

# THE NEW SPECIFICS IN THE UNDERGROUND NATURAL RESOURCES ACT

Contributors:  
Lawyer Dobrina Pavlova.

•  
Jurisconsult Vili Datsov



The energy sector is a key one in the practice of Georgiev, Todorov & Co Law Offices and we constantly follow the changes in the regulations related to the production, transformation, distribution and use of energy resources in the country and the EU.

Our team presents the effective changes in the Underground Natural Resources Act in the information below.

## CONTACTS

**Address:**

27 Petar Parchevich Str., Sofia  
1000, Bulgaria

**Telephone:**

(+359 2) 937 65 00 / 01 / 02

**E-mail:** [office@georg-tod.com](mailto:office@georg-tod.com)

**GEORGIEV, TODOROV & Co.**  
LAW OFFICES

LEADING LAW FIRM IN  
• DISPUTE RESOLUTION  
• EU & COMPETITION  
• M&A IN BULGARIA



**LAW**  
Lawyers  
Associated  
Worldwide

On September 12, 2020, the new amendments to the Underground Natural Resources Act (the "Act") entered into force, promulgated in the State Gazette, issue no. 79. By adopting them, the members of Parliament overcame the partial veto of the president. The main points in the amendments to the Act were considered by the team of **Georgiev, Todorov & Co. Law Offices**.

- **General analysis of changes**

The reasons for the bill indicate that the shortcomings in the old regulation create a need for its refinement. Therefore, the majority of the amendments establish procedures for the exercise of specific powers of public authorities or the rights of private entities. Giving instructions for eliminating irregularities has been introduced in more and more proceedings. The activity of the commissions conducting the tender and competition procedures is described in detail.

**The detailed wording of the procedural rules** increases the administrative weight, but also removes a number of ambiguities that have arisen due to gaps in the old system. Thus, the amendments **prevent disputes regarding the application of the Concessions Act by analogy or of provisions of the Administrative Procedure Code, as a more general law**.

It is possible for associations of individuals and legal entities to participate in proceedings under the Underground Natural Resources Act and to acquire rights under permits / concessions. The same is already possible for state enterprises under Art. 62, para. 3 of the Bulgarian Commercial Act. The hypothesis in which the participant, who won a competition or tender, is not a trader, is settled. The regulation of financial collaterals has been changed.

- **The use of a third party resource**

The new amendments to the Act introduce an obligation for applicants for a prospecting / exploration permit or for a mining concession to meet certain minimum requirements for financial, technical and professional capabilities.

To prove that it has these capabilities, the **law allows an applicant to use the resources of a third party**, as long as it proves that its resources will be available in the performance of the contract, and that there is no reason for exclusion for the third party. There is **no explicit obligation for the third party to assume joint and several liability with the applicant for the performance of the contract**. It should be noted that at present there is no explicit provision on the type and amount of evidence that an applicant must provide in order to be considered to have "available" resources to a third party.

- **Financial capabilities**

The amendments to the Act require the financial capabilities of the applicant to provide a resource for the activities under the permit / concession for not less than 5 years from the entry into force of the concession contract. It should be borne in mind that the **previous legislation did not require financial capabilities** to be proven **for years to come**. The previous version of the Act required only extracts from the annual accounts for the last three years to be attached to the annex.

- **Expansion of extraction rights**

With the changes made, art. 34 expands the rights which the mining concession gives to the concessionaire. Art. 34, item 1 already allows the concessionaire to acquire the right of ownership over

the extracted underground natural resources from **the deposit or from its separate parts (sections)**, for which the concession has been granted, in accordance with the conditions of the concluded contract. At the same time, the right to carry out excavation activities **outside the surface area of the deposit** within the limits of the granted concession area for the purpose of extraction of underground natural resources from the deposit in depth is granted. The law allows the concessionaire to initiate or apply for approval of an investment proposal under the Environmental Protection Act.

- **The maximum term for granted concession is extended**

According to the unchanged provisions, the term of the extraction concession is up to 35 years. The amendments allow it to be extended at the reasoned request of the concessionaire.

It should be noted that such a possibility existed under the previous law, such as Art. 36, para. 2 stated that *"The term of the concession may be extended up to 15 years under the terms of the contract."* Therefore, so far **this extension has been regulated only by the clauses of the contract. Now Art. 36, para. 2 regulates the procedure itself.** No later than one year before the concession expires, the concessionaire must make a reasoned request based on a field development plan and a financial and economic justification for the extension, **provided that the field has reserves / resources.** Up to this moment, the concessionaire must have fulfilled all its obligations under the contract, except for the final activities for liquidation of the mining site and reclamation of the affected lands.

The extended **total term** of the concession may not be longer than **50 years.** The previous wording indicated that the term of up to 35 years. can be extended by up to 15 years. In fact, **both editions of para 2 refer to extension to 50 years in total, but the new one regulates in the law a number of requirements,** which must first be fulfilled, in addition to the clauses in the contract.

The new art. 36, para. 3 regulates an additional possibility for extension of the term. It provides for a motivated request of the concessionaire that the term **may be extended with up to 10 years after the expiration of the general term** and in compliance with the conditions under para. 2, when the stocks / resources have not been seized and the **remaining stocks / resources are not sufficient to grant a new concession to another trader,** in view of the profitability of the investments to be made, the type of available infrastructure and its ownership, as well as the accessories to the concession. **The term is determined according to the residual reserves / resources in the deposit** and the average annual yield envisaged by the concessionaire, which cannot be less than the minimum annual yield reached during the concession. In any case, the contract must be brought into line with the current legislation on the duration of the extension.

Pursuant to the transitional provisions, **the concessionaires, whose term expires within 6 months before or up to one year** from the entry into force of the amendments/ from 12.09.2020 / **may submit proposals for extension of the term** under the new rules.

- **Appeal under the Administrative Procedure Code**

A number of acts are already explicitly provided for the possibility to be appealed under the Administrative Procedure Code. These are: **(i)** the orders / decisions to open competition / tendering proceedings; **(ii)** the refusal to admit to tender; **(iii)** the acts by which permits / concessions are issued / granted after a tender / tender; **(iv)** the acts terminating the competition / tender; **(v)** the termination of proceedings for the granting of a permit / concession; **(vi)** the decision of the Council of Ministers granting a concession by right; **(vii)** refusal to grant a permit / concession.

- **Coordination before starting court proceeding**

According to the new wording, the opening takes place after coordination with "**the competent authorities** for protection of national security, defense of the country, environment and waters, cultural values, management of the roads of the national road network or officials authorized by them".

We note that coordination is no longer limited to ministers, which means that coordination with non-ministerial departments and a number of other bodies may also be necessary. This is a practical issue that will be clarified in the course of the administrative procedure for initiating proceedings for granting a prospecting / exploration permit or a mining concession.

With the new amendments, the provision according to which, when the authority does not provide its opinion in time, the coordination is still considered to have taken place, has been repealed. One might think whether this gap in the law cannot be filled by the more general act - **Administrative Procedure Code**, specifically Art. 53, para. 3 of the APC, which also stipulates that failure to pronounce in time is considered consent.

- **Concessions and exploration and / or exploration permits**

Art. 25 of the Act regulates **the transfer of rights and obligations** from a permit / concession. The provision has already **explicitly added the possibility to transfer to third parties rights and obligations arising from a granted concession**. There must be no grounds for exclusion for the third party and it must meet the minimum requirements for financial, technical and professional capacity.

According to Art. 45 **a tender for granting a concession may be already held**, not only on an official initiative, but also **on the application of a natural person, legal entity or their associations** addressed to the Minister of Energy.

In Chapter Three of the Act, the regime of concession fees has been changed. To ensure their correct definition The law **increases the accounting requirements for concessionaires**, obliging them to ensure "*comprehensive chronological registration of accounting information in analytical and synthetic accounting accounts for each individual concession.*"

The Act already explicitly stipulates that the permit holder / concessionaire and the **land owner** may enter into a contract by which a **property right is transferred** to the holder / concessionaire for the term of the permit / concession. The previous wording only allowed the establishment of a property right of use on the land for the same period.

- **Contracts - content, amendment and termination**

1. **Entering into force and content**

According to the current wording of Art. 65, para. 1 "*The prospecting or exploration permit or the exploration or extraction concession shall take effect from the date of conclusion of the contract*". The text no longer allows something else to be agreed in the contract.

According to para. 2 of the same art. 65, the entry into force of the contract "*may be made conditional on the fulfillment of conditions laid down in the prospecting or exploration permit, or in the decision to grant a mining concession, or in the legislation in force. The fulfillment of the conditions shall be subject to a certain period.*" Therefore, the entry into force of the contract may now occur at a different time, only as a consequence of the content of the prospecting / exploration permit, the decision to grant a mining concession or by law. However, part of the mandatory content of the contract are already the agreements of the parties on the consequences of non-compliance with the conditions for entry into force of the contract - Article 66, paragraph 1, item 10.

The mandatory **content of the contract** has undergone other changes. Part of it is already "*the types, scope and amount of financial security for the fulfillment of obligations*". The contract to provide for "*training and job creation programs*" has been waived.

## 2. Amendments and supplements of the contract

The new amendments to the Act explicitly regulate the possibility **for the parties to a concession contract** to amend or supplement it with an additional agreement. They may do so in the event of: **(i)** a subsequent occurrence of danger in the cases provided by law; **(ii)** partial loss of the object of the concession; **(iii)** objective impossibility to use it as intended; **(iv)** the financial conditions have changed significantly due to objective circumstances.

Art. 66c regulates the procedure in detail. Either party may, with a reasoned proposal, request an amendment and / or supplement. The additional agreement is concluded with the Minister of Energy, but when the amendment / supplement does not correspond to the decision for granting a concession, a decision of the Council of Ministers is needed first. In the cases of extension of a term under Art. 36, para. 2 and 3 with the motivated proposal the Minister proposes to the Council of Ministers to give consent for amendments and / or additions in the concession contract regarding the bringing of the contract in compliance with the current regulation.

The provisions discussed **also apply** to the amendment / supplementation of most contracts for **prospecting / exploration of underground natural resources**.

## 3. Termination of a contract

The law provides new grounds for termination of the contract. Such is the case, for example, when **within three years from the entry into force of the concession contract the extraction of mineral resources has not started for reasons for which the concessionaire is responsible**, such as: failure to submit an application / request to initiate a special law procedure, non-compliance of a body during a procedure under a special law. **The reasons for the bill** indicate that this ground for termination was created **in order to prevent the deliberate blocking of individual deposits**.

The Minister of Energy already represents the Council of Ministers in cases related to the termination / implementation of concession contracts, and also presents the claims of the grantor in court.

A new Section II "a" has been created in Chapter Four of the Law. **Consequences of termination of the concession contract**. Some of the provisions here are analogous to Art. 153 of the Concessions Act. Upon termination of the concession contract, the concessionaire must hand over the object of the concession to a commission appointed by the Minister of Energy.

In general, the transfer must take place within 30 days of the termination of the contract. We should keep in mind the new item 58 of § 1 of the Additional Provisions of the Law on Concessions, which defines the term "object of concession" as "*underground natural resources representing exclusive state property for which the concession for extraction has been granted*".

If the concessionaire is terminated without a legal successor or refuses to hand over the site, the commission draws up a statement of impossibility / refusal to hand over the site. This protocol is the basis for issuing an order for seizure of the site by the regional governor under the State Property Act.

According to the new art. 71c. "*In the event of early termination of the concession, either party may seek compensation for the actual damage suffered in accordance with the general rules.*"

### • Administrative control

According to the motives of the bill, after the Law on Concessions was amended in 2018, legislative gaps have appeared in the Law regarding the **control of the implementation of the concession contracts**

by the Minister of Energy. performance of prospecting or exploration contracts. The new art. 92a to Art. 92e regulate the authorities through which the control will be exercised and their powers.

The conditions and the order for control over the implementation of the contracts for prospecting / exploration, or for concession for extraction will be settled in an ordinance, which will be adopted by the Council of Ministers on the proposal of the Minister of Energy. As of the date of this publication, this regulation has not yet been adopted. With the amendments to the Underground Natural Resources Act, for the first time it gives new state bodies the power to carry out administrative control under this law: inspection by the Court of Auditors'.

With the amendments to the Underground Natural Resources Act, for the first time it gives new state bodies the power to carry out administrative control under this law: "**Inspections of the implementation of concluded contracts for prospecting and exploration, exploration or extraction concessions may also be carried out by the State Financial Inspection Agency and the National Audit Office.**"

- **Administrative penal provisions**

The sanctions provisions of the Act have undergone a number of changes. **The stations of the so far settled formations have been changed, mainly in the direction of their lowering, when the violation has been committed by a person who is not a sole trader or a legal entity.** The only exception to this trend is Art. 93, para. 3.

Violations related to technical and occupational safety are already established by officials from the Executive Agency "General Labor Inspectorate", and penal decrees are issued by the executive director of the agency, respectively by officials authorized by him.

New administrative penal units have been established, related to illegal activities in the territorial sea, the continental shelf and the exclusive economic zone. It should be noted that the amounts of the fines vary from BGN 50,000 to BGN 200,000.

In its previous version, the Law provided, in addition to the property sanction, for the extracted underground natural resources and the technical means used by the violator to be confiscated in favor of the state. The provision already stipulates that confiscation is not allowed when the value of the property clearly does not correspond to the nature and gravity of the administrative violation.

- **Transitional and Final Provisions**

**Contracts concluded before the entry into force of the amendments shall remain in force and shall be performed in accordance with the conditions agreed therein.** At the same time, the changes regarding the amendment and termination of the contracts are applied to the existing cases. Therefore, **the contracts concluded under the old regulation can benefit from the new rules for extension of the term** in art. 36, para. 2 and 3, provided that the term of concession expires within 6 months before or up to one year after the entry into force of the amendments. Such a concessionaire will be able to make a motivated proposal for extension of the term under the new rules within 6 months.

The procedures for granting exploration / exploration permits or extraction concessions, which have started but have not been completed by the time the amendments enter into force, shall be completed in the previous order.

The transitional rules also regulate other hypotheses concerning unfinished proceedings under the old versions of the Insurance Act and the Underground Natural Resources Act.

The state bodies have one year to bring the by-laws on the implementation of the Underground Natural Resources Act in line with the amendments.

- **Conclusion**

With the new amendments to the **Underground Natural Resources Act**, a number of procedural rules have been described in detail and legislative gaps have been eliminated. The status of associations and state-owned enterprises has been settled. Applicants are allowed to refer to third party resources. A number of acts are explicitly envisaged to challenge them under the APC. The regulation for administrative control has been improved. The amount of some of the administrative penalties has been changed.

Concessionaires have been granted new rights, as well as the opportunity to extend the concessions. It is allowed to transfer rights and obligations arising from a concession contract to third parties. The procedure for amending / supplementing the contracts has been settled. New grounds for termination of the contracts are provided, and a new section regulates the consequences of the termination of a contract.

The changes are comprehensive and raise a number of questions. They will find their answer when a certain period of time has elapsed, demonstrating how the new provisions will be implemented.

*\*This text does not constitute a legal advice and should not be taken into account in resolving legal disputes, but only to inform readers.*

***The team of Georgiev, Todorov & Co. Law Offices remains available for assistance and additional information related to the implementation of the amendments to the Underground Natural Resources Act.***