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**THE COMPLIANCE OF SEPARATE PROVISIONS OF THE LAW OF
UKRAINE “ON CONCESSION” WITH THE RULES OF EU DIRECTIVE
ON THE AWARD OF CONCESSION CONTRACTS**

The importance of the proper realization of concession contracts is hard to overestimate. It could be seen from the analysis of court practice. For instance, in the Resolution of the Supreme Court of 20 February 2019, the Case № 924/461/18 it was determined that according to the concession agreement concluded by the participants of the case the concession authorities can refuse in unilateral way from the concession agreement if the concession entities do not systematically perform or improperly perform the following significant conditions of contract at the fault of the concession entity (concession operator): the granting to the population of the city of services of heat supply according to the rules, standards and orders. In such case the agreement must be terminated from the date when the concession authority informs concession operator. In this case concession operator can not receive any reimbursements from the concession authority [1]. So, as could be seen from this decision, social and economic consequences of improper execution of concession obligations is of a crucial importance and predetermines the special attention of legislator to this sphere of relations. Recently the new Law «On concession» was adopted. The provisions of the new Law aim to improve conditions of concession award procedure, as well as procedure of conclusion and performance of concession contracts. The transparency of the award procedure is ensured, the effectiveness of calculation of concession fees is increased in the current legislation, etc. Such improvements go in line with European practice.

However, with a view of integration and globalization processes it seems necessary that national legal provisions must correspond with EU one. Therefore, it will be interesting to analyze separate provisions of EU Directive on the award of concession contracts in the comparison with certain rules of Ukrainian Law “On concession”.

Paragraph 52 of the EU Directive outlines the general demands to the terms of concession agreements. Thus, it is prescribed, that “the duration of a concession should be limited in order to avoid market foreclosure and restriction of competition. In addition, concessions with long duration are likely to result in the foreclosure of the market, and may thereby hinder the free movement of services and the freedom of establishment. However, such a duration may be justified if it is indispensable to enable the concessionaire to recoup investments planned to perform the concession, as well as to obtain a return on the invested capital. Consequently, for concessions with a duration greater than five years the duration should be limited to the period in which the concessionaire could reasonably be expected to recoup the investment

made for operating the works and services together with a return on invested capital under normal operating conditions...” [2]. Ukrainian Law “On concession” [3] in the Article 3 defines the term of concession, which must be not less than five years and not more than 50 years, except concession agreements on construction and exploitation of highways, that should be not less than 10 years. As well as that the Article 3 defines, that the duration of concession agreements depends to a large extent on the reasonable time to return investments and reaching the purpose of concession agreement. So, we can admit the similarity of national legal provisions with European one in the question of duration of concession, which provide quite flexible and clear rules of calculation of duration of concession contracts.

In Articles 26 and 36 of the new Ukrainian legislation on concession the special attention is paid to environmental and social issues. It goes completely in line with provisions of paragraph 59 of EU Directive, that stipulates the importance of measures necessary to protect public policy, public morality, public security, health, human and animal life, the preservation of plant life or other environmental measures, in particular with a view to sustainable development, provided that those measures are in conformity with the TFEU.

Special attention in the Directive (paragraph 66) is paid to the necessity of including as one of the award criteria the employment of long-term job-seekers, the implementation of training measures for the unemployed or young persons in the course of the performance of the concession, etc. National concession legislation in the Article 26 defines the possibility to include into concession agreements conditions about usage of domestic material, employment of the Ukrainian citizens while performing of concession contracts. It goes without saying, that the realization of such legal provisions could serve a public interest, as well as increasing the social effectiveness of concession, reducing unemployment in the region.

It is ought to highlight the actuality of supporting of innovations also by means of concession, taking into consideration the great public impact of concession agreements. Considering this, the implementation of rules of paragraph 73 of EU Directive can be beneficial. The said rule stipulates, that “in exceptional cases where the contracting authority receives a tender which proposes an innovative solution with an exceptional level of functional performance which could not have foreseen by a diligent contracting authority or contracting entity, the contracting authority should, exceptionally, be able to modify the order of the award criteria to take into account the new possibilities brought about by that innovative solution, provided such a modification ensures equal treatment of all actual or potential tenderers by issuing a new invitation to tender or, where appropriate, publishing a new concession notice”.

The indisputable positive norm of Ukrainian Law “On concession” is the possibility to use electronic technical means, which will surely simplify the procedure of concession award and increase the efficiency, speed and transparency of concession award processes. Such a possibility goes corresponds with the best European practice of awarding of concession.

However, from the Ukrainian norms on concession it is not clearly seen what should be done in the situation if structural changes during the

performance of the concession have a place. However, due to the duration of concession contracts and complexity of concession relations such provisions should be included into legislation on concession. Therefore, the provisions of EU legislation seem quite effective to eliminate such disadvantage of national legal provisions. Thus, EU Directive in paragraph 77 prescribes, that the successful tenderer performing the concession should be able to undergo certain structural changes during the performance of the concession, such as purely internal reorganisations, takeovers, mergers and acquisitions or insolvency. Such structural changes should not automatically require new award procedures for the concession performed by that tenderer.

In conclusion it is worth of mentioning that there is still a room for improvement of national concession legislation. The European legal provisions can be taken as a guideline for the developing of Ukrainian legal norms. However, this should be done with consideration of national economic, social and legal particularities.

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БОЙЧЕНКО ЕДУАРД ГАВРИЛОВИЧ

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ДО ПИТАННЯ ВИЗНАЧЕННЯ СКЛАДУ ГОСПОДАРЬСЬКОГО ПРАВопорушення ПРИ ЗАСТОСУВАННІ САНКЦІЇ У ФОРМІ СПРОСТУВАННЯ НЕДОСТОВІРНИХ ВІДОМОСТЕЙ

В юридичній літературі склалося недостатньо вірне уявлення щодо складу господарського правопорушення, вчинення якого передбачає застосування санкції, передбаченої, зокрема, ст. 256 Господарського кодексу України (в подальшому – ГК України) – спростування неправ-