

Introduction

The Nobel Prize for chemistry 2019 awarded to the developers of the lithium-ion battery technology, the importance of improving battery technology to increase electric vehicle use and the importance of developing energy storage to meet decarbonization goals set out, *inter alia*, by the Roadmap for Carbon Neutrality 2050 (“**RCN2050**”), are a few clues as to why this resource has recently been cast in the leading role on the Portuguese economic stage.

In this Legal Update we aim, firstly, to analyze recent developments in the Portuguese legal framework for the research and discovery of lithium and, secondly, to highlight recent movements in the sector, particularly the upcoming tender procedure to award prospection and research concession contracts. ^{CS'}



Legislative developments

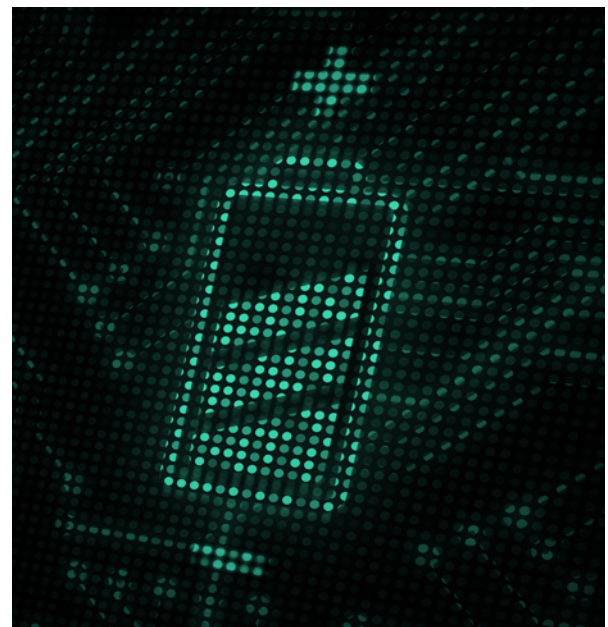
Law no. 54/2015, of 22nd of June, sets out the legal framework governing the discovery and exploitation of geological resources in Portugal. The scope of application of the above provision encompasses the discovery and exploitation of mineral deposits, including lithium, on which this note will focus. Long overdue regulation and provisions that govern the discovery and exploitation of lithium entered into force only recently. Indeed, until the approval of Decree-Law no. 30/2021, of 7th of May, recently amended by Law no. 10/2022, of 12th of January, (“**DL 30/2021**”) lithium discovery and exploitation was governed by the now-repealed Decree-Law no. 88/90, of 16th of March.

Also relevant to this Legal Update, we highlight Council of Ministers' Resolution no. 1522/2021, of 8th of February 2021 (“**Order 1522/2021**”), which promoted a strategic environmental assessment of eight areas to prepare a tender procedure for the award of concession contracts for the prospection and research of lithium. ^{CS'}

The three pillars

After more than 30 years, the changes brought about by DL 30/2021 have not fundamentally modified the logic of integrating mineral resources in the State's public domain nor the types of private and exclusive rights that can be awarded only by administrative contract. This notwithstanding, changes were introduced to tackle what have proved to be fundamental issues caused by the performance of activities aimed at the discovery and exploitation of lithium.

Changes are divided into three pillars. First, compliance with high environmental standards and maximum economic value. Second, public participation of the general and local populations. Third, the distribution of profits between the State and municipalities. We highlight below the most relevant measures that have recently been adopted for each of the above pillars.



I. Compliance with high environmental standards & maximum economic value

Rising concerns with the environmental impacts of lithium mining, in particular with the use of water resources, are in direct conflict with, on the one hand, growing demand for the supply of an indispensable ingredient in electric vehicle batteries and, on the other hand, with the urge to meet the energy transition targets set forth by national and international instruments such as the Paris Agreement and the RCN2050.

Two primary measures have been put in place to tackle those opposing forces:

- First, whenever exploitation rights are awarded, the Directorate General for Energy and Geology (*Direção Geral de Energia e Geologia*, “**DGEG**”) is obliged to consult the relevant environmental impact assessment authority on the need to carry out an environmental impact assessment to implement each project, irrespective of whether or not (i) that project exceeds the thresholds set forth in the relevant legal framework and (ii) it is located in a sensitive area.
- Second, green mining practices are encouraged, such as the inclusion of an energy efficiency plan in the concession contracts for lithium exploitation aimed at (i) minimising energy consumption, (ii) integrating renewable energy production technology in the mining process, and (iii) mitigating greenhouse gas emissions.

Remining practices, such as the reactivation of areas where mineral deposits have previously been exploited are also fostered by (i) simplifying procedures for the award of concession contracts in those areas, (ii) reduction of exploitation costs for the concessionaire in light of the potential environmental liability recovery, and (iii) granting concessionaires technical and financial support from the Mining Development Company (*EDM - Empresa de Desenvolvimento Mineiro, S.A.*).

The need to escape dependence on foreign sources of lithium and to hold on to the potential wealth generated throughout the lithium value chain are also factors that have encouraged the adoption of important and new measures within the sector.

- First, the minimum content of lithium exploitation concession contracts now includes obligations (i) regarding the production, processing and marketing of lithium and (ii) that represent benefits for the technical and economic development of Portugal.
- Second, where appropriate, concession contracts for (i) prospection and research, or (ii) experimental exploitation, may also establish a condition where the award of potential future lithium exploitation rights will be subject to the lithium being industrially processed and marketed in Portuguese territory.

II. Public participation of the general and local population

Communities within areas where lithium mining is expected to take place are often divided as a result of the expected consequences of hosting the new activity in their areas. As such, public participation has been prioritised to ensure that local populations and municipalities have a say in the process. Indeed:

- As it currently stands, all individuals and entities are entitled to take part in procedures that award rights for the discovery and exploitation of lithium. Public participation initiatives can take place within or outside the environmental impact assessment procedure, depending on whether or not the environmental impact assessment is mandatory.
- Core elements of proposals for the award of (i) prior evaluation rights, (ii) prospection and research rights, (iii) experimental exploitation rights, (iv) exploitation rights, or (v) for the launch of public tenders by DGEG to award any of the above rights must be disclosed and open to participation at the [Participa.pt](https://participa.pt) portal.
- Public sessions to provide clarifications must be launched by entities requesting the award of rights of discovery and exploitation of lithium. The organisation of public sessions to offer clarifications is mandatory when the entity is requesting the award of exploitation rights.

III. Distribution of profits between the state and municipalities

Despite mineral deposits being in the State's public domain, unprecedented measures have been implemented aimed at ensuring the distribution of profits from the exploitation of lithium between the State and municipalities where the lithium exploitation concessions are located. Social concerns among local populations and employment generation have also led to the implementation of new measures. In particular:

- As it currently stands, at the end of the concession contract, the handback of assets allocated to a concession can benefit both the State and the municipalities where the concession was previously located.

- Prospection and research or experimental exploitation concessions may include an employment and vocational training program, as well as minimum social responsibility obligations for the future exploitation concessionaire and a social impact assessment. The minimum content of exploitation concession contracts now includes an employment and vocational training program, a social responsibility program and a social impact assessment on local communities.
- The concessionaire's headquarters must be located within one of the municipalities where the concession is located, thus ensuring the distribution of tax revenues and fees collected by the State and the relevant municipalities. ^{CS'}

Final note

Thus, the above three pillars innovate the legal framework on the discovery and exploitation of lithium and aim to tackle connected environmental, social and economic issues. Furthermore, we should offer a final note. Following [Order 1522/2021](#), the Portuguese Environmental Agency (*Agência Portuguesa do Ambiente*) published ([here](#)) a final report with its conclusions on the strategic environmental assessment of eight areas promoted to prepare a tender procedure for the award of concession contracts for the prospection and research of lithium. Of the eight areas assessed, only six have been considered fit for lithium research, prospection and exploitation.

The importance of the above report is expressed in a [press release](#) from the Ministry of Environment and Climate Action, stating that tender procedures for the award of prospection and research of lithium concessions may begin within 60 days from the 2nd of February 2022. We note that future lithium prospection and research concessionaires will have, for a maximum of five years, the right to (i) carry out studies and works inherent to the prospection and research of lithium, (ii) temporarily use any land necessary to carry out the research and prospection activities and establish administrative easements, according to the Expropriations Code (*Código das Expropriações*, approved by [Law no. 168/99](#), of 18th of September, as amended) (iii) request and obtain the award of a concession contract for the exploitation of lithium up to two years beyond termination of the research and prospection concession contract.