



THE REPUBLIC OF BULGARIA
ADMINISTRATION OF THE COUNCIL OF MINISTERS
ECONOMIC AND SOCIAL POLICY DIRECTORATE

GUIDELINE No. CA-11 of August 8, 2018

ON THE IMPLEMENTATION OF THE CONCESSIONS ACT

Art. 21, para. 5 and Art. 63, para. 3 of the Concessions Act

The joint liability provided for in Art. 21, para. 5 and Art. 63, para. 3 of the Concessions Act has to be applied in compliance with the principles of equality and proportionality under Art. 4, para. 1 of the Concessions Act

An inquiry by a Minister raises a question of *"joint liability between (a) the third party, by whose capabilities the financial and economic standing is proved and the concessionaire - Art. 63, para. 3, CA; (b) the economic operators involved in the procedure for designating a concessionaire and the project company established between them ... – Art. 21, para. 2 in conjunction with Art. 21, para. 5, CA and (c) the project company established on the proposal of an economic operator, in which case the participant designated as concessionaire shall take over the capital of the project company as sole owner, and the economic operator – Art. 21, para. 4 in conjunction with Art. 21, para. 5, CA"*. More specifically, the question is as follows:

"Is it possible and acceptable, in the joint reading of the texts of Directive 2014/23 / EU of the European Parliament and of the Council on the award of concession contracts (the Directive) and of the Concessions Act (CA) and in the systematic interpretation of the relevant texts of the CA, to accept the following statements:

1. *The joint liability established under Art. 63, para. 3, CA should be construed and applied as one requiring taking into account the resources provided by the third party and made available to the concessionaire to implement its relevant obligations under the concession contract related to the functions supported by the third party. Furthermore, considering this, the possibility of limiting the amount cannot be ruled out, but in the most reasonable way and for achieving the requirements and objectives of the concession.*

2. *The joint liability established under Art. 21, para. 5 in conjunction with para. 2 and 3 respectively with para 4, CA should be construed and applied taking into account the following: By setting the requirement for the establishment of a project company when the participant designated as concessionaire is a group of economic operators, as well as by setting the requirement that the participant designated as concessionaire shall take over the capital of the project company as sole owner, when the project company is established on the proposal of an economic operator, the option of joint liability provided by the Directive is transposed in the national law - economic operators participating in the procedure should adopt a specific legal form (Article 21, para 2, CA and Art. 21,*

para 4, CA). To ensure joint liability, this form must be in place and cannot be restricted. However, there are no obstacles to setting limits on the extent of the liability of the economic operators participating in the group under Art. 21, para 2 and 3, CA as well as of the economic operator under Art. 21, para. 4, CA, for example, in accordance with the resources they provide in relation with their shareholding in the capital of the project company."

Regarding the first statement put forward in the question:

Art. 63, para 1, CA provides for the option a candidate or participant to prove the fulfilment of the requirements established by the grantor regarding the professional or technical ability and/or the financial and economic standing of the economic operators by the capabilities of one or more persons, referred to in the CA as "third parties". To benefit from this option, the candidate or participant shall submit documents proving thereby that (i) a ground for exclusion is absent in respect of the third parties and (ii) that the candidate or participant will have at its disposal the resources of the third parties upon the performance of the concession contract. (Art. 63, para. 2, CA). Paragraph 3 of Art. 63, CA stipulates that the third party by whose capabilities the financial and economic standing is proved shall incur joint liability with the concessionaire for the performance of the concession contract. The requirement relating to financial and economic standing is one of the possible conditions for participation that the grantor may impose on the economic operators. The conditions for participation are defined by Art. 61, para 1, CA as requirements "*which shall be necessary for the performance of the concession contract*". Art. 62, para 2, item 1, CA sets the requirement that conditions for participation, set out by the grantor regarding professional or technical ability of the economic operators and/or the financial and economic standing thereof to be "*in conformity with the subject-matter and the specificities of the concession*". It is clear from the analysis of the above-mentioned provisions that the requirements regarding the financial and economic standing are not necessary for the performance of the entire contract, but only for those obligations thereunder, which are ensured by the specific requirement of the grantor - in this case - financing of the implementation of the concession contract. From the provision of Art. 63, para 1, CA, follows that an economic operator can prove the fulfilment of the requirements regarding the financial and economic standing both independently and with the abilities of one or more third parties. The provided option for proving by the capabilities of third parties does not rule out personal participation of the economic operator in meeting the requirement. It is therefore possible that the resource that one or more third parties will provide to the economic operator as the concessionaire for the performance of the concession contract to be negligible in relation to the economic operator's own resources. It is possible the necessary resource to be made available to the concessionaire by several third parties in different proportions. That, and the fact that every third party must provide evidence regarding the availability of the resource, which it will provide, leads to the conclusion that the established joint liability shall be to the amount of the commitment made by the third party for the provision of the resource. Otherwise, there will be a breach of the principle of proportionality referred to in Art. 4, para. 1, CA.

With a view to the above, the first statement referred to in the question should be regarded as complying with the CA and the Directive, given the purpose of the liability - to provide the financing of the concession in cases where the concessionaire's own resource is not sufficient. In all cases, the liability of the third party is a function of its commitment to make available to the concessionaire a certain resource and as such, it should comply with the principle of proportionality.

Regarding the second statement put forward in the question:

The statement is based on recital (9) in the preamble to the Directive and the question expresses the following thesis: "*These texts of the Directive in this part seem to link joint liability with the possibility for the grantor to require a group of economic operators to "take" a specific legal form or to lay down requirements to designate joint representation or leading partner for the purposes the procedure for awarding a concession, or to require information on their structure. This understanding is further developed in Article 26 (2) and (3) of the Directive and in these cases it does not provide for joint and several liability.*"

In accordance with the Directive, Art. 18, para. 2, CA allows the option in a concessionaire designation procedure, economic operators to participate either on their own or by associating in a form of their choice, hereinafter referred to as "group of economic operators". Where the participant designated as concessionaire is a group of economic operators, the grantor may set as a condition a requirement for the formation of a project company (Art. 21, para 2, CA). Where the grantor sets no such requirement, the concession contract shall be concluded with all participants in the group. (Art. 20, para 3, first sentence). The rule of concluding the contract with all participants in the group may be derogated, if in the application is specified that the concession contract shall be concluded with (i) the operator who or which represents the group, or with (ii) the lead partner (Art. 20, para 3, second sentence), or (iii) with project company, "*with the holding of the capital being distributed as proposed in the offer*" (Art. 21, para 3, CA). A project company may be formed on a proposal by an economic operator. In this case, "*the participant designated as concessionaire shall take over the capital of the project company as sole owner.*" (Art. 21, para 4, CA).

The conclusion of a concession contract with a project company is an exception to the rule for concluding the contract with the participant designated as concessionaire. The concession contract is concluded with a project company in the hypotheses defined by the CA, two of which are mentioned above. In both cases mentioned - when the project company is formed by economic operators participating in the group (regardless of the reason for this - a requirement of the grantor or proposal of the economic operators) or on a proposal by an economic operator when it is set up on the basis of a proposal made by an individual economic operator participating in the procedure on its own, the CA provides for joint and several liability of the persons who have participated in the procedure for designation of a concessionaire as a group or independently, with their established project company - concessionaire. In the first case - where the project company is incorporated by the economic operators participating in the group - the requirement for joint and several liability actually arises from the quoted in the question texts of the Directive and in particular the provisions of Art. 26 (2), para. 2: "*Member States may establish standard terms for how groups of economic operators are to meet those requirements¹. Any conditions for the performance of a concession by such groups of economic operators, which are different from those imposed on individual participants, shall also be justified by objective reasons and shall be proportionate.*" The national legislator has considered that it should ensure that the capacity to perform the concession contract that the economic operators have demonstrated during their participation in the procedure will be available to the project company - concessionaire. Otherwise, setting conditions for performance of the concession would be pointless. Where the project company is formed by the economic operators participating in the group, pursuant to Art. 21, para 2 and para 3, CA, its capital is distributed as proposed in the offer. In this case, similar to the above with regard to third parties, the liability of each economic operator should be determined in relation to the resources, which it provided when joining the project company. To assume something different would be to impose requirements that are not proportional, thereby breaking the principle under Art. 4, CA, as well as the quoted requirement of the Directive. An argument in this respect can also be derived from the provision of Art. 23, para 2, CA, which imposes the obligation of each of the economic operators participating in the group to provide the project company with the resources "*whereby the said participant has proved that the said participant meets the requirements as to the professional or technical ability and/or to financial and economic standing*".

Although it does not arise directly from the Directive, using a similar approach to joint and several liability of an economic operator participating independently in the concessionaire designation procedure with its project company has the same purpose, i.e. to ensure the performance of the concession contract by a newly established company. When the participant designated as a concessionaire takes over the capital of the project company as sole owner, it seems that a question of the limits of the joint and several liability cannot be put forward as long as the participant has

¹ The requirements regarding the economic and financial standing or the technical and professional ability referred to in Article 38 of the Directive.

independently proved that it meets the conditions for participation of the grantor and has taken over the capital of the project company as sole owner. Nevertheless, with a view to the principle of equality under Art. 4, para 1, AC and the quoted Art. 23, para 2, CA, in this case the liability should also be determined by reference to the resources that the operator has made available to the project company.

With a view to the above, the second statement referred to in the question should also be regarded as complying with the CA and the Directive.

The guideline is issued on the grounds of Art. 41, item 9 of the Concessions Act and Order No. B-205 of December 1, 2017 of the Prime Minister of the Republic of Bulgaria

**ON BEHALF OF
ECONOMIC AND SOCIAL POLICY DIRECTORATE
/signature/ Mariana Slavkova**