

CONCESSIONS REGIME

XI.

XI.1. Legal Framework

The primary legislative acts, which set the framework for concessions in Bulgaria, are the Constitution of the Republic of Bulgaria (promulgated in State Gazette, Issue No. 56 of 1991, as subsequently amended), the Concessions Act (promulgated in State Gazette, Issue No. 92 of 1995, as subsequently amended) and the Municipal Ownership Act (promulgated in State Gazette, Issue No. 44 of 1996, as subsequently amended). The sector specific legislation applying to the different types of property and activities in respect of which a concession could be granted includes the Underground Resources Act 1999, the Waters Act 1999, the Forests Act 1997, the Civil Aviation Act 1972, the Railway Transport Act 2000, the Law on Sea Waters, Inland Waterways and Ports of the Republic of Bulgaria 2000 and the Roads Act 2000.

XI.2. Legal Definitions

Under Bulgarian law, a concession is commonly defined as a legal means whereby the State or municipality, while retaining its responsibility for the public interest, is able to grant rights to a private party to utilize public property and resources and to engage in public services, which are otherwise exclusively reserved for the State/municipalities.

A concession has two aspects. The first is the right to use public property or resources (the so called “utilization” concession); the second is a permit for carrying out public services, which are otherwise exclusively reserved for the State/municipalities (the so called “permit” concession). A “permit” concession may be granted either together with or independently of an “utilization” concession, depending on the nature of the grantor and the rights sought by the potential concession holder. For example, where a concession holder is granted a permit to provide water services on the basis of property which is not public property, but is owned by the State or a municipality in its private capacity, an “utilization” concession is not required. However, “permit” and “utilization” types of concession are also capable of being granted together, as would be the case if a concession were granted to utilize a publicly owned water and sewerage network together with a concession to provide water supply and sewerage services in respect of that network.

Over time in relation to certain types of resource (such as in the case of telecommunications and energy services) the original concession regime has been abolished and replaced, by virtue of special sector legislation, by different procedures, including those for licenses and other permits. Such special licenses and other permits grant rights similar to concessions, but they do not constitute a concession.

XI.3. General Review

Bulgaria’s concession law provides a basic framework to facilitate the granting of concessions and the execution of concession agreements in Bulgaria, thus creating the legal environment for private sector investments in infrastructure development in the country. The Constitution first introduced the concept of a concession and the types of property and activities in respect of which a concession could be granted. The concession concept was further developed in the Concessions Act and the Municipal Ownership Act on the basis that although the state and the individual municipalities respectively, should continue to enjoy exclusive rights and powers in relation to certain property and activities, the private sector should not be excluded from investing in such property or activities and that public property may be utilized by private entities under a grant of concession. As mentioned above, concessions may be granted by both the State and the individual municipalities in their capacity as public authorities owning public property, and different procedures are provided for by the Concessions Act and the Municipal Ownership Act, respectively.

The Constitution exhaustively lists property and resources, which may be owned only by the State and the utilization of which by a private entity may therefore be permitted only by way of concession granted by the State. Such property includes underground resources, seashore beaches, the national road network, waters, forests and parks of national importance, and natural and archaeological reserves. The possible objects of State concession are further developed in the Concessions Act to include biological, mineral and energy resources of the continental shelf and the exclusive economic zone, as regards exploration, development, extraction and utilization thereof, national railway roads, ports of national importance used for public transportation and civil airports for public use, waters, inclusive of mineral waters, which are in the exclusive domain of the State, irrigation and water-supply facilities and systems, provided they are in the exclusive domain of the State. State “permit” concessions may be granted for utilization of nuclear energy or manufacturing of arms, explosive and biologically “powerful” active substances.

The objects of municipal concessions are defined by the Municipal Ownership Act as water sources, including mineral waters, which are used only by the respective municipality, together with the water intaking equipment and the water distribution network and equipment, sewerage networks and facilities, aggregate and other materials used to meet the construction needs of the population, produced by quarrying in quantities not exceeding 10,000 cubic meters per year, water basins, together with their adjacent beaches of municipal significance, local roads constituting municipal property, municipal forests. Municipal “permit” concessions may be granted for any of the following activities: water supply and sewerage, use of networks and equipment of the

transportation infrastructure and transport services for the public, commercial activity performed on real property constituting public municipal property.

XI.4. Procedures for Granting Concessions

XI.4.1. Procedures for Granting Concessions. Regulatory (Issuing) Authority

The concession procedure encompasses the following underlying steps:

- adoption of a resolution for granting of concession;
- carrying out of competitive bidding (tender or auction) for determining of a concessionaire or, direct award of the concession in the cases explicitly provided for by law; and
- execution of a concession agreement.

Except for limited exceptional cases provided for by law (see below), concessions are awarded by way of competitive tenders or auctions. When a concession is proposed, the Council of Ministers, respectively the Municipal Council, are the competent issuing authorities responsible for granting concessions in Bulgaria over property owned by the State, and over property owned by municipalities respectively. The procedure for granting State concessions may be conducted at the initiative of the relevant minister responsible for running the procedure or, at the request of any third party. The procedure for granting municipal concessions may be conducted at the initiative of the mayor of the respective municipality or, at the request of any third party. The tender and auction procedure, including appointing the tender or auction commission, the documents required to be submitted for participation in the procedure, announcement of the successful bidder, execution of the respective agreement, etc., is set forth in details in the Concessions Act, and the Municipal Ownership Act respectively.

A concession without a tender or auction is granted only in exceptional cases explicitly provided for by law. In the first place, an exception to the tender/auction rule as provided by Bulgarian law relates to the case of privatization of commercial companies with State interest. In particular, pursuant to the Privatization and Post-privatization Control Act commercial companies with State interest and announced procedure for privatization, which use sites and/or carry out activities, subject to a grant of concession, shall be granted concessions for the sites used and/or the activities carried out without tender or auction. However, this "direct award" rule does not apply to companies using the following objects of State concessions: national roads part of the railway infrastructure, one or more terminals of ports for public transport of national importance or technologically separated parts thereof and civil airports open to public use. Concession with respect to these assets can be granted only through a competitive tender or auction under the Concessions Act. The concession agreement shall take effect as of the date of the property transfer under the privatization agreement. Similarly, in the event of privatization of a self-standing unit of a company, in which the State holds over 50%

of the shares, where such self-standing unit has direct technologic connection to an unit or activity that are subject to concession, the concession is granted to the purchaser of the self-standing unit under the privatization agreement. In this case the privatization agreement takes effect upon the execution of the concession agreement.

In the second place, an exception to the tender or auction rule arises in the case where an entirely state owned company owns a significant shareholding in the potential concession holder. In particular, pursuant to the Concessions Act a concession may be awarded by the Council of Ministers without a tender or auction to a company in which

- (i) a state-owned company owns at least 25% of the equity of such company, and
- (ii) the value of such equity exceeds BGN 300,000 (three hundred thousand).

Further, still another exception to the tender or auction rule is envisaged in the case of "commercial discovery" of underground resources under the Underground Resources Act. In the latter case, a right to be granted a concession for extraction of underground resources arises by operation of the law for a person or entity, which has obtained a permit for prospecting and exploration, or for exploration only, of underground resources, provided that such person or entity:

- (i) has made a discovery of deposit of underground resources during the term, and within the area, for which the permit has been granted to it, which discovery qualifies as "commercial discovery" within the meaning of the Underground Resources Act,
- (ii) the person or entity has registered such commercial discovery under the terms of the Underground Resources Act,
- (iii) has received a certificate of the commercial discovery made, and
- (iv) has requested in writing the granting of a concession for extraction of underground resources within 6 months as of obtaining a certificate for the registered commercial discovery.

XI.4.2. Validity Term of the Concession

A concession by the State or a municipality is granted for an initial term not to exceed 35 years, or a total of 50 years following an extension.

XI.4.3. Concession Holder

Both Bulgarian and foreign natural persons or legal entities, registered as merchants, may enjoy rights under concessions. However, in practice it is often required that the applicant for concession be a natural person or a legal entity, registered as a merchant (i.e. as a commercial company or as a sole proprietor) under the Bulgarian Commerce Act.

XI.4.4. Transferability and Exclusivity. Restrictions Applicable to a Transfer of Concession to a Third Party

In general, a concession is non-transferable, unless

transferability has been allowed by exceptional provision of a specific statute, which applies to the particular concession. Such case is provided for by the Underground Resources Act (Article 25), whereby the rights and obligations under a concession may be assigned fully or partly to certain qualifying third parties following a permit by the regulatory authority (the Council of Ministers). Third parties have to meet the requirements applicable to license holders as specified above.

XI.4.5. Financial Terms. Concession Fee

The rights exercisable under a concession are granted against a consideration. So far, a special regulation has been adopted by the Council of Ministers only with respect to determining the royalty to be paid by a concessionaire in consideration of the granted concession for mining of underground resources (Regulation on the Principles and Methodology for Determination of the Royalty under Underground Natural Resources Concessions pursuant to the Underground Natural Resources Act, promulgated in State Gazette Issue No. 59 of 1999). As a general rule, the terms and conditions for the payment of the concession fee are to be specified in the respective concession contract. Generally, the concession fee is payable regardless of whether the concessionaire is making profit or suffering losses. The law provides for specific cases where the concessionaire may be temporarily exempted from payment of the concession fee or, the concession fee may be reduced.

XI.4.6. Environmental Aspects of Concession Activities

Carrying out of concession activities could have diverse environmental effects and therefore it is associated with numerous environmental legislative requirements and standards. These standards and requirements are set forth in various legislative acts. Each concessionaire shall perform the operations under the granted concession in accordance with the applicable environment permitting requirements.

XI.4.7. Incentives

An incentive relating to concessions granted under Bulgarian law was introduced by the Bulgarian Government in 1995 by the adoption of Ordinance No. 120 of the Council of Ministers of 12 June 1995 (promulgated in State Gazette, Issue No. 56 of 1995, as subsequently amended). The said Ordinance exempts from customs duties the import of machinery, equipment, appliances and other items by foreign entities, holding permits for prospecting and/or exploration or, concessions for extraction, of oil and gas on shore and in the continental shelf of the Republic of Bulgaria in the Black Sea and in pursuance of the respective prospecting and/or exploration agreement or concession agreement.

XI.4.8. Foreign Investors Related Measures

As long as the rights under concession agreements

are not explicitly excluded from the scope of application of the recently amended Encouragement of Investments Act, such rights may enjoy the favorable treatment provided for by the said law with regard to investments meeting certain criteria.

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