (3) the monitoring of the evolution of the internal energy market and other regional markets; and (4) its participation in defining policies for the promotion of biofuels and other renewable fuels and consumer protection.

Owing to these new duties, the following areas of competence previously corresponding to the Energy and Geology General Directorate (DGEG) were transferred to the ENMC:

- a* monitoring the markets of crude oil and petroleum products;
- b* registering traders of oil products;
- c* monitoring refining, storage, transportation, distribution and marketing of petroleum products;
- d* monitoring storage, distribution and marketing of piped LPG;
- e* regulating third-party access to petroleum products and piped LPG storage, transportation and distribution facilities;
- f* supervising the quality of the fuel provided for consumption purposes and for promotion of technical safety;
- g* handling complaints related to activities of the value chain of the oil products and piped liquefied propane gas;
- h* analysing and assessing the causes of accidents involving the use of fuels; and
- i* creating an updated document and database concerning the main characteristics and development perspectives of the national oil system.

As mentioned above, DGEG's responsibilities with regard to exploration, development and exploitation of oil resources were also transferred to the ENMC. In spite of this, there is a duty of cooperation and articulation with DGEG regarding the preparation of laws and regulations, and on drafting relevant statistical information.

II LEGAL AND REGULATORY FRAMEWORK

i Domestic oil and gas legislation⁴

Oil and gas exploration and production activities are regulated by Decree-Law No. 109/94, published on 26 April 1994 (the Decree-Law). The following documents were published to complement its provisions:

- a* Notice dated 21 July 1994, identifying the areas where oil exploration, development and production operations are permitted, amended by the notice dated 12 March 2002.
- b* Dispatch No. 82/94, establishing the fees chargeable by the competent authorities for the issuance of preliminary evaluation licences and for the signature of concession agreements and assignment agreements.
- c* Joint Dispatch No. A-87/94-XII, establishing surface rental charges.
- d* Ministerial Order No. 79/94, published on 26 July 1994, establishing the basis of the concession agreements referred to in Article 83 of the Decree-Law.

These legal documents aim to clarify and simplify the rules and procedures governing oil and gas exploration and production, including the award of rights, and thus attract new investment to these activities.

The relevant contents of some major provisions of these legal documents are summarised below.⁵

Property of mineral resources

Any underground mineral resources in the areas subject to the sovereignty or dominance of Portugal are an integral part of the state's public domain. Oil and gas exploration and production activities can only be performed under concessions granting exclusive rights without prejudice to any third parties, to other activities or resources, or to national interests in national defence, the environment, navigation and scientific investigation, and management and preservation of maritime resources. Conflicts must be resolved jointly by the overseeing ministers according to national interests and in compliance with applicable international law rules and principles. Studies merely aimed at providing better technical support to any requests for concessions can be conducted with a preliminary evaluation licence.

Public tender procedure for award of concessions

In line with EU directives on public contracting and to increase transparency in award procedures, the preferred method for the award of oil and gas exploration and production rights is a public tender organised by the ENMC through its Unit for Research and Exploration of Oil Resources, which publishes the announcements in the Official Gazette and in the Official Journal of the European Union, specifying the terms of reference of the tender and the basis of the concession agreements.

The ENMC assesses the bids, which must conform to the terms and conditions published with the announcement, and then submits a recommendation to the overseeing

4 For the English version of the texts of the legal documents mentioned in this section, visit www.enmc.pt/en-GB/activities/exploration-and-production-of-petroleum-resources/legislation/.

5 For further details, see Section III, *infra*.

minister. The minister may decide to award the concession, depending on whether the received bids are satisfactory and comply with the terms of reference. The minister's decision is appealable to the administrative courts under general legal terms.

Direct negotiations

Any company interested in a concession must apply directly to the ENMC. If no public bidding is announced, the ENMC will negotiate the terms and conditions of the concession, which must conform to the applicable legal provisions, and, within 90 days (extendable for a further 60 days), submit a proposal to the minister.

Preliminary evaluation licence

A preliminary evaluation licence is limited to the analysis of existing data and documents, surface and well-bore samples, and other studies that contribute to a better understanding of the area's petroleum potential. The licence lasts for a single non-extendable period of six months unless it is compulsorily terminated by the state if the licensee fails to comply with its obligations.

Standards in petroleum activities

Within the limits of the law and the concession agreement, the concessionaire is free to decide on the best way to carry out its activities. However, it must perform the petroleum activities in a regular, continuous way and follow the best practices of the international petroleum industry, as it will be liable for losses and damages caused to the state or any third parties as a result of these activities.

Termination and revocation

The rights granted will terminate:

- a* at the end of the initial period if the concessionaire has not demarcated an oilfield, or at the end of the production period;
- b* at the concessionaire's request, effective on the whole or part of the concession area, with 30 days' advance notice before the end of the third year or of any subsequent year of the initial period, or with one year's advance notice at any time during the production period;
- c* at any time, by mutual agreement of the state and the concessionaire;
- d* at any time, by unilateral decision of the state as a penalty, if the concessionaire fails to complete any operations included in approved work plans and budgets, assigns any full or partial rights or without due authorisation, abandons an oilfield without due authorisation, or breaches any of its contractual obligations; or
- e* at any moment at the state's initiative, for reasons related to the public interest and with payment of fair compensation.

On terminating the concession, any works, information, equipment, instruments, facilities and other assets permanently linked to the concession will revert to the state, free of any charge, cost or compensation to the concessionaire.

Confidentiality

The concessionaire and its contractors must keep confidential all data and information pertaining to the concession for the duration of the concession, and must not disclose any such information without ENMC's prior authorisation.

Directive 2013/30/EU of the European Parliament and of the Council, of 12 June 2013, on safety of offshore oil and gas operations and amending Directive 2004/35/EC, was transposed into the Portuguese law by Decree-Law No. 13/2016, of 9 March 2016.

ii Regulation

ENMC has direct regulatory competence over oil and gas exploration and production activities, and develops its activities under the supervision of the overseeing minister. Therefore, interested entities should address ENMC to resolve any issues concerning a concession agreement or a preliminary evaluation licence.

ENMC acts as a facilitator in relations with other administrative entities, which may have interfering powers regarding the performance of operations, such as the environmental authorities. Fieldwork requires a formal environmental impact assessment and the adoption of adequate safeguards. Usual EU standards in these matters apply.

Works relating to onshore operations, namely seismic assessments, drilling and construction require prior licensing from the competent municipal licensing entities. The maritime authorities grant licences for offshore operations and construction activities in areas subject to their jurisdiction (such as shoreline and harbours).

Support and ancillary activities, usually carried out by contractors (such as land, air or sea transport, construction and radiotelegraphy) may require specific licensing as per general rules and regulations. This licensing requirement may also apply to contractors, as it is the concessionaire's responsibility to ensure that all its contractors have the required licences in good order.

iii Treaties

Portugal is a signatory of the New York Convention, and has a long-established practice of agreeing to arbitration as the preferred method for settling disputes, even when the state is a party.

The Decree-Law states that a concession agreement (and its preliminary evaluation licence) has the nature of an administrative contract and that any disputes with the concessionaire arising from the concession agreement must be settled by arbitration, to be held in Portugal under Portuguese procedural laws.⁶ According to the Decree-Law, concession agreements must contain an arbitral clause.

⁶ In this case, the arbitral procedure would likely be ruled by the arbitral procedure regulation in Act 63/2011, published on 14 December.

Portugal has concluded bilateral investment protection treaties with nearly 50 countries,⁷ and has signed treaties to avoid double taxation with 76 countries based on the OECD model.⁸

III LICENSING

Concession agreements that comply with the Decree-Law are the means of granting oil and gas exploration and production rights.⁹ The key terms of concession agreements are described below:

- a* Concession area: A single concession area may comprise up to 16 contiguous lots, arranged in one or more blocks.¹⁰
- b* Rights granted: The concessionaire has the exclusive right to explore and, in the event of a discovery, develop and produce the crude oil and natural gas discovered.
- c* Initial period: The concession activities are split into several phases. The first phase is dedicated to exploration, defined as all office, laboratory work and fieldwork carried out in the concession area to discover or appraise petroleum accumulations not already included in a general development and production plan (see below). This phase lasts eight years¹¹ extendable at the concessionaire's request for two additional periods of one year each).
- d* Annual work programmes and budgets: During the initial period, the concessionaire must submit a detailed annual work programme to the ENMC before the end of October. This work programme must include a budget for activities to be carried out in the following year. The ENMC may reject a plan if it breaches the law or the concession agreement, and ask the concessionaire to submit a new plan. Whenever technically justified, the concessionaire may submit amendments to the annual plan to the ENMC.
- e* Performance of activities: Once an annual plan has been approved, the activities specified in it are, in principle, also considered approved. However, the concessionaire must not start field operations (including geological and geophysical surveys, exploration drilling and gathering of samples for study) without the ENMC's

7 Albania, Algeria, Angola, Argentina, Bosnia and Herzegovina, Brazil, Bulgaria, Cape Verde, Chile, China, Croatia, Cuba, Czech Republic, East Timor, Egypt, Gabon, Germany, Guinea-Bissau, Hungary, India, Kuwait, Latvia, Libya, Lithuania, Macau, Mauritius, Mexico, Morocco, Mozambique, Pakistan, Paraguay, Peru, Philippines, Poland, Qatar, Romania, Russia, São Tomé and Príncipe, Slovakia, Slovenia, South Korea, Tunisia, Turkey, Ukraine, Uruguay, Uzbekistan, Venezuela and Zimbabwe.

8 Sixty-seven are already in force and nine are signed, but still pending an exchange of notices to come into force. See http://info.portaldasfinancas.gov.pt/NR/rdonlyres/12EA70BF-1D5D-42BB-BF0B-A2E8B608367F/0/Table_of_DTCs_2016.pdf.

9 See www.enmc.pt/en-GB/activities/exploration-and-production-of-petroleum-resources/legislation/.

10 For deep offshore areas, these limits may be exceeded.

11 For deep offshore areas, the duration limit may be exceeded.

approval. The concessionaire must request this approval with 30 days' advance notice. The ENMC will ask the concessionaire to submit a new proposal if the original proposal breaches the law or the concession agreement.

- f* Contractors: The concessionaire can use contractors to perform any activities or operations. The concessionaire must give prior notice to the ENMC of any contracts it intends to enter into for these purposes, and inform of the scope, duration, identity of the contractor and of the persons in charge of supervising these operations and activities.
- g* Bonds: During the initial period, the concessionaire must annually post a bond (a first demand bank guarantee or similar) for an amount equal to 50 per cent of the budget submitted to the ENMC for the relevant year. This bond must guarantee the payment of penalties or compensation for the breach of obligations and for any damage caused while performing operations.
- h* Exploration wells commitment: Exploration activities include drilling a number of exploration wells, as scheduled in the concession agreement. In principle, from the fourth year of the concession, at least one exploration well must be drilled in each block each year. The number of wells drilled in excess of the annual commitment are considered included in the commitment relating to the subsequent year.
- i* Area relinquishment: At the end of the fifth concession year, the concessionaire must relinquish at least 50 per cent of the area not included within demarcated areas (see below).¹² The concessionaire can choose which parts of the concession area to relinquish. The relinquished area must have a regular polygonal shape.
- j* Discovery, delineation and production: If, before the end of the initial period, the concessionaire identifies an oilfield within the concession area, it must provisionally demarcate the relevant area (which must have a regular polygonal shape) and submit to the ENMC a general development and production plan of the oilfield. The plan must include a technical report describing the reservoir, a delineation map, and a development and production work programme, along with maps showing the location of facilities to be built. It must also describe prospective investments and the financial means to support them, specify the estimated production start date and a schedule of production over time, and provide a list of licences and permits obtained or pending. Once this plan is approved, a 25-year 'production period' will start in respect of the delineated area, and the concessionaire must subsequently submit a detailed annual plan and budget regarding the following year's activities in the area. The concessionaire must submit the final delineation within five years. However, the ENMC may extend this deadline if it is technically justified. The production period may be extended for one or more periods of at least three years, up to 15 years.¹³
- k* Rights to oil and gas: The concessionaire is entitled to extract and freely dispose of oil and gas resulting from its production operations. Flaring of any associated gas not used in production operations or channelled to commercial use requires the overseeing minister's approval.

12 For deep offshore areas, the area to be relinquished may be smaller.

13 For deep offshore areas, the time limits may be exceeded for the production period and its extensions, and for submitting the final delineation of the oilfield.

- l* Transportation and storage facilities: The concessionaire can build transportation and storage facilities as required. Any surplus capacity in these facilities may have to be made available to third parties in mutually agreeable terms and conditions.
- m* Health and safety: The concessionaire must fulfil all national and EU health and safety regulations, and prepare and submit to ENMC the plans and measures necessary to ensure fulfilment, keeping them permanently updated.
- n* Environmental protection: The concessionaire must adopt all necessary measures and precautions to minimise the environmental impact of its activities, and must timely submit to ENMC its environmental protection plans as per applicable legal provisions.
- o* Unitisation: Oilfields extending beyond the concession's boundaries will be unitised if the area to which the oilfield extends is included in another concession. If the area is free, the concessionaire is entitled to request direct negotiations for the rights over that area. If the concessionaires of two adjoining areas disagree on the terms and conditions of the unitisation, the government may integrate the oilfield into one of the concessions under reference, basing its decision on sound economic and technical criteria. In this case, the government could also terminate the affected concessions, paying the appropriate compensation to the concessionaires whose interests are affected.
- p* Plugging and abandonment: The plugging of wells and abandonment of an oilfield on the grounds of lack of economic profitability or technical feasibility is subject to the ENMC's approval.

The preliminary evaluation licence is a much simpler document. The rights enable the licensee, for a limited period, to access information with the purpose of conducting studies that may help substantiate its interest in securing concession rights.

IV PRODUCTION RESTRICTIONS

The concessionaire can market, domestically and abroad, the oil and gas it produces. Only restrictions contained in international sanctions to which Portugal is bound apply.

There is no specific requirement to satisfy national oil and gas needs. In the event of war or national emergency declared by the government, all or part of the production may be requisitioned to ensure that Portugal's strategic requirements are met. The concessionaire is entitled to compensation in an amount equal to the market value price of the quantity of the requisitioned product.

Market price, for these purposes, and for determining taxes, is defined as the price currently prevailing in international markets for products with similar characteristics.

V ASSIGNMENTS OF INTERESTS

Subject to prior approval from the supervising minister, requested through the ENMC, the concessionaire (or licensee) can assign all or part of its rights to third parties. The sale of 50 per cent or more of the concessionaire's or licensee's shares will be deemed an assignment.

The request must fully identify the assignee and provide adequate information on its technical and financial capabilities. The decision is made under ordinary administrative procedures and is usually issued within 90 days. A fee is payable on occasion (see Dispatch No. 82/94).

The assignment may be subject to competition sanctioning according to applicable legal provisions.

If the assignment is made by selling a participating interest, the gain (difference between book value and actual selling price) resulting from the proceeds of the sale will be subject to tax.

VI TAX

The concessionaire will pay surface rental charges as stated in the concession agreement, which vary from €12.50 to €250 per year per square kilometre¹⁴ according to the potential of the area and the contractual period.

There is a royalty on the value of the annual production. The applicable sliding scale rates are determined according to the table below:¹⁵

<i>Crude oil</i>	<i>Percentage</i>
Onshore fields	0–9%
Annual production up to 300,000 tonnes (+/- 6,000 bbl/d)	0%
Annual production between 300,000 and 500,000 tonnes (+/- 6,000 – 10,000 bbl/d)	6%
Annual production in excess of 500,000 tonnes (+/- 10,000 bbl/d)	9%
Shallow offshore fields (< 200 metres water depth)	0–10%
Annual production up to 500,000 tonnes (+/- 10,000 bbl/d)	0%
Annual production in excess of 500,000 tonnes (+/- 10,000 bbl/d)	10%
Deep offshore fields (> 200 metres water depth)	0%
Natural gas and condensates	0%

The concessionaire is subject to corporate income tax at the applicable rates, which is levied on its profits.¹⁶ The following tax rules shall also be considered:¹⁷

- a* investments made in crude oil and gas exploration should be accounted for as intangible assets (exception made to the ones whose useful life period exceeds the exploration phase);

¹⁴ These amounts were set in 1995 in the Joint Dispatch mentioned above.

¹⁵ See Article 51 of Decree-Law No. 109/94, dated 26 April.

¹⁶ Rates may vary annually in accordance with the provisions of the state budget approved by parliament. Corporate income tax rate is currently 21 per cent. An additional 1.5 per cent municipal surcharge applies, being a state surcharge applicable as follows:
 Taxable profits in excess of €1.5 million = 3 per cent;
 Taxable profits in excess of €7.5 million = 5 per cent;
 Taxable profits in excess of €35 million = 7 per cent.

¹⁷ See Article 42 of the Portuguese Corporate Income Tax Code and Article 50 of Decree-Law No. 109/94, dated 26 April.

- b* investments referred to in item (a) above may be amortised pursuant to general applicable corporate income tax rules as of the commencement of production. However, investments allocated to a discovery and its subsequent appraisal during the exploration phase may be fully deductible in the first full year of production;
- c* the concessionaire may constitute or reinforce tax-deductible provisions to finance its oil and gas investment in exploration activities in Portugal in the three years following that constitution or reinforcement. The amounts provisioned cannot exceed the lower of the following:
- 30 per cent of the value of gross sales of crude oil produced in the concession areas in the year when the provision is made or reinforced; or
 - 45 per cent of the amount of the taxable income that would be calculated before determining the amount to be allocated to the provision.

If these requirements are not met, the net profits of the tax period in which this non-compliance occurs must be adjusted accordingly. This deduction is conditional on the non-distribution of profits equal to the amount remaining uninvested.

VII ENVIRONMENTAL IMPACT AND DECOMMISSIONING

Under Decree-Law No. 151-B/2013, of 31 October (as amended by Decree-Law No. 47/2014, of 24 March, and Decree-Law No. 179/2015, of 27 August), an environmental impact assessment must be submitted to and approved by the Portuguese Environmental Agency before launching any projects that are likely to significantly affect the environment, including oil and gas operations. The environmental impact assessment is, therefore, a preventive method to foresee, estimate and reduce negative impacts and introduce possible alternatives, based on studies and data gathering. The outcome of the assessment is an environmental impact statement. The statement includes the decision, which may be favourable (with or without conditions) or unfavourable.

The Decree-Law does not have any specific decommissioning rules. However, the concessionaire's general duty is to act in accordance with the best practices of the industry (see Section II.i, *supra*), and general legal provisions and principles governing environmental protection and safety would apply subsidiarily to abandonment.

The concessionaire can abandon an oilfield for technical or economic reasons provided that it requests the minister's permission through the ENMC, which will convey the request to the minister, with its recommendation, within 30 days following receipt of the concessionaire's request. If the minister's decision is not communicated within 90 days following the ENMC's receipt of the concessionaire's request, the concessionaire may deem that the decision was negative and submit the issue to arbitration.

VIII FOREIGN INVESTMENT CONSIDERATIONS

i Establishment

The favoured way to award concession rights is through public bidding. However, the last public tender was organised in 2002 and there are no plans for a new one in the foreseeable future. Therefore, the advisable route for interested companies would be to approach the ENMC to conduct direct negotiations.

The concessionaire does not have to be a Portuguese company, nor does the law require it to incorporate a local subsidiary. However, a form of local establishment must be created. Opening a branch of a foreign corporate entity satisfies this requirement.

The purpose and main advantage of incorporating a branch (which is not a separate legal entity, but rather an extension of the head office with recognised local standing) is related to the simplification of foreign companies' activities and the reduction of direct and indirect costs. The branch, as part of the foreign company, is not required to have its own share capital. The incorporation documents may allocate to the branch a certain amount that will be used as equity to fund its activities.

The branch managers designated by the company will be given all the powers necessary for the appropriate management of the branch.

Formalities for incorporating a branch:

- a* a resolution is adopted by the appropriate body of the foreign company authorising the creation of the branch in Portugal, stating the amount of the equity eventually allocated to it and the address of its office, and identifying the managers;
- b* a power of attorney is executed by the legal representatives of the foreign company granting powers to the branch managers;
- c* a certificate of corporate denomination for the branch is obtained from the National Register of Corporate Entities (RNPC);
- d* the branch is registered with the commercial registry office;
- e* the start-up is notified to the tax authorities; and
- f* the branch is registered with social security.

Incorporating a local company is more complex, takes longer and involves the following formalities:

- a* a certificate of corporate denomination or legal entity name is obtained from the RNPC;
- b* taxpayer identification numbers for foreign shareholders and future foreign managers or directors are obtained;
- c* a bank account is opened and the minimum compulsory amount of the share capital is deposited (minimum share capital is €50,000, of which 30 per cent must be deposited before incorporation, the remaining amount being deferrable for up to five years);¹⁸
- d* the incorporation agreement and articles of association (having certified the powers of attorney of the representatives and their signatures) are executed by the foreign company's designated representatives;
- e* the company is registered with the commercial registry office;
- f* the incorporating documents are published online;
- g* the start-up is notified to the tax authorities;

18 In the case of a company by shares (*sociedade anónima*), equivalent to the French SA or the German AG. In the case of another type of company, the 'sociedade por quotas,' similar to the French SàrL or the German GmbH, there is no minimum amount of share capital, which may be freely established by the shareholders, provided that each 'quota' has a minimum nominal amount of €1. Shareholders must deposit at least 50 per cent of the amount of each 'quota' before the incorporation of the company, the remainder being deferrable for up to five years.

- h* the company and its corporate body members are registered with social security; and
- i* the minute books of the general meeting and board of directors are opened.

A special fast-track procedure may be possible for the immediate incorporation of local companies and branches of foreign entities in Portugal. In this case, some formalities are shortened, as the investor is allowed to choose a corporate name from a list of pre-approved possibilities, and also from a set of pre-written bylaw models, where the investor is required to fill in certain blanks, namely the amount of the share capital or equity, the description of the corporate purpose, and the number of members of the corporate bodies and their identification. The investor may later make other changes to the models to suit its own purposes.

ii Capital, labour and content restrictions

Movement of capital and access to foreign exchange

Portugal is a Member State of the EU and part of the eurozone, and therefore applies EU internal market rules to capital movements and access to foreign exchange.

Without prejudice to the applicability of the harmonised legal framework on money laundering and terrorist financing, Portuguese law does not set limits for entry of foreign capital or access to foreign exchange. Save for limitations resulting from international sanctions, investments are treated under a principle of non-discrimination on grounds of nationality.

There is no requirement for national partners, or specific obligations for foreign investors, or any restrictions on dividend repatriation.

Most foreign and local companies are free to invest in any industry or business sector. However, in the case of activities subject to administrative control or licensing, particularly oil and gas operations, specific requirements may apply, such as the award of a concession.

Hiring of foreign workers

Portugal is a signatory to the Schengen Agreement governing circulation of persons.

There are no restrictions on the ability of oil and gas operators to hire employees who are Portuguese nationals or citizens of other EU Member States.

To hire workers from third countries, they must be duly legalised in Portugal or any other EU Member State, and hold a residence permit or temporary visa for that purpose. Obtaining a residence visa allowing the holder to work in Portugal depends on the employment vacancies that cannot be filled by Portuguese nationals or by nationals of other EU or EEA Member States, or of third countries with which the European Union has concluded an agreement on the free movement of people, as well as nationals of third countries legally residing in Portugal.

iii Anti-corruption

In general, Portugal applies the same measures to prevent active and passive corruption as are applied in the other EU Member States, namely those prescribed in Directive 2003/568/JHA, issued on 22 July 2003 by the European Council, which calls on Member States to criminalise acts of active and passive corruption and to adopt the necessary measures to ensure the criminal liability of legal entities for such acts.

Under Portuguese criminal legal provisions, organisations can be held criminally liable for crimes of corruption when improper tangible or intangible advantages are promised or

given by a person that occupies a management position or is acting with delegated authority. The Portuguese Penal Code provides that legal entities are exempt from criminal liability for acts of corruption committed within the organisation if the perpetrator acted against express orders or instructions from management.

IX CURRENT DEVELOPMENTS

In recent months, there was a public debate about possible environmental consequences of oil and gas exploration operations, and members of the parliamentary coalition that supports the current government expressed an intention to tighten environmental regulations concerning seismic and drilling operations. Following this debate, government sources indicated that a review of the current legislation could be in order, given that the current texts date from over 20 years ago and therefore do not reflect properly the technological advances of the industry and the environmental and other relevant concerns. If these intentions are confirmed, approval of new legislation is likely to take several months.

An exploration well that was planned for the Offshore Alentejo Basin in the summer of 2016 was postponed to 2017 because the procedure for securing the necessary environmental licences took longer than anticipated, which meant that the meteorological window was lost. Another well that was planned for the area offshore on the southern coast of the Algarve for October was also postponed with no new date scheduled.

Appendix 1

ABOUT THE AUTHORS

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Rui Mayer is a partner at Cuatrecasas, Gonçalves Pereira and is in charge of the oil, gas and mining area.

He began practising in 1982. He was a legal adviser of Partex – Companhia Portuguesa de Serviços, SA, where he began his activity in the oil and gas sector. He was resident manager of the oil exploration and production division of the Finnish company Neste Oy, in Lisbon and Algiers. He also worked as corporate secretary and general manager of human resources at Petróleos de Portugal, Petrogal, SA. From 2000 to 2013, Rui was general counsel of the Galp Energia Group. His practice has focused on legal themes relating to all components of the oil and gas industry's value chain. He also has experience in the area of commercial and corporate law, having participated in several mergers and acquisitions, corporate reorganisations, financial transactions, and employment law.

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Diogo Ortigão Ramos joined Cuatrecasas, Gonçalves Pereira in 1996 as an associate. He became a partner in 2000. He is now head of the firm's tax practice in Portugal.

He focuses his practice on EU, national and international taxation, M&A, buyouts, corporate restructuring, financial transactions, structuring and transactions. He also has experience in structuring transactions at Centro Internacional de Negócios da Madeira.

Diogo has been recommended by several directories, including *Chambers Europe*, *PLC Which Lawyer?*, *World Tax and Tax Directors Handbook* for his work as tax specialist and with private clients.

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Ana Isabel Marques joined Cuatrecasas, Gonçalves Pereira in 2005 as an associate. She is now a senior associate.

Her main practice focuses on administrative litigation and public law, particularly urbanism, town planning, environmental and regulatory law. In recent years, she has advised on projects involving town planning and monitored procedures relating to the construction, installation, management and operation of real estate developments in residential, commercial, industrial, logistic and tourist segments. She has also participated in environmental impact assessments and advised on gaseous emissions, waste management; and conducted audits on compliance with urban, environmental and regulatory rules.

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Berta de March has been an associate at Cuatrecasas, Gonçalves Pereira since 2012, having also spent a brief stint at Sal & Caldeira Advogados in Mozambique in 2015. Her practice focuses on civil and commercial litigation, and corporate law regarding oil, gas and mining operations. During her time in Mozambique, Berta published and co-authored several articles on oil and gas regulation in Mozambique.

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