

## BULGARIA: NEW DRAFT CONCESSIONS ACT PUBLISHED

On 19 April 2016 the Bulgarian Council of Ministers published a draft for the new Concessions Act (the "**Draft CA**"), which will replace the current framework regulating concessions and PPPs in Bulgaria. The Draft CA comes at a time when several significant concession procedures are to be launched in Bulgaria, including the concession of Sofia Airport, the concession of the Sofia Urban Heating.

The new law will transpose into Bulgarian legislation the provisions of Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts ("**Concessions Directive**"). This was a good timing for the Government to thoroughly review the current legislative framework and to adapt it to provide more clarity and flexibility on awarding concessions, the concession process, and on the cooperation between the public and the private sectors. The current Concessions Act, which is to be repealed, has been in place since 1 July 2006.

### WHAT IS NEW?

The Draft CA will apply to three categories of concessions:

- works concessions,
- services concessions, and
- concessions for use of municipal or state property.

While the first two types of concessions are also covered by the Concessions Directive and the current Bulgarian legislation, the concession for use of municipal/state property is not. The decision to establish a framework for use of state and municipal property is not new and derives from the status granted under the Bulgarian Constitution to the public state and public municipal property. The new approach, however, is related to the application of concessions regime also to the use of any other type of state and municipal properties.

Concessions for extraction and use of **natural resources**, which are currently included in the scope of the Concessions Act, **will be excluded** from the scope of the new framework and will be subject to regulation under the Natural Resources Act<sup>1</sup>.

The current Concessions Act sets the open procedure as the only **procedure for award of concessions**. Under the Draft CA, an approach similar to the Public Procurement Act, which came into force only recently on 15.04.2016, is followed. For concessions with

<sup>1</sup> Natural Resources Act (Закон за подземните богатства), published in State Gazette issue No. 23/12.03.1999

values over the Concession Directive threshold (e.g. currently EUR 5,225,000.00), the Draft CA provides the choice between an open procedure, a competitive procedure, and a competitive dialogue.

**Concessions terms** are also subject to debates and changes. The current framework allows up to a 35 year concessions term, with the possibility for extension by one third of the initial term under limited circumstances. The Draft CA follows the Concessions Directive, and does not provide for a maximum term. The term of a concession will be determined based on the subject of the concession, the prices of services to be provided under the concession and the time a concessionaire would be reasonably expected to recover its investments. The duration of the concession should not, however, affect the market and impede competition.

The lack of maximum terms could benefit larger infrastructure projects, such as ports and airports as well as hospital or prison PPPs, however, as fiercely debated in the public space, these should not be perceived as hidden privatizations or sale of important public assets.

An exception to the general rule for the duration of concessions will apply to the concessions for use of municipal or state property. They will have a different regime and will be granted for up to a maximum concession period of 25 years.

The Draft CA also addresses the possibility a **concessionaire** to be a new project company (**an SPV**) or a **public-private company**. The joint liability under the concession contract for the shareholders of an SPV is maintained. In case of a public-private company, the public partner will have blocking rights on material minority protection decisions, such as amendments to the articles of association, reduction of increase of the registered capital.

The Draft CA does not envisage adoption of secondary Rules for Application of the Act, as the Draft CA itself is deemed sufficiently detailed. However, the Council of Ministers will further play an active role in shaping the regulatory framework. For example, the Council of Ministers will set in a secondary ordinance the financial and technical requirements and parameters of various types concessions, i.e. it is to still be expected what would be the approach of the Council of Ministers to determine the economic balance for the concessions.

With the entry into force of the Draft CA, the Agency for Privatization and Post-Privatization Control may be tasked, on a case by case basis, by the Council of Ministers/ Municipal Council to supervise the implementation of concessions. The aim is announced to be enhancement of public control over the most important concessions, by way of transferring such oversight to an administration with relevant experience and resources.

## NEXT STEPS

On 19 April 2016 a 14-day period began for public discussions, which will end on 3 May 2016. All interested parties may submit their comments and proposals to the Council of Ministers via its website. This is an important opportunity for stakeholders to raise their concerns and constructive proposals in writing.

Subject to stakeholder comments, the Council of Ministers could modify the Draft and shall submit it for internal coordination between Ministries and State Agencies before the Council of Ministers votes the final text to be submitted to the Parliament.

As a next step, the Draft CA shall be submitted to and debated and voted by the Parliament. The Draft CA will be subject to two votes in the Parliament and be published in the State Gazette before it enters into force. Once it enters into force the current Concessions Act, adopted in 2006, and the Public-Private Partnership Act will be repealed. In order to harmonize the legislation already in place, the Draft CA will also introduce amendments to more than 30 existing legislative acts of the Parliament.

## COMMENT

One of the officially announced goals of the amendment to the existing concessions regime is to promote development of concessions in Bulgaria and incite investments in projects otherwise difficult to be implemented exclusively with public funds. Indeed, until now concessions were used in Bulgaria mainly for existing facilities or services and no large projects have been awarded for development of new facilities and infrastructure. The proposed amendment to the concessions regime is long-time awaited. This first step in formulating more flexible approach to enticing investors to participate and develop new major infrastructure in Bulgaria has some further way to go and is far from being incontestable.

Should the Draft CA be adopted quickly, it will probably be immediately subject to vigorous test with the forthcoming procedures for concession of Sofia Airport and Sofia Urban Heating, which are both expected to be the first upcoming major concessions in Bulgaria.

The text was only published yesterday and detailed analysis is needed to assess the new framework and its practical implementation. There are already question marks on certain provisions, such as transitory and final provisions envisaging the application of the new framework to already awarded concessions with respect to their execution, amendment and termination as long as the new regime does not explicitly contradict the agreements.

An active involvement from the business in the present public discussions procedure, before the Draft CA is submitted to the Parliament, as well as during the discussions in working groups in the Parliament, will be of great importance to assure the good intentions will be implemented into practical solutions.

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