

Bulgaria's new Concessions Act

by Eleonora Mateina, Senior Associate

On 1 December 2017, Bulgaria Parliament adopted a new Concessions Act. The new Concessions Act transposes Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts. Most of the provisions of the Concession Act enter into force as from 1 January 2018. However, due to their complexity, some provisions will enter into force at a later stage, i.e. in December 2018 and in January 2019.

Three types of concession are envisaged in the new act, i.e.:

1. a concession for construction;
2. a concession for services; and
3. a concession for use of public state and public municipal property.

The operational risk under all types of concessions remains with the concessionaire. Upon granting State concessions, the State is represented by the respective minister, depending on the sector for which a concession is granted. For municipal concessions, the municipality is represented by the mayor.

The Concessions Act dedicates a special focus to regulating the relationship between the economic balance and the duration of the granted concessions, i.e. the economic balance of the concession shall be preserved for the entire duration of the concession and shall guarantee that the benefits of the concessionaire, respectively the benefits of the concession grantor and the risks assumed by them are balanced.

The Act provides also methods for calculation of the concession's price, i.e. the price of the concession factors in the aggregate turnover of the concessionaire for the duration of the concession received as income out of the exploitation of the construction or the service. Value added tax is disregarded in this respect.

A concession's term shall not be longer than the time, necessary for the concessionaire to achieve the estimated rate of return of its investment. The initial term of the concession can be up to 35 years for construction and services and up to 25 years for use of public state and public municipal property, except if another term is envisaged in another legislative act. Basically, extensions up to 1/3 of the above term are admissible.

Concessionaires can be an SPV formed by a public and a private partner. In this scenario, following the award of a concession, a joint venture between the public and the private partner will have to be registered, which joint venture will be the, the concessionaire. Within the established joint venture, the public partner has a veto right by virtue of law on major matters, regardless of its share in the joint venture.

As from December 2018, there will be a national and municipal plan for concessions. Concessions that are not included in the plan, will not be granted.

Some special procedures (set out in other acts, in addition to those in the Concessions Act) apply to certain types of concessions, e.g. concessions on underground resources; mineral waters; sea beaches.

The new Concessions Act prescribes also procedural rules on the carrying out of the concession competition or negotiation, i.e.:

1. an open procedure – a one-phase procedure, where negotiations are not permitted;
2. a negotiated procedure – a multiple-phase procedure comprising prequalification, submission of initial offers and negotiations; or
3. a competitive dialogue – a multiple-phase procedure comprising prequalification, dialogue with candidates to determine the requirements of the concession and submission of offers.

The new act leaves interesting aspects to be followed upon: the success of public-private joint ventures, the practices and ways of maintaining the economic balance during the lifetime of the concession agreement, and many others.

Our competition and concessions team remains available to address queries by clients on this major new piece of legislation.

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