

New Law of Ukraine On Concession

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On 20 October 2019, the Law of Ukraine On Concession as of 3 October 2019 (hereinafter referred to as the Law) came into force. The adoption of the law allows to balance interests of all concession participants. On the one hand, the Law facilitates an increase in investment (including foreign investment) in order to upgrade and extend the infrastructure and provide high quality services of social significance. On the other hand, the Law creates conditions that will enable investors to profit from participating in a public-private partnership.

The Law has been developed in accordance with the EU laws, controlling the issue of a public-private partnership. When drafting the Law, the authors considered the international experience of concession projects implementation, which should considerably improve the Ukrainian investment climate in general, and eliminate some administrative barriers during concession projects implementation.

The Law introduces several positive novelties, aimed at simplifying the involvement of private capital of both domestic and foreign investors in public-private partnerships. The key novelties are as follows:

- a transparent procedure for the concessionaire selection on a competitive basis has been introduced;
- the Law allows for the involvement of an independent experts commission, which can provide clarifications and recommendations during the concession tender;
- the procedure of obtaining a land plot for the purposes of the concession project has been simplified;
- clear ownership control over the subject matter of concession has been established;
- additional guarantees for concessionaires and creditors, funding or ensuring the implementation of concession contracts have been introduced, including the right to change a concessionaire by another concessionaire (creditor);
- any disputes in connection with a concession agreement can be resolved by an international commercial or investment arbitration;
- a clear mechanism for control and monitoring of a concession agreement fulfillment has been introduced.

Concession can be used for the project implementation in all fields of economic activities, except for the objects, falling under the restrictions for concession according to the Ukrainian legislation.

Concession Initiation and selection of the concessionaire

The Law stipulates that proposals for fulfilling projects by way of concession can be initiated by the state, represented by the authorized bodies, local authorities, state enterprises with 100% share of state capital or the local community capital, as well as private legal entities (both local and non-resident, i.e. companies intending to lease the object at hand).

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Concession procedure in Ukraine

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The decision as to the viability of state property concession is made by the Ukrainian Government within 3 months after the proposal submission date. In relation to the property of the Autonomous Republic of Crimea and municipal property, such a decision is taken by the Council of Ministers of Crimea and local authorities (corresponding local councils) respectively, at the next session of the relevant authority.

The decision on concession viability may entail that particular measures need to be taken for the concession tender to be held, in particular: measures for the tender committee creation; preparing the objects to be transferred under concession (registration of property rights to the concession object, registration of the land plot, etc.); measures required to engage advisors and independent experts. All of the abovementioned have to be carried out within six months from the date of the decision on the concession viability. Thus, still prior to the transfer of the object under concession and the concessionaire appointment, some preparatory and organizational steps necessary for the further project implementation can be taken.

It should be noted that any legal entity (both domestic and non-resident), an association of legal entities (Ukrainian and /or non-resident), having fulfilled the requirements to acquire the status of a participant, can take part in the selection procedure under concession. However, it should be pointed out that only a Ukrainian legal entity can become a concessionaire (a party to the concession agreement). This means that if the concession tender is won by a non-resident legal entity, such a legal entity shall register a legal entity under the Ukrainian law in order to enter the concession agreement.

The concessor can select the concessionaire based on one of the following options:

1) by holding a concession tender; 2) as a result of a competitive dialogue; 3) by means of direct negotiations with the tenant of the state property being the object of concession.

The first two methods can be implemented via the electronic trading system, with the procedure to be defined by the Government of

Ukraine.

Concession tender

For the purpose of organizing and holding a concession tender, the concessor forms the tender committee, including representatives of relevant authorities, local government, the concessionaire, trade-union organizations. The tender committee evaluates the competitive proposals and provides conclusions as to the best terms of concession implementation as offered by the tender participants.

The concessor can attract independent experts with advisory capacity to the structure of the trade commission on competitive condition. Such experts services are covered from the funds received as the registration fee of the tender participants.

The announcement of holding a tender is placed in public access in relevant media and in online resources. According to the decision of the concessor, the tender participants might be obligated to secure their competitive proposals by means of a guarantee or in another form, the amount of which cannot exceed 1% of the expected volume of capital investments of the project to be carried out under the concession terms. Such a guarantee payment is not returned to the tender participant in the cases provided by the law, e.g., if the participant, having become the concession tender winner, does not sign the concession agreement.

By results of consideration and assessment of all competitive proposals the tender committee within 30 calendar days from the date of the deadline for submission of competitive proposals, prepares a conclusion about the tender winner. The tender results are subsequently published on the concessor's official website.

Competitive dialogue

Another way of identifying the concessionaire is a competitive dialogue, partly regulated by the rules for holding a concession tender.

A competitive dialogue is applied if a concessionaire may not clearly identify technical, qualitative characteristics of the project, or if it is unknown what technical, financial and legal solutions may be offered by potential tenderers. In this case, the negotiations with the participants should be held to allow for an optimal solution (e.g., in case of implementing innovative projects, large complex infrastructure projects, etc.).

Transformation of state property lease agreement into a concession

The law provides the companies, leasing the state property at the time of adopting the Law, with an opportunity to transform lease relations

into the concessionary ones. Undoubtedly, concession instruments give an investor a lot more opportunity than a relationship based on a lease. A concessionaire receives more legal opportunities to make capital investments in the property received by it, and therefore it enjoys more assurances as regards the return on the funds as it has earlier invested.

According to the Law, the tenant, the lease (agreement) was entered into with, before the Law came into force and which has duly complied with its obligations under the state property lease agreement and which intends to implement investment project on the concession terms with the use of the leased property, may apply to the concessionaire for public-private partnership under the concession terms.

Meanwhile, the concession agreement validity period may not exceed the period remaining until the lease term expires, but obligatorily should be at least 5 and not more than 50 years.

It is important to note that only the state property tenant may initiate the above-said process of transformation of lease into a concession. The state is not empowered to initiate a concession as to the property, having already been leased to a private company. Such a way of getting state property into a concession as a result of transformation of a lease into a concession is procedurally much simpler than a concession tender or a competitive dialogue.

Concession agreement

According to the results of the concession tender, a competitive dialogue or direct negotiations with the state property tenant, the concessor shall enter into a concession agreement with the concessionaire. Among the terms and conditions to be included in the concession agreement (in other words, the terms and conditions in respect of which the parties shall be required to reach a consent in order for such an agreement to be considered to be entered into) the Law shall stipulate the following terms and conditions:

- the concession agreement subject matter,, including the type, scope and description of the works and/or socially significant services performed/provided under such an agreement;
- rights and responsibilities of the parties to be determined, in particular with regard to the risk sharing between the parties;
- procedure for providing the land plots required to implement the projects carried out under the concession terms and a list of such plots with an indication of their cadastral numbers;
- the concession agreement validity period;
- the procedure, amount and terms of making concession payments;
- parties' liability for non-performance or improper performance of the obligations, arising out of a concession agreement;
- the procedure for exercising control by concessionaire over the agreement performance;
- the procedure for resolving disputes between the parties;
- other important terms and conditions as stipulated by the Law On Concession.

A concession agreement may include other terms and conditions as agreed upon by the parties, in particular: conditions of the national materials use during the concession, those of employment and involvement of citizens of Ukraine, conditions of use of intellectual property rights, those of financing by a concessionaire the construction of related infrastructure facilities (railways, highways, engineering communications, etc.) and other terms as agreed upon by the parties. Prior to the concession agreement execution, the concessionaire has the right to involve third parties (contractors, suppliers and others), for which actions it will bear full liability.

An important provision of the Law, protecting the investor's rights, is the provision that the concession agreement terms and conditions shall be valid for the entire duration thereof, including the cases when after entering therein the rules will be introduced by legislative acts, worsening the concessionaire's situation.

Period of concession

A concession agreement should be entered into for the period which should be fixed thereby and should be at least 5 years and not more than 50 years. It should be noted that the concession contract period as to the construction and further operation of highways should be at least 10 years.

A concession period may be determined, taking into account such factors as the useful lifetime of the object (facility) of concession and its depreciation term; the term reasonably required by a concessionaire to recover its funds invested in the concession object, etc. At the same time, the provisions of the Law as to the concession terms (periods) were not formulated very well, because it is unclear whether the abovementioned factors may change the concession deadlines as set out in the Law. Obviously, the law enforcement practice will be able to answer this question, and therefore, at the beginning of applying the Law, it is necessary to observe the concession deadlines as set thereby.

Financial terms and conditions of concession

A concession agreement should provide for receipt by the concessionaire of payment from the users (consumers) for the publicly significant services provided by the concessionaire with the object of concession use.

A concession agreement may provide for the concessionaire's payments to the concessionaire and/or vice versa. The conditions and procedure for making such payments shall be determined by a concession agreement in accordance with the Law. Concessionaire's payments in favor of the concessionaire shall be possible, if the concessionaire may not receive full reimbursement of the investment made by it at the expense of the services users (consumers).

Concessionaire's payments in favor of the concessionaire may include concession payments and/or a one-time fixed fee as referred to in the

concession agreement under the procedure prescribed by the Law. The methodology for calculating concession payments shall be approved by the Cabinet of Ministers of Ukraine.

Ownership of the concession object (facility)

Any actions as performed by the concessionaire in relation to the concession object (its complete construction, major repairs, reconstruction, technical re-equipment, etc.) do not result in the concessionaire's acquiring the ownership of such a constructed or reconstructed object. The concession object ownership shall remain with the state or territorial community. Upon concession agreement termination such an object shall be returned to the concessionaire.

The concessionaire is entitled to lease a part of the property constituting a part of the concession object, if it is stipulated by a concession agreement. In such a case, a concession agreement should contain an exhaustive list of the property which may be leased, as well as its lease terms.

As regards the movable property, purchased by the concessionaire to perform the concession agreement, the concessionaire remains such property owner, unless otherwise provided for by the concession agreement.

Assignment of property rights under a concession agreement

The concessionaire may transfer, in coordination with the concessionaire, all or part of its property rights arising out of the concession agreement to a third party for the period not exceeding the concession agreement term, unless otherwise provided for thereby.

The concessionaire shall be also entitled to pledge the property rights arising out of the concession agreement, if the same is provided for thereby. Meanwhile, only all rights (and not part of them), arising out of the concession agreement, shall be pledged and recovery shall be enforced on such rights by substituting the concessionaire in the concession agreement.

The subject of pledge (pledged property) may also be, in coordination with the concessionaire, the right of claim under the concession agreement.

Urban planning documents

In Ukraine, any immovable property shall be erected subject to and on the basis of urban planning documents, in particular it should comply during the construction with the requirements, as contained in detailed plans of territories (hereinafter – the "DPT"), where such immovable

property is erected. At present, not all territories possess the developed DPT. Therefore in case of necessity to develop the DPT in order to implement the concession project, the concessor shall be obliged to ensure the development and approval of respective DPT.

Funding for DPT development may be raised at the expense of the state or local budget or from other sources not prohibited by the Ukrainian legislation. The financial costs related to developing a detailed plan of territory may be reimbursed by the concessionaire in accordance with the terms and conditions of the concession agreement.

Obtaining land plots for concession

The land plot of state or communal ownership, necessary to implement the concession project, shall be leased to the concessionaire for the term of concession agreement in the manner stipulated by the Land Code of Ukraine. The preparatory measures necessary to lease the land plot to the concessionaire, in particular development of land management documents and land plot formation required to implement the concession project, may be taken due to the concessionaire's efforts and at the expense of the state or local budgets. The costs for development of the abovementioned documents may be reimbursed by the concessionaire in accordance with the terms and conditions of the concession agreement.

Unless the concessionaire acquires through the concessionaire's fault within one year from the date of concession agreement the right to lease the land plot necessary to implement the concession project, and if such a fact results in the concessionaire's failure to comply with its obligations and liabilities under the concession agreement, the latter one shall have the right to terminate the concession agreement.

Guarantees of the rights of the concession activity entities

The Law also establishes the guarantees for the concessionaire in case of the applicable legislation amendments. The Law states that the concessionaire's rights and obligations, as determined by the concession agreement, shall be governed by the legislation of Ukraine, effective on the day of concession agreement (except for the legislation, reducing the amount of taxes or fees or abolishing them, simplifying regulation of economic activity, weakening the state supervision/control procedures in the field of economic activity, mitigating the concessionaire's responsibility or otherwise improving the concessionaire's position, which should apply from the date of entry into force of such a legislation).

The above guarantees shall not cover the amendments in the legislation as to defense, national security, public order and environmental protection, licensing, rules and conditions for providing socially important services in markets in the state of natural monopolies.

Applicable law and dispute resolution

The Law enshrines the principle of a free choice of law that will apply to the concession agreement. However, if the applicable law is not chosen in the concession agreement, then such an agreement shall be governed by the law of Ukraine.

In accordance with the Law, the concession agreement parties may also freely choose the dispute resolution mechanism, including mediation, non-binding expert evaluation, national or international commercial or investment arbitration, including arbitration with location abroad (if a concessionaire is a foreign-owned enterprise/company within the meaning of the Law of Ukraine On Foreign Investment Regimes), and procedural rules for dispute resolution.

State support for the concession

The concessionaire may be supported by the state in the following forms:

1) by paying for the facility's operational readiness (usability); 2) in the form of the concessionaire's acquiring a certain amount of goods (works, services) produced (performed, provided) by the concessionaire in accordance with the concession agreement; 3) by supplying to the concessionaire the goods (works, services) necessary to perform the concession agreement; 4) in the form of construction (new construction, reconstruction, overhaul, etc.) by state or municipal enterprises of related infrastructure (railways, highways, communication lines, engineering communications, etc.), which are not the concession objects, but necessary to perform the concession agreement.

Control, monitoring and final evaluation of concessions

The concessionaire's control shall be exercised under the procedure to be agreed upon by the agreement parties and therefore, at the stage of concession agreement, attention should be paid to formulating the provisions on how and in what forms the concessor will exercise such a control, and clearly describing the parties' rights and obligations pertaining to such a control.

The state shall also monitor the concession agreements performance, and such a monitoring shall be exercised by the Ministry of Economic Development, Trade and Agriculture of Ukraine by receiving the reports on annual concession agreements performance from concessionaires.