

CONCESSION AGREEMENT IN COMPARISON WITH RELATED LEGAL STRUCTURES IN THE PRACTICE OF UKRAINE AND EU COUNTRIES: CONTENT AND PROTECTION OF SUBJECTIVE CIVIL RIGHTS

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The article is devoted to the study of the peculiarities of a concession agreement in comparison with related legal structures in the practice of Ukraine and EU countries. Particular attention is paid to the concept of a concession agreement and its difference from related categories of agreements, such as financial leasing and lease.

The article examines the requirements to a concession agreement and analyzes the essential terms and conditions that must be included therein. The author also points out the impossibility of privatization of the property transferred to the concession as a special type of protection of the concessionaire's investment interests. The author also characterizes the interrelation of such concepts as transfer of objects into concession and transfer of ownership of this object to the concessionaire and loss of state property rights. The study of this relationship allows the author to conclude that a concession is a tool for exclusively disposing of state property rights, and not for terminating such property rights. An important part of the study concerns the issue of the priority of the concessionaire's rights after the concession agreement for the privatization of the concession object is terminated. Of course, we are talking about priority in case of offering an equivalent privatization price.

According to the requirements of national legislation, concession agreements are subject to mandatory registration, and therefore the author examines the validity of such agreements if the registration has not been carried out. In particular, the author points out that the fact of registration or non-registration of a concession agreement does not affect its validity, since the concession agreement comes into

force from the date of agreement on all essential terms and conditions and signing of the agreement by the parties.

With regard to the experience of European countries, the author analyzes it in relation to all issues related to national legal regulation of the concession institution. The author concludes that the most valuable for Ukraine in terms of implementation is the experience of Great Britain, France, Germany, the Netherlands, Portugal, Spain and Italy, since these countries are the luminaries of public-private partnerships.

The study focuses on the content and protection of subjective civil rights of the parties to a concession agreement.

As a general conclusion, the author points out that concession has a chance to become one of the most effective instruments for disposing of state property rights. Those objects that cannot be transferred for privatization without losing the rights to them by the state and without increasing the state debt in the context of budget deficit have a chance to be modernized and used effectively. Therefore, only by bringing the legal requirements for the concession institution in line with the requirements of the law and good political will can the foundation for establishing truly powerful concession relations in Ukraine be laid, and state property will not be lost, but only increased as a result of such relations.

Keywords: concession, concession agreement, effective management of rights, state property, subjective law, protection of subjective civil rights, contractual obligations, parties to the contract, method of protection, remedy, form of protection.

Problem statement

Effective management of property rights is the most important thing for any owner. And when it comes to the state, it is even more so. After all, as an owner, it is tasked not only with making a profit, but also with performing social, defense, economic and other functions. Therefore, the use of various forms and methods of disposing of state property rights allows preserving property as such and contributing to the development of our state's potential.

Concession as a form of disposal of state property rights is only emerging in Ukraine, but it has every chance of becoming one of the most effective. The experience of European countries confirms that only public-private partnerships can save public funds and, at the same time, modernize state-owned facilities. In this case, private investments are reliably protected and the partnership is mutually beneficial.

Analysis of recent research and publications

Among the national and foreign scholars whose research has dealt with concession issues are the following: M. Bil, O. Belyanets, I. Bernstein, M. Braginsky, S. Bratus, A. Venediktova, B. Vernek, O. Dzer, O. Ioffe, O. Kraynik, B. Landau, V. Marushchak, V. Mamutova, M. Oborotov, I. Selivanova, I. Proshko-Fateeva, H. Tretiak, V. Ustymenko, V. Fedorenko, K. Shundykov, V. Shcherbyna, Y. Yumasheva, O. Yurchenko, and others. The contribution of each of these scholars is invaluable for the science of civil law, but the space for scientific research is still open in this area. After all, the legislation of Ukraine was supplemented by a special law only in 2019, the norms contained in the Commercial Code of Ukraine became only general, and many of them were generally withdrawn, and about 20 bylaws relating to concessions expired. Therefore, we can talk about a complete reboot of the civil law regulation of the concession mechanism, which once again confirms the relevance of the research topic we have chosen.

Previously unresolved problems

The need to reboot the civil law regulation of the concession mechanism was caused by a

significant number of contradictions that existed at the subordinate regulatory level, and there were no norms of higher legal force, so concession relations were only declarative, not real. The course of the new government to address the issue of the effective use of state property rights has raised the issue of concessions as a possible mechanism for implementing public-private partnerships among other issues related to privatization, corporatization, lease, and other issues. The existence of a special law and the harmonization of other legal acts with it, as well as the political will of lawmakers and government officials, are the key to launching a concession mechanism in Ukraine. Of course, no mechanism can work flawlessly right away, so studying the experience of implementing legislation in practice, as well as the possibility of adapting the best foreign experience in this area, is the subject of further research by civil law scholars.

The purpose of this article is to analyze the civil law regulation of a concession agreement in comparison with related legal structures; to study foreign experience in this area and to develop proposals on how it can be used in Ukraine.

Summary of the main material

The Commercial Code of Ukraine contains Chapter 40 entitled «Concessions». And this chapter currently consists of only one Article 406, which defines the concept of concession and the basis for concession activities in two paragraphs. The rest of Articles 407-410, which existed until recently, were excluded by the Law of Ukraine «On Concession» dated 03.10.2019 No. 155-IX.

Thus, the Code proposes to understand a concession as a form of public-private partnership, which consists in granting the concessor to the concessionaire the right to create and/or construct (new construction, reconstruction, restoration, overhaul and technical re-equipment) and/or manage (use, operation, maintenance) the concession object and/or provide socially important services in the manner and on the terms specified in the concession agreement, and provides for the transfer to the concessionaire of the majority of the operational risk, which covers the Clause 2 provides that

«Concession activities are carried out on the basis of concession agreements concluded in accordance with the legislation of Ukraine between the concessionaire and the concessionaire» [1].

Clause 11 of Article 1 of the Concession Law contains a similar definition of concession, so we can already note the absence of contradictions in the conceptual and categorical apparatus.

Analyzing the concept of concession, the following should be noted:

- A concession should be understood as a form of public-private partnership. The fact that a concession is a form of partnership is confirmed by the Law of Ukraine «On Public-Private Partnership», which mentions a property management agreement, a joint venture agreement and other agreements;

- this form consists in the concessionaire granting the concessionaire the right to create and/or construct and/or manage and/or provide socially important services in the manner and on the terms and conditions specified in the concession agreement. Based on the above, we conclude that the subject matter of the agreement is one of the four types of activities mentioned above, or a combination of them. The combination of these types is developed by the potential parties to the concession agreement;

- The peculiarity of this form of public-private partnership is the transfer to the concessionaire of the majority of the operational risk, which includes demand and/or supply risk. Assumption of the majority of the risk puts the concessionaire in the status of an ordinary business entity, and its activities are less costly than in other forms of business. The concessionaire receives state-owned property that is already generating income, but it requires some modernization to increase profitability. Therefore, the opportunity to modernize the property along with the real opportunity to use it and make money on it creates favorable conditions for doing business on the basis of concessions.

The ownership of the property transferred to the concession will be discussed below, but here we will only note that businessmen do not always have ambitions to take over every-

thing; the possibility of receiving guaranteed profits in the long term (up to 50 years) is quite enough for many.

Such relations are extremely beneficial to the state, as they can be applied to those types of property that are not subject to privatization and cannot be managed effectively by the state. Therefore, by transferring property into concession, the state has guaranteed concession payments, efficient use of its property and its modernization, and upon completion of the agreement even acquires ownership of the property created by the concessionaire in the course of its activities. Therefore, this form of public-private partnership is truly mutually beneficial for both parties in the long run.

In essence, this type of activity is very similar to rental and financial leasing, but they still need to be distinguished.

Among the common features are the following:

- all three types of activities are characterized by the fact that the owner provides property that is needed by another person.

- This transfer is conditioned by the need for use, including for business and other activities.

- In all three cases, the use is paid for and for a fixed term.

- the risk inherent in carrying out business activities is present in all three cases.

Among the differences that distinguish a concession from related categories are the following:

- while financial leasing or renting involves ready-made property, concessions transfer the right to create (build or complete) property (the concession object) and to use it (manage, operate) by the concessionaire for profit. Importantly, the right to create may be combined with the right to use the transferred property, which can be modernized, recycled or otherwise improved. Therefore, there are much more powers and opportunities in the case of a concession;

- The term of a concession agreement is much longer than, say, a lease or a rental agreement. It varies from 5 to 50 years, depending on the objects to be transferred and the amount of investment required. In this way, the state establishes guarantees of return

on investment and the possibility of obtaining sufficient profits by the concessionaire;

- during the term of the concession agreement, it is prohibited to put up for privatization state property that has not been transferred to the concession, while in related categories there is no such prohibition.

These features once again prove the prospects of concession relations and their mutual benefit for both parties.

In order for concession relations to arise, certain pre-concession procedures must be completed. These include, in particular, the preparation of proposals and a decision on the expediency or in expediency of the concession; in case of a positive decision on the expediency, preparation for a concession tender is envisaged; submission of an announcement on a concession tender; prequalification; and the concession tender itself.

All of the above stages are described in detail in the Concession Law of Ukraine, and therefore there is no need to elaborate on them. We are interested in analyzing the concession agreement itself, which is the primary basis for the emergence of concession legal relations.

Thus, a concession agreement is an agreement between the concessionaire and the concessionaire that determines the procedure and conditions for the implementation of a project carried out on a concession basis [2]. Therefore, this agreement can be qualified as a two-line, written, consensual, fixed-term and paid agreement. Let us explain this qualification in more detail.

This agreement is bilateral because it requires two parties - the concessionaire and the concessionaire. The concessionaire in respect of state-owned property is the state, represented by the relevant state bodies that manage state-owned property. The concessionaire is the winner of the concession tender. The fact that the concessionaire may involve a significant number of other persons in its activities does not make them a party to the agreement, and therefore there are only two parties.

The agreement is concluded in a simple written form without notarization, but with mandatory registration by the public-private partnership body that keeps records of con-

cluded concession agreements. This registration is a condition for the validity of this category of agreements, so non-compliance with this requirement leads to the nullity of concession agreements.

Pursuant to Article 24(2) of the Law, «A concession agreement shall be deemed concluded from the date of agreement on all material terms and conditions and signing of the agreement by the parties. The occurrence, change or termination of rights and obligations under a concession agreement may be conditioned by the occurrence of a postponement or cancellation circumstance» [2]. This indicates the consensual nature of the agreement. Clearly established requirements of the law regarding concession payments as periodic payments made by the concessionaire in accordance with the terms of the concession agreement indicate that this type of agreement is paid for.

The essential terms of the concession agreement are defined in Article 26 of the Law. The social orientation of state ownership is evidenced by the following conditions that may be included in the agreement: provision of benefits for users (consumers); conditions for the use of domestic materials; conditions for hiring and employment of Ukrainian citizens. The inclusion of these conditions in concession agreements allows for the implementation of various government programs, effectively incorporating public law relations into private law relations. The expediency of modernization of many state-owned facilities indicates the inevitability of using innovative technologies and materials. Despite the fact that the legislator provides for the possibility of stipulating in the contract the conditions for the use of intellectual property rights, we believe that this provision is insufficient. We are convinced that it is necessary to prioritize the use of intellectual property owned by national right holders. And it is also a priority that these are rights arising from valid patents. The use of rights that have passed into the public domain cannot contribute to the innovation of processes and products, and therefore it is always necessary to choose from those objects for which the rights are still valid. The

above will result in certain state support for national intellectual property rights holders and will intensify the process of their disposal of intellectual property rights. The receipt of profits by the right holders through royalties or other types of payments will stimulate their payment of taxes and filling the state budget. Therefore, the effect of such application will be synergistic.

In this regard, we propose to amend subpara. 6 of para. 2 of Art. 26 should be restated as follows: «conditions for the use of intellectual property rights belonging to national right holders and arising from the effective protection documents».

The issue of determining the ownership of the property transferred to the concession is important to study. In this regard, the Law states that «The transfer of an existing concession object to the concessionaire, including its further reconstruction, restoration, overhaul, technical re-equipment by the concessionaire, does not entail the transfer of ownership of such object to the concessionaire and does not terminate the rights of state or municipal ownership or ownership of a business entity 100 percent of the shares (stakes) of which belong to the state, the Autonomous Republic of Crimea, a territorial community or another business entity 100 percent of the shares (stakes) of which belong to the state. Such an object shall be returned to the concessionaire upon termination of the concession agreement» [2].

Therefore, the issue of transfer of ownership in the case of a concession is not even raised. Interesting is the guarantee provided for the concessionaire that the property cannot be transferred for privatization during the term of the concession agreement. We believe that this guarantee should go further - in the case of privatization after the concession agreement expires, it would be advisable to prioritize the rights to purchase the former concession property from the former concessionaire among other buyers. Given that the former concessionaire has invested a lot of effort in the reconstruction and renovation of state property, it should have priority rights in the event of equal offers for the price and terms of privatization. This provision could be

added as an additional clause 6 to Article 36 of the Law.

To develop recommendations for the further development of the concession mechanism, let us turn to foreign experience. It is worth noting that foreign countries use concessions for a wide variety of projects - from the construction of schools and hospitals to large infrastructure facilities, such as the Euro-tunnel under the English Channel. Historical research shows that even the Eiffel Tower and the first railroads in the Russian Empire were built through public-private partnerships [4].

In general, the transfer of infrastructure facilities to concession is used in more than 120 countries. The largest share of contracts (over 80%) relates to the port sector, and almost 70% to the transportation sector. Among the EU countries, the most active in terms of the number of concession agreements are the UK, France, Germany, the Netherlands, Portugal, Spain, and Italy. To develop recommendations for the further development of the concession mechanism, let us turn to foreign experience. It is worth noting that foreign countries use concessions for a wide variety of projects - from the construction of schools and hospitals to large infrastructure facilities, such as the Eurotunnel under the English Channel. Historical research shows that even the Eiffel Tower and the first railroads in the Russian Empire were built through public-private partnerships [4].

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For example, the renovation of the London Underground is a merit of concessionary relations. In the early 2000s, there was an acute problem of underfunding, the need to upgrade rolling stock and subway infrastructure. The solution was found within the framework of the Public Private Partnership-PPP program [4]. In France, bridges, canals, roads, municipal infrastructure, cultural and

sports facilities were built under concession agreements. Foreign experience shows that public-private partnerships are most popular in difficult times for the state. The property is not lost, but thanks to private funds, it is effectively used and multiplied. As the role of the state in the economic life of the country grows, the use of concession agreements gradually decreases. For example, the renovation of the London Underground is a merit of concessionary relations. In the early 2000s, there was an acute problem of underfunding, the need to upgrade rolling stock and subway infrastructure. The solution was found within the framework of the Public Private Partnership-PPP program [4]. In France, bridges, canals, roads, municipal infrastructure, cultural and sports facilities were built under concession agreements. Foreign experience shows that public-private partnerships are most popular in difficult times for the state. The property is not lost, but thanks to private funds, it is effectively used and multiplied. As the role of the state in the economic life of the country grows, the use of concession agreements gradually decreases.

Ukraine is currently facing a significant budget deficit and is in the position where concessions will make the most sense. At present, we are talking about road construction, renovation of at least four airports, many railway stations, Ukrzaliznytsia, seaports, and much more.

As Ukraine's legislation has been updated with the support of consultants and experts from the EBRD and IFC, taking into account international experience, we have overcome the first part of the problems with the intensification of concession relations. The next step is to acquire practical skills in drafting concession agreements. It's no secret that such a long-term perspective, which is embedded in contractual relations, requires the coordinated work of a large number of specialists - lawyers, economists, managers, analysts and many others. Risks in this area should be distributed between both parties to the maximum extent possible, and concession payments should be interdependent with the profit generated.

Conclusions

To summarize the study, we emphasize that the experience that is available in foreign countries and can be used in Ukraine is as follows:

1. In the matter of disposal of state property rights, before moving to decisions on corporatization or privatization, the possibility of a concession should be studied.

2. State guarantees should play a significant role in these relations, and the contract should be fully supported by management decisions that minimize risks.

3. Concession agreements should have not only economic but also social effects. Creation of new jobs, support of national employees, use of intellectual property of national right holders, use of national raw materials in production processes - these are the social effects that should be included in concession relations.

4. A complete inventory of state-owned objects and the efficiency of their use should be a prerequisite for the formation of a list of concession objects. Concession proposals should be formed by the authorities, and private investors should always have a sufficient choice of objects offered to them.

5. Concession relations should replace operational management or economic management relations in case of inefficiency. Thus, the mechanism for managing state property rights should become mobile and dynamic, capable of updating and transforming.

6. Privatization of objects that were under concession should be an exceptional phenomenon. During the existence of the concession agreement, the state should update its capabilities to use property rights, so concession relations should become a guarantee of possible transformations of the state's influence on the economy.

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**КОНЦЕСІЙНИЙ ДОГОВІР У
ПОРІВНЯННІ З СУМІЖНИМИ
ПРАВОВИМИ КОНСТРУКЦІЯМИ В
ПРАКТИЦІ УКРАЇНИ ТА КРАЇН ЄС:
ЗМІСТ ТА ЗАХИСТ СУБ'ЄКТИВНИХ
ЦИВІЛЬНИХ ПРАВ**

Стаття присвячена дослідженню особливостей концесійного договору в порівнянні з суміжними правовими конструкціями у практиці України та країн ЄС. Особлива увага приділена поняттю концесійного

договору і відмінності його від суміжних категорій договорів, таких як фінансовий лізинг та оренда. У статті розглядаються вимоги до договору концесії та аналізуються істотні умови, що мають бути у ньому обов'язково закладені. Значна увага в дослідженні зосереджена на питанні змісту та захисту суб'єктивних цивільних прав сторін концесійного договору.

Зроблено висновок, що найціннішим для України в плані запровадження є досвід Британії, Франції, Німеччини Нідерландів, Португалії, Іспанії та Італії, адже саме ці країни є корифеями втілення державно-приватного партнерства.

Ключові слова: концесія, концесійний договір, ефективне управління правами, державна власність, суб'єктивне право, захист суб'єктивних цивільних прав, договірні зобов'язання, сторони договору, спосіб захисту, засіб захисту, форма захисту.