

THE LAW OF UKRAINE

"On Concessions"

This Law establishes the legal, financial and organizational basis for implementation of concessions aimed to ensure the modernization of infrastructure and the higher quality of services of general economic interest.

CHAPTER I

GENERAL PROVISIONS

Article 1. Key Terms and Definitions

1. Terms and definitions shall have the following meaning hereunder:

"availability payments" shall mean payments to the concessionaire stipulated by the concession agreement that are paid after the concession object is operation and depend on the achievement of the performance level (reliability, availability) of the works/services defined by the concession agreement;

"bidder" shall mean applicant that is admitted to the participation in concession tender basing on the results of the prequalification stage in accordance to the procedure defined by the grantor, who paid registration fees and signed with the grantor confidentiality agreement with regard to the transferred information;

"applicant" shall mean private legal entities (residents or non-residents) or associations of enterprises or other associations of legal entities (including non-residents) that filed the applicaton for participation in concession tender in accordance with the procedure defined by the grantor;

"Concession" shall mean the form of the private-public partnership that is based on granting to the concessionaire by the grantor the right to create (construct, reconstruct, modernize) or/and manage (use, operate, undertake technical maintenance) of the concession object (objects) and/or rendering of services of general economic interest in accordance to the terms and procedure defined by the concession agreement. The concession shall provide for transferring to the concessionaire of the major part of operational risk that encompasses risk of demand and/or supply risk or both of them, that means that under terms of operation in accordance to the concession agreement the return of the investments made by the concessionaire or the costs incurred during the execution of works or the provision of services under the concession agreement are not guaranteed;

"concession agreement" shall mean an agreement between the concessionaire and the grantor that establishes the procedure and terms of concession;

"concession payment" shall mean a periodic payment made by the concessionaire to the grantor in accordance to the concession agreement;

"concessionaire" shall mean a private legal entity that is resident of Ukraine or association of enterprises that is resident of Ukraine, acting as a party to the concession agreement;

"financing agreement" shall mean an agreement between the concessionaire, and lender(s) or their representatives that is concluded for the purposes of concession financing;

"direct agreement" shall mean an agreement between the grantor, concessionaire, and lender(s) or between the grantor and lender(s) that defines procedure and conditions for substitution of the concessionaire, and may also provide obligation of the lender to provide financing in the case of concessionaire substitution, guarantees of the concessionaire rights and other conditions upon agreement of the Parties.

"grantor" – the state of Ukraine represented by state administrative body that in accordance with the Law of Ukraine No 185-V "On Management of State Property" dated 21.09.2006 execute the function of state property management or/and local councils.

"concession object" – the objects of state or municipal ownership or objects which belong to the Autonomous Republic of Crimea that are transferred to the concessionaire for the purposes of the execution of concession agreement, and the assets of business entities, 100 per cent of the statutory capital of which belong to the state, territorial community or the Autonomous Republic of Crimea for the purpose of the execution of concession agreement, or are created by the concessionaire in the process of execution of the concession agreement;

"lender" shall mean any financial institution that has provided or intends to provide debt financing or guarantee to the concessionaire to ensure its execution of the concession agreement;

"services of general economic interests (SGEI)" shall mean services aimed to ensure public interests and needs, that are performed to all consumers (users of services) and/or the provision of which shall be ensured by the state administrative body, local councils or enterprises which are under their management (hereinafter – enterprises, institutions, organizations) or economic companies, in which one hundred (100) per cent of share capital belong to the state, a territorial community or the Autonomous Republic of Crimea.

"Public-Private Partnership Unit" shall mean the central executive power body that proposes and executes state policy in the field of the PPP;

Article 2. Concession Legislation

1. Relations arising in connection with the implementation of concessions, are regulated by the Constitution of Ukraine, this Law, the Civil Code of Ukraine, Commercial Code of Ukraine, other regulatory legal acts adopted in order to ensure fulfilment of provisions of this Law and by the international treaties of Ukraine ratified by Verkhovna Rada of Ukraine.

2. If international treaties of Ukraine ratified by the Verkhovna Rada of Ukraine, establish other rules then the ones stipulated by this Law, the provisions of the international treaty are to be applied.

3. The provisions of the Law of Ukraine "On State-Private Partnership" apply to concessions in part that does not contradict to this Law.

4. Public procurement regulations established by other laws of Ukraine shall not apply to choosing the concessioner and implementing concession agreement.

5. Concessions may be implemented in any sector, unless there is restriction or prohibition on transferring of objects into concession.

6. Norms of this Law will not be applied to in the following projects that are implemented in the form of concession:

if a private partner receives full reimbursement of its investment from the public partner

that do not stipulate creation (construction, reconstruction, modernization), and/or management (use, exploitation, technical maintenance) of concession facilities or providing services of public interest.

Article 3. Concessions Term

1. The minimum term of concession shall be three years, and the maximum term shall be fifty years and shall be set on the basis of:

a) the economic life of the concession object;

b) the time reasonably needed for the concessionaire to recover the costs of its investments (including costs incurred in connection with financing acquisition) and receiving certain level of income;

c) the time reasonably needed for the concessionaire to achieve the desired benefits of the concession; and

d) the characteristics of the sector and social importance of the concession.

CHAPTER II

PREPARATION OF PROPOSALS AND DETERMINATION OF PROPOSED CONCESSION VIABILITY

Article 4. Preparation of Proposals

1. Initiators of preparation of proposals related to the implementation of public private partnership in the form of concessions may be:

the State of Ukraine represented by state administrative body that in accordance with the Law of Ukraine No 185-V "On Management of State Property" dated 21.09.2006 execute the function of state property management;

local councils;

private legal entities (resident or non-resident) or associations of legal entities).

2. Preparation of proposals related to the implementation of public private partnership in the form of concession and appraisal of the project basing on such proposals shall be executed in accordance to the chapter III of the Law of Ukraine "On State-Private Partnership" considering the peculiarities established by this Law.

Article 5. Determining Viability of Proposed Concession

1. The determination of the viability of a proposed concession shall be taken within three months from the day the proposals were filed (for village, town, city, district or regional council – it should be taken at the next scheduled session from the time of filing) in accordance to the procedure stipulated by the Law basing on the appraisal conclusion related to implementation of PPP in respect of the objects of:

state property - by the the State of Ukraine represented by state administrative body that in accordance with the Law of Ukraine No 185-V "On Management of State Property" dated 21.09.2006 execute the function of state property management;

municipal property - local councils in accordance to the competence conferred by the Law of Ukraine "On Local Self-Governance";

property owned by the Autonomous Republic of Crimea - the body authorized by the Council of Ministers of the Autonomous Republic of Crimea, and if such a body is not defined by the Council of Ministers of the Autonomous Republic of Crimea.

2. The decision determining the viability of a concession shall set forth the necessary measures of preparation for holding the concession tender. The requirements established by this part does not apply to the events stipulated by the part 3 of this article.

1) measures aimed at the forming a Tender commission and approval of the provision on it;

2) measures necessary for the preparation of an object for the transfer to concession, including, but not exclusively, measures aimed at the registration of the right of state ownership of the property that is the subject of a concession, the registration of land plots necessary for the concession, conducting an inventory and independent assessment of the property which is the subject of the concession;

3) measures aimed at the organization of information support of the concession project, including conducting activities on analyzing interest of potential investors;

4) measures aimed at attracting advisers;

5) measures aimed at regulating the interaction between grantors (if several grantors participate in the concession project);

6) other measures by the grantor's decision.

3. If the results are based on a PPP appraisal and it was determined that the concessionaire selection shall be carried out by way of negotiations in the cases stipulated by this Law, the decision on concession viability shall state the necessary preparatory measures for negotiations.

4. The body that took decision on concession viability shall inform its decision to both the person that initiated PPP in form of concession and the PPP Unit within 15 days from the day the relevant decision was taken.

CHAPTER III

SELECTION OF CONCESSIONAIRE

Article 6. Procedures for Concessionaire Selection

1. The grantor shall select the concessionaire on the basis of a concession tender or upon direct negotiations. Public procurement regulations established by other laws of Ukraine shall not apply to the procedure of the concessionaire's selection.

2. The procedure for concessionaire selection shall be governed by the following basic principles: transparency, equal treatment, non-discrimination.

3. The concession tender and/or direct negotiations shall be carried out in accordance to the procedure stipulated by this Law.

4. The terms and conditions of the concession tender and/or direct negotiations shall be defined by the grantor.

The terms and conditions of the concession tender shall be stipulated by the tender documentation.

Article 7. Tender Committee

1. The grantor shall form a tender committee for the purposes of preparation and holding of the concession tender.

2. A tender committee shall be formed by the grantor, except in cases stipulated by the part 3 of this article.

3. If the object of concession is the state-owned objects, assets of business entities, 100 per cent of the statutory capital of which belong to the state, that are granted to the concessioner for the purpose of the execution of the concession agreement or are created by the concessionaire in the process of execution of the concession agreement, the value of which according to the data of the latest financial statements exceeds 1 (2? - according to the resolution No 777) billion UAH, or the expected volume of capital investment of such project, carried out under the terms of concession, is 50 million EUR, the organization and realization of concession tender shall be carried out by a tender committee, that is formed by the Cabinet of Ministers of Ukraine and acts on the basis of regulation on the tender committee, approved by the Cabinet of Ministers of Ukraine.

Functions of secretariat of a tender committee, which is formed by the Cabinet of Ministers of Ukraine, shall be carried out by the Ministry of Economic Development and Trade (or concessionaire?).

4. The tender committee shall be composed of at least 7 voting members, number of voting members should be odd.

The composition of a tender committee, formed by the Cabinet of Ministers of Ukraine shall be not less than 11 people, 5 of which shall be permanent, the number of voting members should be odd.

5. The tender committee must include:

with respect to the state property – representatives of the grantor, MoEDT, Minfin and the representatives of the other state or municipal bodies basing on the decision of the grantor;

with respect to the municipal property - representatives of the grantor and representatives of the other state bodies under the decision of the grantor.

with respect to the property owned by the Autonomous Republic of the Crimea – representatives of the Council of the Ministers of the ARC, the Republican executive body authorized to manage the ARC property, as well as of the State Property Fund of the ARC, the Ministry of Finance of the ARC and the Republican Committee of the ARC Land Resources.

The tender committee, formed by the Cabinet of Ministers of Ukraine, must include representatives of the Ministry of Economic Development and Trade, the Ministry of Finance, the State Property Fund, independent non-state experts (as permanent members) and representatives of the grantor and other interested bodies (as temporary members).

6. The chairman and the secretary of the tender committee shall be the representatives appointed by the grantor, except if the tender committee is formed by the decision of the Cabinet of Ministries of Ukraine.

On request of the grantor the relevant authorities shall provide candidates for Tender Committee within 10 calendar days, except if the tender committee is formed by the decision of the Cabinet of Ministries of Ukraine.

7. The tasks of the Tender Committee are:

to determine the timeline of the Concession Tender;

to develop the Tender Documentation and submit it to the grantor for approval;

to register the applicants' applications for participation in the concession tender;

to provide applicants and bidders of a concession tender with the required information (documents) for the preparation of concession bid (proposal) and to issue the explanations with respect to the tender documentation. All explanations are subject to mandatory publication on the official website of the grantor and are to be sent to all applicants/bidders;

to prepare and submit to the grantor the terms of concession tender for approval;

to prepare and submit to the grantor the opinion with respect to the admission (non-admission) of applicants to participation in the concession tender;

to consider and assess the bids of the concession tender bidders, to determine their compliance with the concession tender terms;

to issue opinion with respect to the best terms of the concession proposed by the concession tender bidders;

to prepare opinion with respect to the selection of the winner;

to notify the winner with regard to the results of the concession tender on behalf of the grantor;

other tasks related to the preparation and holding of the concession tender.

8. The independent advisors might be invited to the participation in the Tender Committee in a consultative capacity.

9. The chairman, secretary and other members of the tender committee shall be trained on organizing and conducting of the concession tender. *(to postpone coming into force for a year)*

Article 8. Tender Documentation

1. The grantor shall approve the tender documentation prepared by the Tender Committee.

2. The tender documentation will contain all information required by interested parties to prepare and submit their bids and shall consist of:

the terms of conducting of the concession tender;

the Guidelines for the applicants;

the Guidelines for the bidders;

the draft of the concession agreement setting out risk sharing goals and other key provisions;

other documents upon the decision of the grantor.

3. The grantor may make amendments to tender documentation until the day of the publication of the invitation to submit the final bids by the bidders.

4. The concession tender terms must include:

description of the concession object (facilities);

the timing for holding of the concession tender;

general description of the selection criteria;

the definition of the material terms of a concession, including the list of works and services that must be provided by the concessionaire, the determination of the sources of income of the concessionaire (financing at the expense of the users of the services or mixed payments – that are payments from users and availability payments);

proposals with respect to the allocation of risks between the concessionaire and the grantor (if any);

registration fee that is to be paid by the bidder;

other conditions upon the decision of the grantor.

The concession tender terms may provide for the following obligations of the concessionaire:

- the employment of a certain number of employees of the state or municipal enterprise which property is transferred into concession for the purposes of the concession agreement performance;

- making a single fixed payment in favor of the grantor/ enterprises, institutions, organizations, which property is transferred into concession. The aim of this payment is to cover costs related to the transferring of the property into concession including but not limited to the provision of social guarantees stipulated by the legislation of Ukraine to employees that are to be dismissed due to the liquidation of the enterprise, institution, organisation which property is transferred into concession if they are not employed by the concessionaire, or in order to secure the other obligations including but not limited to debts of the state or municipal enterprise, institution, organisation which property is transferred into concession.

5. The obligations of the concessionaire provided by the part 4 of this article shall be included in the terms of the concession tender upon their justification in PPP proposal and if they were stipulated by the PPP (concession) appraisal opinion.

Article 9. Taking Decision on Holding Concession Tender

The decision on holding the concession tender shall be adopted by the grantor no later than 90 days after the approval of the tender documentation.

Article 10. Tender Stages

A tender shall include the following stages:

- 1) pre-qualification of bidders;

- 2) tender of proposals;
- 3) evaluation of tender proposals and selection of the winning bidder
- 4) negotiations with the winning bidder.

Article 11. Tender Announcement

1. Not later than 10 business days following the date of the decision on holding concession tender, the grantor shall publish the tender announcement in Ukrainian language in the newspaper "Holos Ukrainy" and on the official website of the grantor, as well as in English in the Official Journal of the European Union.

The tender announcement shall include:

- concession tender terms;
- the manner and place for filing the applications for participation in prequalification that are defined by the grantor and shall not last less than 30 days;
- the procedure and place for obtaining Guidelines by the applicants;
- other information upon the decision of the grantor.

2. The Guidelines for applicants shall be placed on the official site of the grantor together with the tender announcement.

Article 12. Pre-qualification of Applicants

1 Pre-qualification of applicants shall be carried out by the grantor to identify potential bidders with the required level of competence for the implementation of a concession.

2. The guidelines for the applicants shall include the following information:

- 1) admission requirements for the applicant in order to participate in the tender of proposals;
- 2) the requirements for the design and contents of the applications;
- 3) the procedure for submission of applications and their registration;
- 4) the procedure for obtaining the additional information required to apply for participation in the pre -qualification;

5) the procedure for making amendments to application and for withdrawal of the application;

6) the procedure for consideration of applications and decision on admission (non-admission) of applicants to participation in tender of proposals;

7) procedure for notification of applicants with respect to the results of consideration of applications;

8) pre-qualification criteria;

9) amount of registration fee;

10) other information in accordance to the decision of the Tender Committee.

3.The criteria for pre-qualification may include one or more of the following criteria:

1) the relevant level of the potential bidder's professional and technical qualifications;

2) equipment and other physical facilities as necessary to carry out all the phases of the project, including design, construction, operation and maintenance;

3) employees with relevant qualifications that have required knowledge and experience;

4) the documented experience of the performance of the similar agreements;

5) Sufficient ability to manage the financial aspects of the project and capability to sustain its financing requirements;

6) any other criteria according to the decision of the grantor (the Tender Committee).

4.The following applicants shall not be admitted to participation in tender of proposals:

1) declared bankrupt or in respect of them there is an instituted insolvency proceedings as of the date of filing the application;

2) being in a stage of liquidation or reorganization;

3) if they are controlled by each other, or are under joint control or are associated persons (if each such applicant is filing separately);

4) if they did not disclose the information with respect to the persons that have direct or indirect control over them till the beneficiary owners which should be sufficient for the determination of the legal entities or persons that will furtheron control the commercial activity of the concessionaire;

5) the legal entities in which 10 percent or more the stocks (shares) are owned or which are under ultimate beneficial owner's control established by the resident of the state recognized as aggressor –state by the Verkhovna Rada of Ukraine or by the state recognized as aggressor –state by the Verkhovna Rada of Ukraine;

6) the executive state bodies;

7) persons registered in offshore zone or persons, stocks (shares) of which, representing in aggregate more than 50 percent of the authorized capital, belong directly or indirectly to such persons (list of such zones is determined by the Cabinet of Ministers of Ukraine) or countries included in the FATF list of countries that do not cooperate in the field of the anti- money laundering;

8) persons who directly or indirectly are controlled by persons, ultimate beneficial owner (controller) of which are persons referred to in this part, or are associated persons of such persons;

9) legal entities or entities associated with them that are registered in the state, recognized as aggressor state by the Verkhovna Rada of Ukraine or against whom the sanctions are applied in accordance to the law;

The term "control" shall be defined in accordance to the Law of Ukraine "On Joint Stock Companies". The term "ultimate beneficial owner (controller)" shall be defined in accordance to the Law of Ukraine "On Prevention and Counteraction to Money Laundering, Financing of Terrorism and Financing of Proliferation of Weapons of Mass Destruction". The term "associated person" shall be defined in accordance to the the Tax Code of Ukraine.

5. The opinion on admission (non-admission) of the applicants to participation in tender of proposals and the decision of the grantor with approval of this opinion shall be adopted within 30 business days from the date when the term for filing the applications to participate in concession tender is expired.

Article 13. Admission (Non-admission) to Participation in Tender of Proposals

1. The grantor shall inform the applicants with respect to their admission (non-admission) to tender of proposals within 5 days from the date of the approval of opinion on admission (non-admission) of the applicants.

2. If the applicant is non-admitted to the tender of proposals, the notification mentioned in part 1 of this article shall contain the grounds for such refusal.

3. The following information shall be provided to the applicants admitted to the tender of proposals together with the notification on admission:

the draft of non-disclosure agreement;

the term for payment of the registration fee and for signing of the non-disclosure agreement.

4. The applicant shall be admitted to the tender of proposals after the provision to the grantor of the evidence of the registration fee payment and of signing the non-disclosure agreement.

5. On the business day following to the performance of the requirements stipulated by the part 4 of this article the tender committee registers the bidders of the concession tender during 3 business days. The tender committee shall send to the bidder notification with the procedure, terms and the place where it will be possible to receive Guidelines, the draft of the concession agreement and other documents that are part of the tender documentation.

Article 14. Tender of Proposals

1. The Guidelines for bidders shall define the procedure for submission of the tender proposals.

The Guidelines for bidders shall contain the following information:

- 1) requirements for tender proposal;
- 2) evaluation criteria and methodology for evaluation of the proposals; the relative weight of each evaluation criteria;
- 3) suggestions on risk distribution among participants of the project implemented in a form of concession;
- 4) the draft of the concession agreement with indication of the terms that are not subject to further negotiations;
- 5) requirements to security of the tender proposals (if required by the grantor);
- 6) project specification and performance indicators including but not limited to the description of the works that shall be performed and/or services that shall be

rendered, the indicative schedules of works/services, technical requirements for the operation and maintenance of the object of concession; the minimum acceptable design and operational standards (including environmental); quality standards which will be used by concessionaire during the evaluation of proposals;

7) other information in accordance to the grantor's decision.

2. The tender of proposals may be in one or two stages in accordance to the decision of the grantor.

3. Two-stage tender of proposals shall apply in cases if the technical, quality characteristics (specifications) of the concession were not determined and there is the necessity of negotiations with the bidders in order to adopt the decision.

4. Where a two-stage procedure is used, the bidder are expected to submit their tender proposals with respect to the characteristics (specifications) of the project and/or define operational indicators of the project in the first stage. On this stage the tender proposals shall contain general engineering design concepts or operational indicators and the indicative financial model of the concession.

The term for submission of the tender of proposals on the first stage shall not be less than 45 days from the date the bidders have obtained the guidelines, the draft of the concession agreement and other documents that are part of the tender documentation.

The Tender Committee together with consultants convenes meetings and holds discussions with each of the bidder separately and additionally together with all of them. During the meetings any issue with respect to the concession may be discussed. During the negotiation the Tender Committee shall not apply discriminatory approach to the bidders, in particular, to disclose confidential information received from bidders during these negotiations.

The Tender Committee may invite advisers to the meetings and negotiations.

All the meetings with bidders shall be recorded by means of the audio and video recordings.

The aim of the meetings is the definition of the key parameters of the concession. Upon the termination of the meetings the grantor shall make amendments to the tender documentation, determine the key parameters of the concession and send to all of the bidders the invitation to take part in the second stage accompanied with the amended tender documentation.

5. The term for submission of tender proposals on the second stage shall be at least 90 days following the day the invitations to take part in second stage were

received. The examination and estimation of the proposals on the second stage shall be conducted in accordance to the Guidelines for bidders.

6. At any time before the deadline for submission of tender proposals the bidder has the right to modify or withdraw his tender proposal.

7. If only one participant has submitted a bid, a concession agreement may be concluded with that participant by negotiation taking into account the provisions of part four of Article 17.

Article 15. Tender Proposals Security

1. The security of the tender proposal may be required under the decision of the Tender Committee.

The tender proposal security shall be in the form of the guarantee or other form according to the decision of the Tender Committee.

If such decision is taken, the Guidelines for the bidders shall set forth the amount, type, term and warnings with respect to the cases when the bidder forfeit tender proposal security. In this case the bidder shall submit tender proposal accompanied by the tender proposal security.

2. The Guidelines for bidders shall stipulate the amount of the security that shall not exceed 1 percent from the expected capital investments in concession.

3. The security shall be enforced in case of:

withdrawal of the tender proposal by the bidder after the deadline for submission of proposals but before the expiration of the term during which the tender proposals are in force;

failure to enter into concession agreement by the winning bidder;

failure to provide by the winning bidder required security for the fulfilment of the concession contract after the proposal has been accepted if provision of such security was specified in the guidelines for bidders;

in other cases specified by the guidelines for bidders.

4. The funds obtained in course of the tender proposal security enforcement (in case these funds are forfeited by the bidder) shall be transferred into State Budget of Ukraine or relevant municipal budget.

Article 16. Evaluation Criteria

1. Depending on the decision of the grantor there may be the following evaluation criteria:

- 1) technical specification of the concession project;
- 2) compliance with environmental standards;
- 3) quality of services/works;
- 4) the net present value of the cash flow over the concession period;
- 5) the net present value of the availability payment over the concession period ;
- 6) the net present value of the capital costs and operating and maintenance costs;
- 7) the reliability of the proposed financial arrangements;
- 8) the extent of public support;
- 9) net present value (NPV) of the concession payment;
- 10) other criteria specified by the decision of the grantor.

2. The weighting of the price criterion, specified by points 4,5,7,8,9, shall be no less than 50 per cent.

Article 17. Selection of the Winning Bidder and Negotiations with respect to the Concession Agreement

1. Within 30 calendar days from the day of the deadline for submission of bids, according to the results of consideration and evaluation of all bids, the Tender Committee prepares and approves the conclusion on the definition of the best conditions for the implementation of the concession, which specifies the results of the assessment of all bids and determines the competitive bid that received the highest rating.

2. The grantor approves the conclusion within 5 business days from the day of its approval by the Tender Committee.

3. The grantor shall invite the winning bidder to negotiate the concession agreement within 3 business days from the date of the approval of the opinion mentioned in the part 3 of this article.

4. The winning bidder may negotiate with the grantor the existing terms of the draft concession agreement and include new terms to the draft concession agreement. Such amendments shall not change the material terms and conditions of the concession agreement established by the guidelines for the bidders (including terms that disclose the content of the tender proposal of the winning bidder).

5. If within 30 business days the parties do not reach consent with respect to the terms of the concession agreement, the grantor shall inform the winning bidder about the termination of the negotiations and invites the bidder having the next rating.

6. The grantor is forbidden to resume negotiations with a bidder with which negotiations have been terminated.

Article 18. Appeal

1. Disputes arising in connection with the concession tender shall be resolved in court.

Article 19. Direct Negotiations

1. By the decision of the Cabinet of Ministers of Ukraine, as an exception, a concession agreement may be concluded without tender procedure by direct negotiations only in the following cases:

1) need for national security and defense;

2) possibility of performing works (providing services) by one person (in cases of know-how, copyright, etc.);

3) obtaining a positive conclusion on the results of an analysis of the effectiveness of the Implementation of public-private partnership in the form of concession based on the analysis of the proposal of the person who is the lessee of the property, which is a potential concession object.

4) concluding a concession agreement with the lessee by direct negotiations provided that:

the lessee duly fulfilled his obligations under the contract and did not allow a material breach of his obligations under the contract;

the lease agreement provided for the tenant to make improvements to the leased property;

the term of the concession agreement must not exceed the term of the lease agreement (in case if several lease agreements have been concluded, then the term of validity of one of them, which expires the last, is taken into account);

the concession contract must comply with requirements for concession contracts established by this Law;

the lessee must meet the requirements for the concessionaire established by this Law;

the conclusion and execution of a concession agreement should not lead to a reduction in the volume of concessionaire investment compared to the amount established by the lease agreement.

The Cabinet of Ministers of Ukraine may establish additional requirements for the procedure specified in paragraph 3 of this article.

Article 20. Peculiarities of the Participation of a Consortia

1. Consortia of private legal entities (both residents and non-residents) may participate in Concession Tender and direct negotiations.

2. In order to prove the compliance of the consortium of private legal entities (both residents and non-residents) qualifications with the pre-qualification criteria, the information shall be submitted with regard to the consortium as a whole as well as to its individual bidders.

3. After the termination of the pre-qualification the members of the consortium of private legal entities (both residents and non-residents) shall not be altered.

4. If the consortium of private legal entities (both residents and non-residents) becomes the winning bidder, all members of the consortium shall incorporate SPV for the purposes of the concession that shall become the concessionaire within 60 days.

5. Each member of a consortium of private legal entities (both residents and non-residents) may participate, either directly or indirectly, in only one consortium at the same concession tender. A violation of this rule shall cause the disqualification of the consortium and of its individual members.

Article 21. Engagement of the Advisers

1. The grantor may engage advisers for the purposes of the development of the feasibility study of the concession, tender documentation and performance of other tasks stipulated in the part 2 of this article.

2. The main tasks of the advisers shall be:

collection of information and analysis of economic, technical, legal, and financial performance of the concession object;

audit and legal analysis;

determination of investment attractiveness of the concession object and possible ways of its increase;

search of potential investors;

preparation of tender documentation;

structuring of the concession;

other tasks related to the organization and holding of the concession tender.

3. The services of the advisers may be financed at the expense of state and/or local budget, enterprises, institutions, organizations that are under the grantor's management, funds of international financial organizations and from other sources that are not forbidden by the legislature.

Payment for advisory services shall be made by paying to the adviser a fixed amount of remuneration, provided that the adviser fully fulfills the terms of the contract for the provision of services concluded with the adviser, and a variable part of remuneration, if a concession agreement is concluded - in the amount established in percentage terms of the value of investment or concession payments.

The determination of the fixed amount of remuneration to be paid to the adviser for the concession preparation, as well as the procedure for determining the remuneration of adviser in percentage terms - shall be carried out in accordance with the procedure approved by the Cabinet of Ministers of Ukraine. (discussion)

The grantor may engage international financial organisations for the purposes of the development of the feasibility studies of the concession, tender documentation and performance of other tasks stipulated in the part 2 of this article.

4. In order to fulfil the part 3 of this article, the grantor may sign agreement with international financial organizations (IFO) that shall regulate the cooperation between parties in the process of preparation and structuring of the concession.

The agreement may include the provisions with respect to:

- 1) the obligations of the grantor to hold concession tender in accordance to the Ukrainian legislation and best international standards;
- 2) full or partial reimbursement of the costs of the MFIs related to the project implemented under the terms of the concession at the expense of the winner and/or grantore and/or at the expense of the enterprises, institutions, organizations under the control of the grantor in cases and in accordance with the procedure, established by such agreement;
- 3) compensation of IFO costs if the grantor rejects the concession tender;
- 4) other provisions in accordance to the decision of the grantor.

The agreement with IFO shall be signed basing on the results of the direct negotiations without application of the Law of Ukraine "On Public Procurement".

1. The terms of the concession agreement may provide for the compensation by the winning bidder of the costs related to the preparation of the concession tender, including the costs of feasibility studies of the concession, costs of advisers related to preparation of tender documentation and structuring of the concession project, the costs of information support for the concession carried by the grantor/IFO/enterprises, institutions and organisations that are under the management of the grantor.

CHAPTER IV

CONCESSION AGREEMENT

Article 22. Conclusion of Concession Agreement

1. The concession agreement shall be concluded by the grantor with:

1) the winner of the concession tender or the legal entity incorporated by the winner of the concession tender for the purposes of the concession if it is provided by terms of the concession tender, while during the period defined by the concession agreement the winner of the concession tender shall directly or indirectly possess more than 50 percent of its share capital;

2) concessionaire selected by the results of direct negotiations;

2. The concession agreement is deemed to be concluded from the day of signing of the text of the agreement by the parties.

3. Within 3 calendar days from the moment of conclusion of the concession agreement, the grantor shall send the copy of the concession agreement with all its amendments certified by the grantor by recommended letter with notification to the PPP Unit. PPP Unit shall keep records of concluded concession agreements.

4. Other civil agreements, including a financing agreement (direct agreement), may be concluded for the purposes of concession agreement performance.

Article 23. Parties to Concession Agreement

1. The parties to the concession agreement are the concessionaire and the grantor, as well as, by decision of the grantor, a third person (persons) on the side of the grantor.

2. The grantor by its decision may engage enterprise, institution, organization and/or economical society in which 100 per cent of share capital is owned by the state, municipality or the Autonomous Republic of Crimea, to act on the side of the grantor in the concession agreement. The grantor bears subsidiary liability for the performance of obligations by such enterprise in accordance with the concession agreement.

3. There may be several state administrative bodies and/or local councils on the side of the grantor. The rights and obligations of these bodies in connection with their joint participation on the side of the grantor shall be defined by the agreement that is to be concluded between them. This agreement shall be concluded before the conclusion of the concession agreement and shall contain the following terms:

1) the amount and form of their participation, including financial and (or) other material participation in the concession agreement;

2) the procedure of performance of their rights and obligations in the concession agreement, including the allocation of rights on the concession object after putting it into operation if the concessionaire acquires rights to that object in accordance to the concession agreement.

The copy of this agreement shall be added to the concession agreement.

4. The following legal entities may not act as concessionaires: enterprise, institution, organization and/or economical society in which fifty (50) per cent of share capital or more is owned by the state, municipality or the Autonomous Republic of Crimea.

5. The parties to concession agreement shall be treated equally.

6. If the concessionaire is reorganized, the other legal entity created due to the reorganizaton acquires the rights and obligations of the concessionaire under the

condition of the compliance of the legal entity incorporated due to the reorganisation with the requirements contained in the tender documentation.

Article 24. Essential Terms and Conditions of Concession Agreements

1. Concession agreements shall include the following terms and conditions:

parties to the concession agreement;

concession object (the composition and value of the property or the technical and financial conditions for the creation of the object of concession);

the procedure and conditions for the entry into force of the concession agreement;

the subject matter of concession agreement, including the scope of work, content and other requirements as to the works and SGEI provided in accordance to this agreement;

rights and obligations of the parties;

procedure of the provision of land plots required for the implementation of the concession;

the term of concession agreement and the procedure of its modification, early termination and termination;

terms of setting and modifying the prices (rates) for the goods (works, services) produced (provided) by the concessionaire (in case of concession markets that are in a state of natural monopoly);

conditions for granting state support (if applicable);

procedure, amount and conditions for making concession payments if they are provided by the concession agreement;

grounds for, procedure and circumstances of termination of the concession agreement, including payments upon early termination;

allocation of essential risks between parties and definition of

liability of the Parties for non performance or improper performance of the obligations provided by the concession agreement;

monitoring by the grantor of the performance of the concession agreement;

conditions for the substitution of the concessionaire;

dispute resolution procedures;

other terms.

2. A concession agreement may include other terms and conditions agreed by the parties, in particular:

provision of certain incentives to users (customers);

terms of use of domestic materials;

terms of recruitment and use of the labor of Ukrainian citizens;

terms of use of intellectual property.

3. The terms of the concession agreement shall be in force during the concession term even if after its conclusion the rules diminishing (worsening) the state of concessionaire are implemented by laws.

Article 25. Modification, Early Termination and Termination of Concession Agreements

1. The parties may amend or terminate the concession agreement by mutual consent. The parties may not amend the essential terms and conditions of the concession agreement defined in the winner's bid.

2. The concession agreement shall terminate upon the expiration of its term. Early termination of the agreement occurs in case of its dissolution.

3. The concession agreement may be modified or dissolved on demand of one of the parties basing on the decision of competent court or tribunal in case of material breach by other party of obligations defined by the concession agreement or in case of material change of circumstances that were essential for the conclusion of the concession agreement and in other cases stipulated by the concession agreement.

4. The concession agreement may provide for instances when it may be terminated unilaterally by means of written notice to the other party, without applying to a competent court or tribunal.

5. In case of early termination of the concession agreement due to the breach by the grantor of the obligations provided by this agreement the grantor shall compensate to the concessionaire his investments in part that was not reimbursed during the term of this contract, and losses caused by early termination of the agreement. The amount

of such compensation shall be calculated on the basis of the respective provisions of concession agreement.

Article 26. Liability of Parties to Concession Agreements

1. The Parties bear the responsibility established by the laws of Ukraine and the concession agreement for failure to perform or improper performance of their obligations (including fulfillment of requirements, guarantees and other duties), determined by the concession agreement. Concession agreements may provide for the application of penalties not prohibited by Ukrainian legislation.

2. A concessionaire has the right to involve third parties for implementations of a concession agreement. If the concessionaire engages third parties for implementations of a concession agreement, he bears full responsibility for the actions of such parties.

Article 27. Substitution of the Concessionaire

1. If a concessionaire does not fulfill his obligations under the concession agreement and the direct agreement (if any), he may be substituted by another concessionaire on the initiative of the grantor or at the request of the creditor in the manner determined by the procedure for the replacement of a private partner under an agreement concluded within the framework Public-private partnership, approved by the Cabinet of Ministers of Ukraine, solely in cases determined by a concession agreement or financing agreement (direct agreement).

2. A concession agreement may provide for the following legal consequences of non-fulfillment of its obligations by the concessionaire:

(A) creditors may execute the right to enter into a concession contract and to substitute the concessionaire in the cases specified in the financing agreement (direct agreement);

(B) the grantor or creditors have the right to temporarily assume the concessionaire's obligations under the concession contract. The costs associated with such interference are borne by the party to whom these commitments are made in accordance with the concession agreement and / or financing agreement (direct contract).

3. The substitute concessionaire shall meet all qualification requirements and other requirements which the initial concessionaire complied with .

Article 27-1. Direct Agreement

1. A direct agreement shall be concluded no later than the entry into force of the concession agreement.

2. A direct agreement shall contain conditions as regards the obligations of the creditor to provide the concessionaire with information regarding the financing of the concessionaire, changes in financing conditions.

Subject to negotiations with the IFI!
UNCITRAL Recommendations (paragraphs 148-150)

CHAPTER V

LEGAL REGIME FOR CONCESSION OBJECTS

Article 28. Legal Regime for Concession Objects

1. The grantor shall transfer the existing concession object to the concessionaire on terms and conditions stipulated by the concession agreement.

Transferring to the concessionaire the existing concession object, including its further reconstruction shall not lead to the acquiring of the title on this object by the concessionaire and shall not terminate municipal ownership on these objects. These objects shall be returned to the grantor upon termination of the concession agreement.

Transferring to the concessionaire the concession object is the basis to register concessionaire's material rights to own and use the concession object in the State Register of Real Property Rights to real estate by the.

2. The concession object shall be recorded separately from other his assets. The concessionaire shall ensure separate accounting for the transferred property.

3. A concessionaire can acquire ownership of real estate, constructed on the basis and in accordance with the terms of the concession agreement and is the subject of a concession. End or termination of a concession agreement is the basis for terminating the concessionaire's property rights to real estate, constructed on the basis and in accordance with the conditions of the concession contract, and the acquisition of such property in the ownership of the state or the respective territorial community.

4. The laws of Ukraine regulating the lease of state and municipal property and its debiting shall not apply to the concession object in accordance to the concession agreement. The procedure of transferring of these objects into lease and their debiting shall be defined in the concession agreement.

5. The concession agreement may stipulate that the concessionaire has the right to transfer all or part of his material (real) rights to the concession object to a third party for a term not exceeding the term of the concession agreement.

6. A concessionaire may acquire rights in movable property acquired by him in accordance with a concession agreement.

Article 29. The Developer in Concessions

1. The developer for the construction/reconstruction in a concession, shall be either the concessionaire or enterprise, institution, organization, defined by the grantor that shall be the third party to the concession agreement on the side of the grantor.

2. If the concessionaire is the developer of the construction, then enterprise, institution, organization that is the land user and, accordingly, the developer of construction, shall refuse from its rights on land plots for execution of concession agreement except if the concession is on construction and operation of highways. The land plot should be transferred to the concessionaire according to the procedure defined by the Land Code of Ukraine.

If the concessionaire is not the developer of the construction, then enterprise, institution or organization that is the land user must conclude with the concessionaire the development agreement simultaneously with signing of the concession agreement. The development agreement ??? shall define rights, obligations and liability of the concessionaire for execution of the developer's functions on behalf of and in interests of the relevant land user in accordance to town-planning legislation. It also shall contain terms of compensation of land tax paid by the land user. In this case, upon the decision of the grantor the enterprise, institution or organization takes part in the concession agreement on the side of the grantor.

Article 30. Urban Planning Documentation - needs consultation and cooperation with Ministry of the Regional Development

Alternative version of the article:

1. If a detailed plan of the territory is needed for the purpose of the concession project, the Grantor must ensure the development and approval of the corresponding detailed plan of the territory.

The works on the development of the territory detailed plan may be financed at the expense of the state, local budgets, the budget of the Autonomous Republic of Crimea or the funds of enterprises, institutions and organizations that belong to the management of the Grantor or at the expense of other sources not prohibited by law.

Costs for the development of a detailed plan of the territory shall be reimbursed by the concessionaire in accordance with the terms of the concession contract.

2. A detailed plan of the territory developed for the purpose of implementing a concession agreement does not require its approval by any person other than the Grantor in accordance with the procedure specified in the concession agreement and is not subject to approval in accordance with the procedure and requirements established by the Law of Ukraine "On Regulation of urban development», provided that the detailed plan of the territory does not contradict the general plan of the locality. The approval of a detailed plan of the territory by the Grantor creates sufficient grounds for the issuance of urban development constraints and constraints.

Article 31. Land Plots Allotment for the Concessions

1. The land, where the concession object is located or which is necessary for the construction of the concession object shall be granted to the concessionaire to use during concession agreement in accordance with the Land Code of Ukraine.

If a land plot use is necessary for the concession project implementation, at the request of the grantor, the executive bodies, local authorities, which according to the Land Code of Ukraine, are empowered to transfer land plots for use, are obliged to transfer the land plot necessary for the the concession agreement implementation to the concessionaire.

If a land plot use is necessary for the concession project implementation, the grantor is obliged to ensure the development and approval of the land management project on the land allocation and other documentation on land management, required by the law in order to provide the land for use.

Works on the development of a land management project for land allocation and other documentation on land management, required by the law in order to provide land for use, may be financed at the expense of the state, local budgets, the budget of the Autonomous Republic of Crimea or funds of enterprises, institutions, organizations, belonging to the management of the grantor or at the expense of other sources not prohibited by law.

Expenses for development of the specified documentation shall be reimbursed by the concessionaire in accordance with the conditions of the concession contract.

2. If a land plot use necessary for the concession project implementation, is being used or rent by companies, institutions or organizations, this company, institution or organization that is the land user is obliged to abandon its right to use the land plot in order to perform the concession agreement, except concessions to build and operate roads. Refused land plot is to be transferred to the concessionaire according to the procedure defined by the Land Code of Ukraine. By the moment of

transfer of such land plot to the concessionaire, it cannot be divided, privatized, transferred to the use of a third party or otherwise alienated.

3. Non-provision of land plots or rights to such land plots to the concessionaire in violation of the concession agreement or if the development agreement is not signed with the concessionaire that will cause impossibility to perform obligations stipulated by the concession agreement, for more than 9 months from the day the concession agreement was signed, shall be the ground for unilateral termination of the concession agreement by the concessionaire.

Article 32. Liquidation of Enterprises, Institutions and Organisations if all of their Assets are Transferred into Concession

1. Enterprises, institutions and organizations may be liquidated if all of their assets are transferred into concession.

2. The right of economic maintenance and operational management of enterprises, institutions, organizations on the concession object is terminated from the moment the concession object is transferred to the concessionaire.

CHAPTER VI

FINANCIAL CONDITIONS OF CONCESSION

Article 33. Types of Payments in Concession Agreements

1. The concession agreement shall provide for payments in favour of the concessionaire paid (directly or indirectly) for SGEI rendered by him by using concession object from consumers (users) of such services.

2. Depending on the profitability of concession, the concession agreement may provide for a concession payments by the concessionaire to the grantor or payments by the grantor to the concessionaire. The terms and conditions of making such payments shall be set out in the concession agreement.

3. If applicable the payments from concessionaire to the grantor may be in form of concession payment or/and single fixed fee defined by the concession agreement.

4. The concession payment shall be paid by the concessionaire in accordance to the concession agreement and may be in the form of:

a specified portion (in percentage) of net revenues received by the concessionaire as a result of its operations under the concession;

a specified portion (in percentage) of the concession object value that is defined basing on its market value;

in other forms consistent with the laws of Ukraine.

A concession payment may be defined by way of combination of different approaches to its calculation. The methodology of calculation of concession payments shall be adopted by the Cabinet of Ministers of Ukraine.

5. If the concession object is the object constructed (reconstructed) in accordance to the concession agreement, the concession payments shall be paid from the moment of its use for the purposes of provision of SGEI defined by the concession agreement.

6. Concession payments shall be credited respectively to the State budget of Ukraine or local budget. If there are state administrative body and local council on the side of the grantor in the concession agreement, the concession agreement shall determine the conditions of distribution of concession payments between the state and local budgets in accordance with the budgetary laws of Ukraine. Such conditions shall be defined in agreement on joint participation on the side of the grantor concluded between state administrative body and local council.

7. Singled fixed fee may be stipulated by the concession agreement for the purposes of performance by the grantor of the obligations of enterprise, institution, organization that is to be liquidated due to the conclusion of the concession agreement or in other cases provided by the agreement.

If the concession agreement provides for single fixed fee then it also should contain its further purpose use and terms of payment.

8. Payments from the grantor to the concessionaire may be in form of:

availability payment;

other payment provided by the concession agreement.

The payments from the grantor to the concessionaire shall recover only insignificant part of investments or costs that were incurred during the performance of works or provision of SGEI that is the subject of concession, except the occurrence of force-major events, and also except for the situations if the body regulating the relevant sector of natural monopoly, establishes tariffs on such services on the level lower then the level provided by the concession agreement.

Under normal operating conditions of the concession object, recoupment of the investments made by the concessionaire in accordance to the concession agreement

shall be achieved mainly by obtaining payments from consumers (users) of SGEI the provision of which is the subject of the concession agreement.

9. The payments from the concessionaire to the grantor and payments from the grantor to the concessionaire shall be paid in cash by wire transfer in terms defined by the concession agreement.

Article 34. State Support for Concession

1. State support may be granted to the concessionaire:

- 1) by means of state guarantees;
- 2) by means of municipal guarantees;
- 3) by means of financing from state budgets or other sources in accordance to state programs;
- 4) by means of financing from local budgets or other sources in accordance to local programs;
- 5) by means of payments to the concessionaire stipulated by the concession agreement including but not limited to the availability payments;
- 6) by means of purchasing of specified amount of goods (works, services) that are provided (manufactured, done) by the concessionaire in accordance with the concession agreement;
- 7) by means of supplying to the concessionaire of goods (works, services) that are required for the execution of the concession;
- 8) by means of the grantor developing the adjacent infrastructure required for the purposes of concession;
- 9) in other forms provided by the laws of Ukraine.

2. State support that is granted for the purposes of performance of the concession agreement shall not mitigate in full the risk of demand and/or supply or both of these risks that are carried by the concessionaire in accordance to the concession agreement and shall not exceed the amount of the investments the concessionaire stipulated by the concession agreement.

3. If the state support for concession project is granted according to points 1 and 3 of Part 1 of this articles, the decision on granting the state support for concession shall be made by the Cabinet of Ministers of Ukraine. If the state support for

concession project is granted according to points 2 and 4 of Part 1 of this articles, the decision on granting the state support for concession shall be made by local councils or by the Council of Ministers of the Autonomous Republic of Crimea in accordance with the law. IN all the other cases, the decision on granting state support to the concession project is to be made by the grantor.

4. The form and amount of the state support shall be fixed in the tender documents.

CHAPTER VII

GUARANTEE OF THE RIGHTS OF CONCESSION ACTIVITY SUBJECTS

Article 35. Guarantees of Concessionaire's Rights

1. The State guarantees stability of conditions for the implementation of concessions, observance of the rights and legitimate interests of the concessionaire.

Foreign and local concessionaires shall be treated equally and provided the same rights and guarantees that shall exclude application of any discriminatory measures.

Investments made by the concessionaire in concession are covered by the guarantees of investment protection stipulated by the laws of Ukraine and by the international treaties ratified by Ukraine.

2. The rights and obligations of the concessionaire defined by the concession agreement shall be regulated by the legislature that is in force on day of its conclusion except for the legislature that reduces tax and fees rates or abolish them, simplifies the regime of commercial activity, reduces procedures of state supervision (control) over commercial activity or weakens the liability of the concessionaire, - the mentioned legislature shall be applied from the day it comes in force.

The mentioned guarantees do not cover changes to legislature that regulates defense issues, national security, public order and environmental protection, licensing.

3. If, during the term of concession agreement, laws of Ukraine, or any act issued by any public authority establishes rules, changing the concessionaire's position in such a way that it becomes substantially deprived of what it was entitled to expect at the time of its entering into the concession agreement, the terms and conditions of the concession agreement shall be amended in accordance to the concession agreement.

4. The grantor may grant the concessionaire with special or exclusive rights to carry out activities specified in the concession agreement.

5. The grantor shall assist the concessionaire in obtaining the permit documents necessary for the implementation of the project on the terms of concession.

Article 36. Guarantees for Lenders

1. The concession agreement and/or financing agreement (direct agreement) shall provide for the guarantees for the lenders' rights.

2. A financing agreement (direct agreement) may provide for a creditor rights in the event of a concessionaire replacement, in particular the approval of such replacement, if initiated by the grantor and vice versa.

3. The financing agreement (direct agreement) may, in particular, include the right of the creditor to enter into the rights and obligations of the parties in the event of the exercise of such right, the conditions for reimbursement to the lender in the case of early termination of the concession agreement and other provisions.

4. It is prohibited to establish any restrictions that impede the realization by creditors of their rights related to the implementation of the project on the terms of the concession.

CHAPTER VIII

PECULIARITIES OF THE CONCESSIONS IN MARKETS THAT ARE IN STATE OF NATURAL MONOPOLY

Article 37. Peculiarities of Concessions on Markets that are in State of Natural Monopoly

1. The Concession agreement which provides for the rendering of the SGEI that are subject to the state regulation in the field of natural monopolies shall contain the following terms:

the grantor`s obligations to compensate part of investments made by the concessionaire into creation or improvement of the concession object under concession agreement (including costs incurred due to the debt financing and the risk premium), that cannot be reimbursed by the concessionaire due to the lower level of tariffs (prices) fixed by the agency authorized on state regulation of prices (tariffs) on relevant services in comparison with those provided by the concession agreement. The mentioned compensation shall be paid in the form of the availability payment or by means of other payments stipulated by the concession agreement;

or

the right of the concessionaire to refuse from the concession agreement or to suspend the performance of investment obligations till the agency authorized on state regulation of prices (tariffs) adopts new prices (tariffs) for the relevant services at the level prescribed by the concession contract;

or

the right of the concessionaire to initiate amendments on terms provided by the concession agreement with regard to the scope and terms of making investments, terms of running into operation of the concession object, and also amendments to the characteristics of SGEI defined by the concession agreement in accordance to the procedure and basing on grounds stipulated by the concession agreement.

CHAPTER IX

PECULIARITIES OF THE CONCESSIONS ON CONSTRUCTION AND OPERATION OF PUBLIC ROADS

Article 38. Concession Object with Respect to the Concessions on Construction and Operation of Public Roads

1. In case of concession on construction and operation of public road, the state public roads shall be concession object.

A public road may be transferred into concession only if an alternative free passage exists in accordance with Law of Ukraine No. 2862-IV "On Roads" dated September 8, 2005.

2. The concessionaire obtains rights to construction and operation of the public road in accordance to the procedure and on terms stipulated by the concession agreement.

The construction of public road encompasses the complex of road construction and design works related to the construction of a new road.

Article 39. Decision on the Expediency or Inexpediency of Concession on Construction and Operation of Public Roads

1. Decision on the viability of concession on construction and operation of public roads shall be taken by the Cabinet of Ministers of Ukraine based on the PPP appraisal conclusion.

The decision on concession viability on construction and operation of public road shall contain the following mandatory terms:

the grantor defined by the Cabinet of Ministers of Ukraine;

the executive bodies responsible for the preparation (seizure, redemption, allotment etc) of land plots for the construction and operation of public road;

general characteristics and technical parameters of the public road;

approximate value of the public road construction and basic financial indicators of the concession;

the boundaries of land plots that shall be allotted for the construction and operation of the public road;

the maximum concession term;

the maximum term for compensation of investments made by the concessionaire;

the maximum level of tolls for the public road;

the route of alternative free passage;

the necessary preparatory measures for concession tender;

other terms of concession on construction and operation of the public road.

Upon the adoption of the mentioned decision with regard to the land plots required for the concession on construction and operation of the public road, the relevant encumbrances on land plots shall be registered in accordance to the procedure stipulated by the laws.

The decision on holding the concession tender shall be taken by the grantor.

Article 40. Peculiarities of the Implementation of the Concession on Construction and Operation of the Public Road

1. The enterprise, institution, organisation that is the land user and, accordingly, the developer of construction, shall conclude with the concessionaire the development agreement simultaneously with signing of the concession agreement. The development agreement shall define rights, obligations and liability of the concessionaire for execution of the developer's functions on behalf of and in interests of the relevant land user in accordance to town-planning legislation. It also shall contain terms of compensation of land tax paid by the land user.

2. Property created under the concession agreement or obtained by the concessionaire in accordance to the concession agreement and located within the road easement area shall be in the ownership of the grantor except the road service facilities that may be obtained in ownership of the concessionaire in accordance to the concession agreement.

Property created under the concession agreement and located outside the road easement area shall be in the ownership of the concessionaire unless otherwise is provided by the concession agreement.

3. Upon running the public road into operation it shall be included into the list of state public roads if it is necessary under the provided procedure.

Article 41. Tolls on the Public Road

1. Tolls on public road constructed under concession shall be defined by the concessionaire within the limits of maximum rate of tolls for such road and may be adjusted considering the inflation rate.

The maximum amount of tolls shall be determined by the Cabinet of Ministers of Ukraine.

2. The Cabinet of Ministers of Ukraine shall determine the procedure with respect to the free pass on the public road granted in the concession and compensation for it (in cases of natural disasters, catastrophes, epidemics, epizootics, for vehicles of public officials of state executive bodies, units of the Ministry of Defense of Ukraine, the Border Guard Service, National Guard of Ukraine, the National Police and ambulance).

CHAPTER X

GOVERNING LAW AND DISPUTE RESOLUTION

Article 42. Governing Law

1. The concession agreement shall be governed by the laws of Ukraine.

2. The parties shall be free to choose the law governing their relations under other agreements entered into in connection with the concession unless otherwise provided by the laws of Ukraine.

Article 43. Dispute Resolution

1. Any disputes arising out of a concession agreement, a direct agreement or any other agreement related to a concession shall be settled through the dispute settlement process agreed by the parties in the respective agreement or in bilateral investment treaties ratified by Ukraine.

2. Parties to a concession agreement may freely choose the mechanism of dispute resolution, including mediation, non-binding expert appraisal, national or international (where the concessionaire or the private party in an institutional concession or at least one of their shareholders is a foreign-controlled legal entity or consortium, or a foreign individual) commercial arbitration or investment arbitration, and the procedural rules for such dispute resolution.

3. The grantor shall not be entitled to state immunity in case of the disputes under the concession agreement, direct agreement or any other agreement related to concession.

CHAPTER XI

CONTROL, MONITORING AND POST EVALUTION OF CONCESSIONS

Article 44. Control and Monitoring of Concessions

1. The control over the performance of the concession agreements shall be executed by the grantor, PPP Unit, other state executive bodies and local councils, by their officials in accordance with their powers stipulated by the law.

Executing the control over the performance of the concession agreements it is prohibited to interfere with any business activity carried out by the concessionaire or third parties engaged by the concessionaire; and also to disclose any confidential data, which was obtained during the monitoring.

The control over the performance of the concession agreements shall be executed by the PPP Unit by means of appraisal of reports on performance of the concession agreement submitted by the concessionaire every six months in the manner and in accordance with the form approved by the PPP Unit.

2. PPP Unit shall execute monitoring, compilation and disclosure of the results of concessions' implementation, including appraisal and monitoring of the general level of the grantor's risks in concessions in accordance to the provided procedure.

Article 45. Post Evaluation of Concessions

1. In order to assess the results of concessions, and to identify problems that arose during its implementation, upon the completion of a concession, its post evaluation shall be conducted.

The mentioned post evaluation shall be conducted by the body, authorised by the Cabinet of Ministers of Ukraine and not involved in the preparation and/or implementation of the respective concession.

2. The grantor and the concessionaire shall submit to the body, authorised by the Cabinet of Ministers of Ukraine, all the information on the concession to conduct its post evaluation.

3. Upon the completion of the post evaluation the body, authorised by the Cabinet of Ministers of Ukraine, shall prepare an evaluation report and submit it to the Public-Private Partnership Unit for its analysis.

CHAPTER XI

TRANSITIONAL AND FINAL PROVISIONS

1. This Law enters into force from the day of its publication.

2. To declare invalid:

Law of Ukraine "On Concessions";

Law "On Concessions for the Construction and Operation of Roads";

3. To amend such legislative acts of Ukraine: [***]

4. The Cabinet of Ministers of Ukraine within three months from the date of entry into force of this Law:

submit to the Verkhovna Rada of Ukraine proposals for bringing the legislative acts of Ukraine in compliance with this Law;

bring its normative legal acts in compliance with this Law;

to ensure the revision and abolition by the executive authorities of their normative legal acts that are not in compliance with this Law.

5. Legislative and other regulatory acts adopted prior to the entry into force of this Law shall be applied in the part that does not contradict this Law.

6. Contracts concluded before the entry into force of this Law shall be valid until the expiration of their term in accordance with the terms of the said agreements.

7. The State Property Fund of Ukraine [within three months from the date of entry into force of this Law] shall ensure the transfer of the register of concessions to the Ministry of Trade and Economic Development.

8. The provisions of this Law will not apply to public-private partnership projects carried out in accordance with the Law of Ukraine "On Public-Private Partnership".