

SOME QUESTIONS OF THE LEGAL REGULATION OF THE CONCESSION ACTIVITY IN UKRAINE AND THE COUNTRIES OF THE EUROPEAN UNION

Summary. *The article examines the theoretical and practical issues of the concession activity of the construction and operation of roads in the countries of the European Union and Ukraine.*

Key words: *concept of concession, types of concessions, concessions for the construction of roads, concessions for the operation of roads, experience of European countries and Ukraine.*

The problem definition. The arrangement of the safe conditions for the population's life and health is one of the state essential functions. Nowadays the Ukrainian roads safety is the most problem being discussed at all the levels. The conducted researches prove that 97% of the Ukrainian roads are in an unsatisfactory state which has a very negative effect on the economy of the state. According to expert estimates, only through bad roads the state annually loses about 30 billion uah GDP.

However, as Y. Koval reasonably observes that the whole complexity of the situation lies in the fact that irresponsible attitude towards the state property, which are the roads of the general use, has led to the fact that some of them are already foolishly repaired and it is better and correctly to build new ones instead of them.

Proceeding from the fact that there is barely enough public funds for the pit repair and repayment of the previously taken loans, other sources of financing are needed for the construction of roads, one of which may be concessions for the highways construction and maintenance.

The current state of the infrastructure objects and priority sectors of the Ukrainian economics require the involvement of the financial resources of the private sector into the socially important investment projects, which stipulates the use of the concession mechanism. The stated form of the investment makes it possible to attract private investments and replace them with a portion of the budget expenditures, which is a significant plus for the industries where an opportunity of the attracting private capital is a prerequisite for the implementation of investment projects aimed at the high economic or social benefits.

Due to the lack of experience in the concession activity in Ukraine, we consider it useful to study the experience of the foreign countries and an opportunity of its application in our country, which determines the relevance of this study. The purpose of the present article is to analyze the legislation of some countries of the European Union, which regulates issues of concession activity in the highways construction and maintenance, and legislation of Ukraine, as well as the proposals development for its improvement.

Analysis of Research and Publications. The concession, as a tool for attracting the private sector to the implementation of infrastructure projects, has become widespread in the world as early as the second half of the twentieth century. At present 120 countries of the world use the practice of cooperation between the government and investors on the basis of concession agreements [2].

During the work on the article, the researches of Ukrainian and foreign authors, such as M. Bahurin-skaya, L. Goncharuk, O. Grigороva, A. Zakharova, Y. Koval, M. Kucheriavenko, O. Medvedev, M. Ovakimyan, G. Pilgrim, etc. have been used.

Currently there are a large number of definitions of terms "concession" and "concession agreement". Thus, in the most European countries, a concession is treated as a state confidence trust to a third person, to which the state power gives certain powers related to the full or partial management of the objects related to the competent state administration. In the terminology of the World Bank, a concession is understood as the acceptance by a private party of the management functions of a state-owned enterprise within a certain period of time and imposing significant financial risks on itself.

However, under such agreements, the compulsory directives are in force for the European Union, according to which the project, where the participation of the state amounts to more than half of the total amount of

concession contract financing, should not be transferred to a private operator, since it is subject to the rules that are subject to all the state projects in European countries [3].

The modernization of the transport infrastructure in Italy, France, Spain, and the United Kingdom is a striking example of the successful involvement of the private capital in the reconstruction and construction of the state-owned objects. Thus, according to the National Institute for Strategic Studies under the President of Ukraine, France possesses 5830 km of the highways built and maintained under the concession conditions; the total length of the Spanish motorways built by the concessionaires is about 1000 km.

One of the leaders in the concession mechanism implementation for the construction and operation of roads is France. Thereby in France nearly 300 highways are operated under the concession conditions, which justifies the analysis of the concession legislation of that country. In France the law on concessions in the field of the public services (housing and utilities, road construction and exploitation, energy, etc.) has existed since Napoleon, that is, the first concessions to private companies were issued at the beginning of the XIX century.

The French companies are among the leaders among the foreign firms that use public-private partnership mechanisms (hereinafter – PPP) [4]. Thus, they have created and continue to develop one of the two basic models of the widely used concession in the world, the so-called "French model", which differs significantly from the other – Anglo-American one – in a number of the significant features, as follows:

1) the exclusion (prohibition) of the privatization by a concessionaire of a municipal or state property that was transferred to him by a concession;

2) the complex nature of the concession, when the concessionaire is simultaneously entrusted with the development of the concession, and the implementation of measures necessary for the creation or modernization of infrastructure facilities and their operation.

For example, unlike the Anglo-American model, where three private tenders are conducted for the selection a private partner (for design, construction, maintenance (or management), in France the only one tender for all the types of works or services exists.

It should be noted that there is no single law combining all the forms of PPP in France. The legal regime with regarding to the concessions is based mainly on the administrative law and the law of Sapin [4], which came into force in 1993 and provides a large number of the measures in the fight against corruption, in particular the mandatory participation in the consideration and approval of the contracts for public works of representatives the opposition and the Directorate General for Competition and Consumption.

According to the legal regulation within the EU in France, there exists "contractual" and "institutional" forms of PPP. The Contractual PPP is a concession granted to a private investor (concession for works, services, leasing, etc.). The institutional form of PPP is the creation of a joint venture with the participation of a public authority or a company on the one hand and private investors on the other hand.

The concessional forms of the contracts occupy a special place in the practice of PPP in France. Over the past 20 years, they have undergone the significant changes, first of all, concerning to the financial obligations growth of the state. Thanks to this, the concession mechanisms have become more commonly used in the large-scale infrastructure projects, especially in the transport sector and in the energy sector. The highways, health protection, utilities and energy spheres occupy the most dominating positions in the French PPP economics. The United Kingdom is considered to be the second in terms of the implementation and timing of the concession policy expansion. The English authorities have made a significant progress in the concession legislation developing. However, it retained the right to issue an official permit for the construction of the roads and determined the special points for the established fare collecting.

The concession activity experience in Italy deserves our attention as well. Among the terms for the concession policy implementation in the country, it should be noted that from the very beginning the state control over the roads construction and operation was stipulated, the obligatory deductions of concessionaires to the state treasury were determined, and the construction of new transport lines was an important condition for the concession contracts. Thus, an example of successful concession in modern practice was the development of concessionary mechanisms by the French authorities. A little later, a similar form of state participation in infrastructure projects was taken over by Spain, where concessionary mechanisms were more justified and perfect, the effect of which implementation has surpassed the success of other countries. In one decade in Spain almost all the infrastructure was upgraded.

The concessional activity in Ukraine is governed by a large number of normative legal acts: Chapter 40 of the Civil Code of Ukraine [5], Laws of Ukraine "On Concessions" [6], "On Concessions for the Construction and Operation of Highways" [7] and others. However, the Ukrainian legal practice at present includes only two concession contracts for the construction and operation of roads: the concessions for the construction and operation of the

Lviv-Brody highway [8], the concession for the construction and operation of the new Lviv-Krakovets highway [9], which were terminated by the state in connection with the undertaken obligations failure by the concessionaires.

It is noted that, the imperfect regulatory and legal framework is one of the reasons for the concession contracts failure, since the existing Law of Ukraine "On Concessions" does not meet the requirements of the current time and it requires a qualitative upgrade in terms of the procedure editing for the concession payment calculating, the conditions for a concession tender conduction and the winner election, lack of the terminated expert examination of the concession facility, though 17 amendments have already been made to the mentioned law.

But it should be agreed with Y. Koval, who states that legislation, whatever perfect it may be, is never able to be the reason for the social relations changing. Thus, the legislation may reflect already existing relationships, transferring them thus into a legal ground, or become a catalyst for a change, but only if there have already been existed external prerequisites [1].

On February 27, 2018, the Verkhovna Rada of Ukraine adopted a law that allows transferring on the terms of the concession public road of general use for construction and operation [10]. The implementation of the law, according to the press service of the Presidential Administration, will facilitate the creation of the conditions for attracting investment for construction and operation of motor roads under the concession conditions. The Law provides for amendments to the Laws of Ukraine "On Concessions", "On Concessions for the Construction and Operation of the Roads", "On Roads", "On the Sources of Financing of the Road Economics of Ukraine", "On alienation of land plots and other immovable property objects, disposed on them, being in private ownership, for public needs or from the motives of social necessity" [11].

The law also provides that the decision to conduct a concession bid is taken by the Government of Ukraine, in which, in particular, the technical parameters of the highway, the basic financial indicators of the motorway provision by the concession, the deadline for which the concession is granted, the maximum amount of compensation to the concessionaire, the alternative free travel route and a number of other issues are stipulated.

However, it is hardly possible to agree that the provision of the specified type of the motor roads in the concession was not foreseen by the current legislation, since Article 3 of the Law "On Concessions" stipulates that the objects that can be granted by the concession are construction (a complex of the road construction and design works related to the construction of a new highway) and the exploitation of the highways, objects of the road industry, and other road structures.

On April 3, 2018, the Verkhovna Rada of Ukraine adopted the bill "On Concessions" in the first reading [12] as the basis, which means it having accused **all** of the imperfect concession legislation, it began its reforming. In connection with this, the question arises whether the new legislation takes sufficiently into account the mistakes made, the question of the state's relation to the foreign and national investors, the experience of concession activity of the foreign countries, the countries of the European Union and its legislation.

Conclusions. The Constitution of Ukraine states that exclusively the laws of Ukraine define the principles of organization and operation of the transport (p. 5, cl. 92); the principles for the foreign economic activity (p. 9, cl. 92). Due to the political and socio-economic crises in Ukraine, we reckon that decisions on the concessions granting for construction and operation of highways should be taken by the Verkhovna Rada of Ukraine. In addition, the construction and operation of highways is a full-scale investment project, therefore, the Verkhovna Rada of Ukraine, as the manager of budget funds, should also guarantee the rights protection for the investors of these projects. We also consider it expedient to study the experience of the concessions on the construction and operation of motor roads in foreign countries, countries of the European Union, as well as the experience of legal provision of this area of activity in order to improve the concession legislation of Ukraine.

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Г.Й. Пузанова. Деякі питання правового регулювання концесійної діяльності в Україні та країнах Європейського Союзу. – Стаття.

Анотація. У статті досліджуються теоретичні й практичні питання концесійної діяльності будівництва та експлуатації автомобільних доріг в Україні та країнах Європейського Союзу.

Ключові слова: поняття концесії, види концесій, концесії на будівництво доріг, концесії на експлуатацію доріг, досвід України та країн Європейського Союзу.

Г.И. Пузанова. Некоторые вопросы правового регулирования концессионной деятельности в Украине и странах Европейского Союза. – Статья.

Аннотация. В статье исследуются теоретические и практические вопросы концессионной деятельности строительства и эксплуатации автомобильных дорог в Украине и странах Европейского Союза.

Ключевые слова: понятие концессии, виды концессий, концессии на строительство дорог, концессии на эксплуатацию дорог, опыт стран Европейского Союза и Украины.