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Cross-Border Real Estate

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The year 2019 was notable for the major changes in the political life and legal environment triggered by presidential and parliamentary elections that have totally changed the balance of political forces in Ukraine. All these changes launched the highly anticipated reforms to strategic real estate legislation of Ukraine.

I. New Opportunities in the Infrastructure

According to the Action Program for the Government, substantive development is expected in infrastructure, including improvement of Ukrainian road conditions, development of railways, and construction of seaports, airports, and the like.²

The Ukrainian government has chosen concession as one of the key instruments for improvement of efficiency and attraction of private investments into infrastructure.³

Meanwhile, before October 20, 2019, the legislation on concessions was not very clear or workable. Most investments were attracted based on hybrid structures, such as investment agreements and lease of land or buildings. But on October 20, 2019, a new law, titled “On Concession,” became effective, that set forth the new rules of play as well as replaced the obsolete legislative framework.⁴ According to its explanatory note, the main goals of the law are aimed at improving the legal regulation of concessions

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2. Про затвердження Програми діяльності Кабінету Міністрів України [Decree of the Cabinet of Ministers of Ukraine “On Approval of the Action Program for the Cabinet of Ministers of Ukraine”] issued Sept. 29, 2019, effective Oct. 3, 2019 (Ukr.), *available at* <https://zakon.rada.gov.ua/laws/main/849-2019-%D0%BF> [hereinafter Action Program for the Government].

3. *See* Про Концесію [Law of Ukraine “On Concession”] issued Oct. 3, 2019, effective Oct. 20, 2019, Law No. 155-IX (Ukr.), *available at* <https://zakon.rada.gov.ua/laws/main/155-20> [hereinafter the Law].

4. *Id.*

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based on the best international experience with implementation of concession projects.⁵

Under the new rules, a concession is “a form of public-private partnership.”⁶ It provides Ukrainian legal entities (concessionaires) under a contract entered with a public authority (concession owner) the right to create, construct (new construction, reconstruction, restoration, major repairs, and technical re-equipment), and manage (use, operation, maintenance) the concession object.⁷ This is the first time that a concession may include provision of socially significant services by concessionaires, including energy, water distribution, and transport operation services, for example.⁸ The law also transfers a substantial part of the operational risks to the concessionaire.⁹ At the same time, such risks may be covered by concession owner payments in favor of a concessionaire under the terms and conditions of the concession competition or contract.¹⁰

The main novelties and advantages of the law are as follows:

- (a) The possibility for foreign investors to take part in concession projects through a Ukrainian SPV.¹¹
- (b) The introduction of minimum eligibility criteria that let investors check the conditions for participation and pre-evaluate the outcome of the project.¹²
- (c) The term of the concession can be for five years (ten years for roads) up to fifty years.¹³
- (d) The concessionaire may be elected upon the bidding, through the competitive dialogue or direct negotiation with the tenant of the concession object.¹⁴
- (e) The use of digital platforms must be launched after October 1, 2020.¹⁵ A state or municipal body could, on its own intention or upon an investor’s initiative, conduct the bidding for project implementation.¹⁶ The projects may impose some specific requirements to the concessionaire providing certain benefits such as facilitation of permission receipts, guarantees of implementation of concession projects, and the like.¹⁷

5. Пояснювальна записка до законопроекту “Про концесію” [Explanatory memorandum to Draft Law “On concession”] issued Mar. 15, 2018, Draft Law No. 8125 (Ukr.), *available at* http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=63630.

6. The Law art. 1(1)(1)–(11).

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*; The Law art. 34(2).

11. The Law art. 22(4).

12. *Id.* at art. 12(3).

13. *Id.* at art. 3(1).

14. *Id.* at art. 6(1).

15. *Id.* § 12(1).

16. *See id.* at art. 4.

17. *See id.* art. 28 (1).

- (f) The new rules provide an opportunity to attract external financing into the projects. Now, concessions are bankable due to the introduction of such instruments as concessioner proprietary rights pledges and automatic assignment of the claims under a project financing agreement.¹⁸
- (g) The agreements may be governed by foreign legislation upon the decision of the parties thereof.¹⁹

Another important novelty of the law is the ability to attract international financial institutions with their experience in implementation of similar projects and organization of concession projects.²⁰

Based on the new rules, the main objects of concession are airports, roads, port infrastructure, and hospitals, with the private transport services provided.²¹ In 2019, the major pilot concession projects, in particular, the seaports of Olvia (Mykolaiv) and Kherson, were launched by the Ministry of Infrastructure of Ukraine under this procedure.²² There could be a huge contribution of the International Finance Corporation (IFC) and the European Bank for Reconstruction and Development (EBRD) in the launch of these port projects.²³ As of now, the above-mentioned projects are in their final stage of completion. Moreover, despite the worldwide impact on logistics operations caused by the COVID-19 pandemic, the process of the Ukrainian seaports' concession is ongoing.²⁴

II. Anti-Raider Law Modifications

To intensify the protection of property rights, the Ukrainian Parliament has adopted amendments to current legislation that deprive private accredited agencies of the power of state registration.²⁵ The necessity for such amendments was caused by numerous cases of illegal takeover actions

18. See The Law art. 30(4).

19. *Id.* at art. 44.

20. See *id.* at art. 1 (13)–(14).

21. Vladyslav Kryklii, *The Ministry of Infrastructure of Ukraine Announce the Launch of Competitive and Transparent Concession Tenders for the Seaports of Olvia and Kherson*, THE MINISTRY OF INFRASTRUCTURE OF UKR. (Sept. 12, 2019, 12:45 PM), <https://mtu.gov.ua/en/news/31123.html>.

22.

23. *Id.*

24. *Ministry of Infrastructure: Concession is the main way of modernization of Ukrainian seaports*, THE MINISTRY OF INFRASTRUCTURE OF UKR. (April. 30, 2020, 13:19 PM), <https://www.kmu.gov.ua/en/news/mininfrastrukturi-koncesiya-osnovnij-shlyah-modernizaciyi-ukrayinskih-morskih-portiv>.

25. Про внесення змін до деяких законодавчих актів України щодо захисту права власності [Law of Ukraine “On amendments to certain legislative acts of Ukraine on the protection of property rights”] issued Oct. 3, 2019, effective Nov. 2, 2019, Law No. 159-IX, (Ukr.), *available at* <https://zakon.rada.gov.ua/laws/main/159-20> [hereinafter Law on Protection of Property Rights].

involving such entities.²⁶ Now, all actions with respect to state registration of property rights to real estate in Ukraine may be conducted only by state registrars, executive local government bodies, and notaries.²⁷ Moreover, all registration rewards related to title registration of real estate in the State Register of Property Right must be done within the area where such real estate is located, unless otherwise determined by a decision of the Ministry of Justice of Ukraine.²⁸ The state registrar is also obliged to check the information contained in state registers (cadasters) and automatic information systems before completing any registration.²⁹ Penalties for violation of state registration procedures are almost doubled.³⁰

III. Abolition of “Share Contribution” in the Development of Public Infrastructure

Until recently, Ukrainian legislation required all developers of new buildings to pay an obligatory state levy (a so-called share contribution) into the city budget on development of the municipal infrastructure with certain exceptions.³¹ The maximum amount of such contribution is four percent of the estimated construction cost for residential and ten percent for non-residential real estate objects.³² This legislation did not establish a clear mechanism for using the share contribution for its designated purposes.

In order to improve the investment environment in Ukraine and consider the absence of analogues in international practice,³³ the Ukrainian Parliament abolished such state duties.³⁴ These respective changes will enter

26. See Andrey Chekalov, *Property Law: Another Round of Reforms or a Step Against Raids?*, YUR GAZETA (Dec. 24, 2019, 12:27 PM), <https://yur-gazeta.com/publications/practice/inshe/zakon-shchodo-zahistu-prava-vlasnosti-chergoviy-vitok-reform-chi-krok-do-protidiyi-reyderstvu.html>.

27. Про державну реєстрацію речових прав на нерухоме майно та їх обтяжень [Law of Ukraine “On state registration of proprietary rights to real estate and its encumbrances”] issued July 1, 2004, effective Aug. 3, 2004, Law No. 1952-IV, art. 6 (1)-(2), art. 10 (1)-(2) (Ukr.), available at <https://zakon.rada.gov.ua/laws/main/1952-15> [hereinafter Law on State Registration of Proprietary Rights].

28. *Id.* at art. 3(5).

29. *Id.* at art. 10(3).

30. Кодекс України про адміністративні правопорушення [Code of Ukraine on Administrative Infractions], issued Dec. 7, 1984, Code No. 8073-X, art. 166.11 (Ukr.), available at <https://zakon.rada.gov.ua/laws/main/80731-10?lang=en>.

31. Про регулювання містобудівної діяльності [Law of Ukraine “On regulation of urban planning”] issued Feb. 17, 2011, effective March. 12, 2011, Law No. 3038-VI, art. 40 (Ukr.) available at <https://zakon.rada.gov.ua/laws/show/3038-17/ed20110217/print>.

32. *Id.*

33. Пояснювальна записка до законопроекту “Про внесення змін до деяких законодавчих актів України щодо стимулювання інвестиційної діяльності в Україні” [Explanatory note to Draft Law “On amendments to certain legislative acts of Ukraine on the stimulation of investment activity in Ukraine”] issued Aug. 29, 2019, Draft Law No. 1059 (Ukr.) available at http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=66289.

34. Про внесення змін до деяких законодавчих актів України щодо стимулювання інвестиційної діяльності в Україні [Law of Ukraine “On amendments to certain legislative acts

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into force on January 1, 2020.³⁵ But full abolition must be executed within one year.³⁶ In this case, the amount for share contribution payable during 2020 must be equal to two percent of the estimated construction cost for residential and four percent for non-residential real estate objects.³⁷ All agreements on payment of share contribution into city infrastructure executed before the new amendments are entered into force will be valid.³⁸

of Ukraine on the stimulation of investment activity in Ukraine”] issued Sept. 20, 2019, effective Oct. 17, 2019, Law No. 132-IX (Ukr.) *available at* <https://zakon.rada.gov.ua/laws/main/132-20>.

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

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