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„Renegotiation v Termination of Concession Contracts: Comparative Analysis of EU Law and International Best Standards with Ukrainian Legislation"

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TABLE OF CONTENTS

LIST OF ABBREVIATIONS

EBRD	European Bank of Reconstruction and Development
IFC	International Financial Corporation
WB	World Bank
PPP	Public-Private Partnership
EU	European Union
MT	Master Thesis
MCL	Modern Concession Law
EBRD Core Principles	Core Principles for a Modern Concession Law adopted by the EBRD
UNCITRAL Legislative Guide	Legislative Guide on Privately Financed Infrastructure Projects prepared by the United Nations Commission on International Trade Law, 2001, A/CN.9/SER.B/4, United Nations Publication Sales No. E.01.V.4 ISBN 92-1-133632-5
Concession Directive	Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts, Official Journal of the European Union, Volume 57, 28 March 2014
UNCITRAL	the United Nations Commission on International Trade Law
OECD	the Organization for Economic Co-operation and Development
OECD Basic Elements	Basic Elements of a Law on Concession Agreements adopted by the Organization for Economic Co-operation and Development 1999-2000
UNCITRAL Model Provisions	Model Legislative Provisions on Privately Financed Infrastructure Projects prepared by the United Nations Commission on International Trade Law, 2004 Sales No.

E.04.V.11 ISBN 92-1-133583-3

UNECE	United Nations Economic Commission for Europe
CJEU	The Court of Justice of the European Union
TFEU	Consolidated Version of the Treaty on the Functioning of the European Union, Oct. 26, 2012, 2012 O.J. (C 326) 47
Para.	Paragraph
O.J.	Official Journal
Art.	Article
PfI	Private Finance Initiative

1. INTRODUCTION

1.1. Problem Statement

Concessions require large, sunk, irreversible investment enabled by long-term, complex contracts.[1] That is why it is impossible to imagine successful concession without project financing provided by banks or international financing institutions (i.e. EBRD, World Bank, IFC etc).

EBRD investments in private sector projects range from 5 million euro to 250 million euro.[2] The average amount is 25 million euro.[3] The representative examples of EBRD project financing of concession projects are Concession for Road Construction M5 motorway, Hungary in 1995 and 2004 (67 million euro loan)[4], Concession on construction of Water treatment plant, Romania launched in 2002 (55 million euro loan)[5], Sofia Water System Concession Project in 2000 (Senior debt of 31 million euro)[6] etc. Still EBRD 'criticised transition countries for not adopting laws more favourable for PPPs, for using a standardised concession agreement – and for not providing sufficient state guarantees for PPPs'.[7]

The role of the World Bank in concession project financing also deserves attention. The following projects were successfully implemented thanks to the project financing provided by the World Bank: Railway Concession Project in Cameroon (commitment amount to 21.39 million US dollars)[8], Toll Road Concession in Columbia in 2010 (commitment amount to 137.10 million US dollars)[9].

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[1] Daniel Albalate, Germà Bel, Paula Bel, Richard Geddes 'Risk Mitigation and Sharing in Motorway Concessions: An international benchmark', 2. Material is available at the link: http://www.human.cornell.edu/pam/cpip/upload/JCPA-Final-Oct-10-2015.pdf.

[2] Guide to EBRD financing, September 2013, 1. The Guide is availble at link: http://www.ebrd.com/downloads/research/factsheets/guidetofinancing.pdf.

[3] Ibid.

[4] Henry A Davis, 'Infrastructure Finance: Trends and Techniques', Euromoney Institutional Investor PLC, 2008, 452.

[5] Henry A Davis, 'Infrastructure Finance: Trends and Techniques', Euromoney Institutional Investor PLC, 2008, 453.

[6] Sofia Water System Concession Project, material is provided by the EBRD at the link: http://www.ebrd.com/work-with-us/projects/psd/sofia-water-system-concession-project.html.

[7] David Hall, 'WHY PUBLIC-PRIVATE PARTNERSHIPS DON'T WORK.The many advantages of the public alternative', Public Services International Research Unit University of Greenwich, UK 2015, 18

[8] World Bank. 2010. *Cameroon - Railway Concession Project*. Washington, DC: World Bank Group; material is available at the site of the World Bank by the link: http://documents.worldbank.org/curated/en/187591474652734289/Cameroon-Railway-Concession-Project.

[9] World Bank. 2010. *Toll Road Concession in Columbia*. Washington, DC: World Bank Group; material is available at the site of the WB by the link : http://documents.worldbank.org/curated/en/444651474909135631/pdf/000020051-20140604054216.pdf.

International Financial Corporation[10] is also known for its input in financing and development of concession projects. 'The International Finance Corporation (IFC) is the private sector funding arm of the World Bank. Whereas the WB itself lends directly to governments, the IFC lends only to private companies'[11]. Among projects with its financial participation are Manila Water Concession launched in 1997 (commitment amount to 50 million US dollars), Khandwa Water Supply Concession in India launched in 2010 (commitment amount to 2 million US dollars).[12]

Public-Private Partnership in Infrastructure Resource Center (World Bank Group) considers the "project financing" to be one of the most common - and often most efficient - financing arrangements for PPP projects.[13]

Thus bankability of the concession project is a crucial prerequisite for its successful development. Bankability is achieved when the lender is satisfied that the project will be successful so that the borrower will profit from the project and be able to repay the loan plus interest, and when the lender is satisfied that the contractual allocation of risk between the project parties is such that, even if difficulties are encountered, the debt will be protected so far as reasonably possible.[14]

Each lender stipulates its own requirements for project bankability. For instance, EBRD underlines seven areas that can 'enhance the bankability of concession projects'. They are as follows: to award concessions fairly, to clarify power of granting authorities, to clarify tax and licensing regimes, to provide lenders effective security, to permit government undertakings to lenders, to permit concessions to be governed by investor-friendly choice of law rules and dispute resolution mechanism, to provide for financial stabilization.[15] At the top of the mentioned areas is the main and crucial challenge for lenders in concession projects, that is the absence of assets in concession projects to secure the granted loan. The only primary assets of the project are

[10] The private sector lending institution to the World Bank.
[11] David Hall, 'WHY PUBLIC-PRIVATE PARTNERSHIPS DON'T WORK. The many advantages of the public alternative', Public Services International Research Unit University of Greenwich, UK 2015, 14.
[12] Mr. Rajesh Sinha.
[13] Public-Private Partnership in Infrastructure Resource Center (World Bank Group) 'Main Financing Mechanisms for Infrastructure Projects'; material is available by the link: https://ppp.worldbank.org/public-private-partnership/financing/mechanisms.
[14] Michael Dew, 'Bankability of construction contracts' May 9, 2005; material is available at the link: http://legaltree.ca/node/778.
[15] Walid Labadi and Anita Ramasastry, 'A favourable concessions regime: a lender's perspective and perceptions from transition countries', EBRD; material is available at the link:http://www.ebrd.com/downloads/legal/concessions/labadi.pdf.

contractual rights of the concessionaire. And this primary asset derives from the long-term concession agreement, which may be subject to modification or even termination in the event of a concessionaire's non-compliance with its obligations or under other circumstances. Empirical evidence supports the thesis that most concessions end up being renegotiated.[16] This is certainly true in the case of counties with the concession legislation that does not comply with International Best Standards, particularly, EBRD requirements.[17] Ukrainian concession practice is a good illustration of the consequences to which the drawbacks in concession legislature may lead. The first Ukrainian concession project that is concession on construction and operation of the highway Lviv –Krakovets illustrates this point clearly. This project was launched in Ukraine in 1999. It was concession on construction and operation of high motorways Lviv-Krakovets. Basing on the results of public tender Polish investor was chosen as a concessionaire. Project lasted for 10 years during which even land plots were not allotted for construction of motorway. From the first glance it seems unreasonable why the contract was not terminated during its first years when financial impossibility or breach of agreement was evident. The problem was deeper and concerned legal impossibility to renegotiate the contract without conducting new tender as well as absence of legal and contractual provisions for unilateral termination of the concession contract by the state as a grantor. The other concession projects launched in Ukraine followed the same scenario.

Nevertheless Ukrainian government deeply believes that concessions are the way to attract foreign direct investments and to ensure renewal of industrial and transport infrastructure.[18] For the present moment the list of projects for state concessions contains 49 state objects (ports, state roads, airports etc. – strategic infrastructure)[19]. To launch successful concessions Ukrainian legislation requires revision with the consideration of the International Best Standards and EU acquis communautaire.

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[16] Carlos Oliveira Cruz, Rui Cunha Marques 'ENDOGENOUS DETERMINANTS FOR RENEGOTIATING CONCESSIONS: EVIDENCE FROM LOCAL INFRASTRUCTURES'; material is available at the link: http://www.ub.edu/catedramaragall/old/eng/WP-1-2012final.pdf., 3

[17] EBRD ASSESSMENT OF THE QUALITY OF THE PPP LEGISLATION AND OF THE EFFECTIVENESS OF ITS IMPLEMENTATION 2011. Material is available by the link: http://www.ebrd.com/downloads/legal/concessions/ukraine.pdf.

[18] Policy Statement on concession legislation reforming, adopted by the Interagency Work Group on concession legislation reforming at Ministry of Economy, Trade and Development of Ukraine in accordance with Protocol #3 dated 20 January 2017.

[19] The Regulation of the Cabinet of Ministers of Ukraine 'On Approval of the List of State Property that is to be Transferred into Concession' dated 11December 1999 № 2293.

To conclude this section, it is evident that in order to find out how the Ukrainian concession legislation should be developed so to introduce the required level of protection of the rights and interests of the concessionaire and the lenders, the comparative legal analyses of the International Best Standards, EU law and Ukrainian legislature shall be carried out.

1.2. Scope of Analysis

Legal analyses shall be provided basing on the following Methodology.

First of all, the legal analyses of the main sources of the International Best Standards in respect of the definition of the concessions, concession contracts and the legal regime for modification or termination of the concession contract will be carried out (Chapter 2).

Afterwards, the general overview of existing EU Law and Ukrainian PPP and concession legislation, the areas of its contradictions and correlation with regard to the analysed issues will be considered (Chapters 3-4).

The detailed comparative analyses of concession legal frameworks through International Best Standards and EU law based on modern concessions trends will be provided (Chapters 5-6) basing on the following methodology for each of the issue:

General Description shall consist of:

- description of the legal approach provided by the International Best Standards on the corresponding issues;
- description of approaches stipulated in Ukrainian legislation on this issue including identification of discrepancies and contradictions between the PPP Law and concession legislation;

Practical Impact shall represent deficiencies in the current legislation on the corresponding issues based on experience of concession implementation

Gap Analysis shall specify the existing gaps based on the comparative analyses provided in General Description.

Conclusions will encompass brief summary and state results of comparison.

1.3. Research Questions

In this Master Thesis the following questions will be addressed basing on the comparative legal analyses of Ukrainian legislation with International Best Standards and EU Law:

- What shall be the legal grounds for modification of concession contracts without launching new tender? Shall the Law stipulate such grounds in order to prevent abuse of the rights by the grantor or by both of the parties?
- Shall the grantor have the right to unilateral termination of the concession contract and basing on which grounds? In case of the concession contract early termination shall the grantor be obliged to return investments to the concessionaire if the early termination was caused by (a) the concessionaire default; (b) by unilateral decision of the grantor?
- How may the lenders perform their step-in rights in concession project?
- In which cases termination of concession contract is tantamount to expropriation of contractual rights of foreign concessionaire?

Finding the answers to the mentioned questions will probably assist in defining legal gaps of Ukrainian legislation that are to be addressed in the process of approximation of Ukrainian legislation to EU Law and International Best Practices as well as in attracting lenders into local concession projects.

2. KEY SOURCES OF INTERNATIONAL BEST PRACTICE RELATED TO CONCESSION CONTRACTS, ITS TERMINATION AND RENEGOTIATION

2.1. EBRD Core Principles for a Modern Concession Law

As was pointed out in the introduction to this paper, the concessions should be bankable. The key legal conditions that promote the bankability of the concessions are not usually stipulated by national laws. For instance Austria, Germany , Denmark being leading countries in the field of concessions do not have any concession law basically relying on their normal legislation on contracts which apply also when one of the parties is the public sector.[20] But the concession projects bankability in these counties are assessed from the point of its compliance with the EU law as well as with International Best Standards set by international organizations or creditors.

Core Principles for a Modern Concession Law is the guidelines developed by the EBRD based on the International Best Standards and best practices and 'therefore can assist in assessing a country's MCL and in identifying the need for reform. These principles are meant as guidelines only and speak more of the results to be achieved rather than the process by which to achieve them'[21].

The guidelines contain 10 principles without providing any definition of the concession. By promoting clearness, fairness, stability, predictability and flexibility among their major objectives, the EBRD Core Principles aim at protecting both investors and the public sector from unfair treatment and abuses. The EBRD Core Principles are based on maximum transparency of procedures, thus ensuring benefits to all parties. Establishing these principles the Guidelines neither mention nor deal with the most crucial situations for long term projects that is renegotiation or termination of concession projects. Taking into consideration the aim of the Guidelines as 'to protect both investors and the public sector from unfair treatment and abuses'[22], they should have significant impact on national and EU legislature regulating the situations of renegotiation and termination of concessions. In mentioned situations the 'fair

[20] Steen Brun Nielsen, 'Report on EU/International Best Practices on Concession and PPP Legislation' EU-twinning Project - SR 07 IB FI 01, 18.03.2011, 14.

[21] EBRD, 'PPPs/Concessions Assessments'; material is available by the link: http://www.ebrd.com/what-we-do/sectors/legal-reform/ppp-concessions/sector-assessment.html.

[22] EBRD Core Principles for a Modern Concessions Law – Selection and Justification of Principles Prepared by the EBRD Legal Transition Team, 1; material is available by the link: http://www.ebrd.com/cs/Satellite?c=Content&cid=1395238764510&pagename=EBRD%2FContent%2FContentLayout (furtheron – 'EBRD Core Principles').

treatment' is quite complicated to define and to apply. For instance, the substitution of the concessionaire without new tender could be considered to be fair treatment or would cause the abuse of the participants who took part in initial tender that lead to concession contract.

Because of its aim and uniform character the EBRD Core Principles can be analyzed with respect to their application to possible events of modification and termination of the concession project.

Applying the mentioned EBRD Core Principles to the analyzed events of the early termination and modification of the concession contract, the following requirements and legislative approaches are to be complied with:

Principle 1. 'A Modern Concession Law (MCL) should be based on a clear policy for Private Sector Participation'. This principle may be interpreted with regard to the analyzed events as requiring transparent and comprehensive rules and requirements as to the private investor's participation from the moment his bid is accepted as winning till the termination of concession project including early termination. The implementation of this principle may mean that the general terms and consequences of the concessionaire's substitution or/and concession agreement termination/modification should be stipulated by the law.

Principle 2. 'MCL should create a sound legislative foundation for concession'. In justification of this principle the EBRD states:

> [A]n enabling legislative foundation is important for establishing roles and responsibilities of all parties and estimating a so-called country risk by potential investors.[23]

The significance of this principle is supported by the fact that before the Concession Directive was adopted 'the absence of clear rules at EU level governing the award of concession contracts was considered to give rise to legal uncertainty'[24].

Extrapolating this principle to the analysed events that may occur during the concession, it may be presumed that potential creditors of the concession project are to estimate the possible risk of concession agreement early termination in advance basing primarily on clear concession policy and national concession legislation. For instance if

[23] EBRD Core Principles, 2.
[24] Support for Improvement in Governance and Management '2014 EU Directives: Concessions', Brief 31, July 2014, 3.

the concession law does not clearly prescribe the return of investments to the concessionaire's creditors in case of the early termination of the concession agreement either due to the breach of the concessionaire or the grantor, the creditor will be reluctant to enter into such project. In the mentioned case the return of investments will be legally uncertain, depending on the court decision.

Principle 3. 'MCL should provide clarity of rules'. As EBRD explains:

> [c]larity is essential for the predictability of the concession regime, for the stability and validity of the concession agreement as well as for the prevention of ungrounded arbitrary actions by the contracting authorities.[25]

It means that clarity and unambiguity of rules may prevent early termination of the concession agreement caused by the potential invalidation of the contract that is in breach with the existing legislation. For instance, if the law defines legal procedure and consequence of the concessionaire's substitution the concession agreement will preserve its stability and validity. The implementation of this principle will prevent the situations similar to the one with Ukrainian concession project on construction and operation of high way Lviv-Krakovets. The project was launched in 1999 and terminated in 2010 after more than 10 years of legal impossibility to substitute the concessionaire and/or modify terms of concluded concession agreement. The existing Ukrainian concession legislation in contract with the analysed principle does not stipulate procedure, legal consequence of the substitution of the concessionaire. The mentioned project vividly confirms the significance of the analyzed principle.

Principle 4. 'MCL should provide a stable and predictable concession legal framework'. There may be various reasons and legal grounds for the early termination/modification of the concession agreement that are not consistent with long-term projects. One of such reasons that conflicts with analyzed principle is the instable concession legal framework. The EBRD maintains that:

> [T]he risk of changing legislation may endanger the validity of the project agreement and thus the sustainability of the project itself. In order to ensure the stability of the project agreement and the parties' capacity to carry out their rights and duties, the state should avoid frequent changes to concession-related legislation and the concession law should foresee a mandatory provision in the agreement

[25] EBRD Core Principles, 3.

stipulating the surviving applicability of the regime in force at the moment of agreement or other mechanisms for dealing with legal risks.[26]

This principle is also emphasized and repeated by the Recommendation 58 of the UNCITRAL Legislative Guide.[27] In accordance to this Recommendation concession law should require the concession agreement to address the potential legal risks and set forth provisions regarding compensation for the negative consequences of legislative changes as well as mechanisms for revising the terms of the agreement following the occurrence of such changes.[28] The OECD Basic Elements of a Law on Concession Agreements also contain a so-called "stability clause" that is meant to protect the concessionaire from the possible changes in legislation.[29]

***Principle 5.* 'MCL should promote fairness, transparency and accessibility of concession rules and procedures'.** In accordance to the interpretation of the EBRD:

> [T]his principle relates to the fairness, transparency and accessibility of the rules and procedures governing the selection of concessionaires, awarding and further implementation of a concession'.

In most legal acts the attention is paid exclusively to the observance of the fairness, transparency and accessibility of concession rules and procedures within the concession tender forgetting about its importance on the later stages of the project (i.e. OECD Basic Elements of a Law on Concession Agreements). On contrary, the Concession Directive[30] introduces 'the principles of equal treatment and transparency' throughout the whole tender procedure covering also the conclusion and execution of the concession contract.[31] In accordance to the article 3 of the Concession Directive contracting authorities and contracting entities shall aim at ensuring the transparency of the award procedure and of the performance of the contract.

Principle 6. 'MCL should be consistent with the country's legal system and particular laws'. Based on the explanation provided by the EBRD, the analyzed

[26] EBRD Core Principles, 4.
[27] Legislative Guide on Privately Financed Infrastructure Projects prepared by the United Nations Commission on International Trade Law, 2001, A/CN.9/SER.B/4, United Nations Publication Sales No. E.01.V.4 ISBN 92-1-133632-5 (furtheron –'UNCITRAL Legislative Guide').
[28] UNCITRAL Legislative Guide, Recommendation 58.
[29] OECD Basic Elements, article 18.
[30] Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts, Official Journal of the European Union, Volume 57, 28 March 2014 (furtheron – 'Concession Directive').
[31] Concession Directive , recitals 77 , 81, 87, article 3.

principle is aimed to 'avoid unnecessary collisions of laws and inconsistency in their application'. With regard to the events of early termination of the concession agreement and preservation of its validity in course of its modification, the inconsistency between PPP and concession legislation, between concession and tax, budget legislation may cause real obstacle to fair treatment of concessionaire. Thus, the legal consequences of the mentioned events should be stipulated by concession legislation corresponding to the provisions of other legislation (especially, tax, budget laws).

Principle 7. 'MCL should allow for negotiability of concession agreements'. This principle actually provides the concessionaire with right to influence and balance the terms of the contemplated concession agreement. As a result there will be more expectations that the concessionaire will make his input in stating contract clauses defining the condition precedent and legal consequence of the analyzed events (early termination and modification of concession agreement). The EBRD supports and justifies the principle explaining that:

> [F]reedom to negotiate concession agreements is important because it allows the factoring in of a greater variety of circumstances while allocating risks between the parties and thus elaborating a more creative and financially efficient approach to risk allocation.[32]

Nevertheless the Concession Directive as well as Ukrainian concession legislation[33] does not contain provisions allowing or prescribing the participation of the concessionaire in preparation and negotiation of concession agreement. In accordance to the article 37 (6) of the Concession Directive the subject-matter of the concession, the award criteria and the minimum requirements shall not be changed during the course of the negotiations.

Although the EBRD principles are general, stipulating the key requirements to the MCL, they are of key importance for understanding of the features of the sound concession legal framework regulating events of early termination and modification of the concession contract.

2.2. UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects

[32] EBRD Core Principles for a Modern Concessions Law – Selection and Justification of Principles prepared by the EBRD Legal Transition Team, 5.
[33] The Law of Ukraine 'On Concessions' dated 16.07.1999 № 997-XIV.

In 2001 UNCITRAL published Legislative Guide on Privately Financed Infrastructure Projects (containing recommendations for countries that need to have laws in place to authorize privately financed infrastructure programmes).[34] In July 2003, the UNCITRAL adopted the Model Legislative Provisions on Privately Financed Infrastructure Projects as an addition to the Legislative Guide on Privately Financed Infrastructure Projects, which has been adopted two years earlier. The UNCITRAL Legislative Provisions [35] translate the advice given in the recommendations contained in the Legislative Guide into legislative language (51 provisions).[36]

UNCITRAL Legislative Guide contains legislative recommendations that 'are intended to assist in the establishment of a legislative framework favourable to privately financed infrastructure projects'[37]. Neither UNCITRAL Legislative Guide, nor UNCITRAL Model Provisions contains definition of 'concession' although providing the recommendations based on this form of privately financed infrastructure project. Nevertheless these documents stipulate and pay special attention to the events of extension and termination of concession agreement. These issues are covered by the chapter V of the UNCITRAL Legislative Guidethat defines legal grounds as well as consequences of the extension and termination of concession agreements. At the same time the UNCITRAL Legislative Guide does not cover the issues related to possible modification of the essential terms of the concession agreement.

Pursuant to the para. (C) of the chapter V of the UNCITRAL Legislative Guide, the following legal approaches to the extension of the concession agreement are applied:

Option 1. The extension of concession agreement is not authorized. Under this approach after the term of concession agreement expires, the new concessionaire should be selected in accordance to the standard tender procedure.

Option 2. The extension of project agreement is only authorized under exceptional circumstances.[38]

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[34] Roger McCormick, 'Legal Risk in the Financial Markets' second edition Oxford University Press 2010, 197.

[35] Model Legislative Provisions on Privately Financed Infrastructure Projects prepared by the United Nations Commission on International Trade Law, 2004 Sales No. E.04.V.11 ISBN 92-1-133583-3 (furtheron –'UNCITRAL Legislative Provisions').

[36] Seungwoo Son, 'Legal Analysis on Public-Private Partnerships regarding Model PPP Rules' June 2012, 5; material is available at the site of UNCITRAL by the link: https://www.uncitral.org/pdf/english/colloquia/public-private-partnerships-2013/20120704_Report_on_PPP_legal_IssuesSon_Seungwoover.11.pdf.

[37] UNCITRAL Legislative Guide, xi.

[38] UNCITRAL Legislative Guide, 152.

Option 3. The exclusive concessions are rebidded periodically restricting the parties in their right to freely extend the concession agreement.

Option 4. The extension of the concession period is subject to a global cumulative limit or requires the approval of a specially designated public authority.[39]

In accordance to the recommendations provided in the UNCITRAL Legislative Guide, the Option 1 is not advisable because it excludes entirely the parties' right 'to negotiate an extension of the concession period under certain specified circumstances'[40]. In support of this UNCITRAL recommendation, it should be noted that the Option 1 is not consistent with EBRD Core Principles that declare 'negotiability of the concession procedures and contract'. As it is explained in the UNCITRAL Legislative Guide:

> [T]he parties may find that an extension of the project agreement (as a substitute for or combined with other compensation mechanisms) may be a useful option to deal with unexpected impediments or other changes of circumstances arising during the life of the project.[41]

In order to compare, it should be noted that the Ukrainian legislation follows the Option 4 defined in the UNCITRAL Legislative Guide. In accordance to the article 9 of the Law of Ukraine "On Concessions" the term of concession may be extended without new tender or other authorizations but under condition that the total period of concession will not exceed 50 years. In contrast with the Option 2, the extension of contract under the described approach does not require any special circumstances, the mutual consent of the parties is sufficient.

Concession Directive contains absolutely economic approach toward the issue of extension of the concession contract's term. In accordance to the recital 52 of the Concession Directive:

> [f]or concessions with a duration greater than five years the duration should be limited to the period in which the concessionaire could reasonably be expected to recoup the investment made for operating the works and services together with a return on invested capital under normal operating conditions, taking into account specific contractual objectives undertaken by the concessionaire in order to deliver

[39] Ibid 153.
[40] Ibid 153.
[41] Ibid 153.

requirements relating to, for example, quality or price for users. The estimation should be valid at the moment of the award of the concession.

So the determination of the duration of the concession agreement depends on the estimated period of the reimbursement of the concessionaire's investments that is to be defined before the concession tender. This approach is not covered by the analysed options stipulated by the UNCITRAL Legislative Guide. In fact it means that the parties to concession agreement are restricted in their right to prolong or revise otherwise the term of the executed concession. Although the Concession Directive does not stipulate directly the right of the parties to extend the term of the concession contract, it provides the parties with the right to modify the concession agreement under certain condition that will be analysed in the Chapter 3 of this Master Thesis.

The provisions of Concession Directive including the analyzed above should have been transposed into national legislature till 18 April 2016. As a result Member States were to exclude from their concession laws the provisions related to the concession period extension. For instance, before the harmonisation of the national French concession legislation[42] to the Concession Directive it was possible to extend the concession period exclusively in two cases: (i) for reasons of public interest but without the extension exceeding one year or (ii) when the delegatee is obliged to make material investments not provided in the initial agreement that modify the overall economic fairness of the delegated service and which cannot be amortised in the remaining duration of the agreement - other than by imposing a manifestly excessive price increase.[43] The French concession legislation effective before the Directive transposition complied with the UNCITRAL Legislative Guide recommendations (Option 2). French lawyers characterized it as follows:

> [T]he law was, therefore, clear and no extensions of the duration of concessions were permitted except in the above two well-defined hypotheses. Apart from in these two situations, no extensions were possible.[44]

After the transposition of the Concession Directive into French concession legislation, 'neither the Order nor its enacting decree include any provision concerning

[42] Law of France No. 93-122 of 29 January 1993 'On the Prevention of Corruption and the Transparency of Economic Life and Public Procedures'.
[43] Emmanuel Paillard, 'France: Extension Of The Duration Of Concession Contracts: Room For Doubt', Mondaq 4 November 2016.
[44] Ibid.

extensions of the duration of concessions. And for good reason, since their purpose is to transpose a Community Directive (Directive 2014/23/EU of the Parliament and Council of 26 February 2014 on award of concession contracts) which is itself silent on this question. Both the Directive and the Order and its enacting decree incorporate extensive statements on the durations of concessions, but nothing on the faculty of extension.'[45]

Basing on the legal analyzes of the practical consequences of the transposition of the Concession Directive provision with respect to the contract term extension into national legislation, the approach recommended by the UNCITRAL Legislative Guide (Option 2) appears to be more balanced and flexible. It allows remedying the exceptional situations, for instance, when immediate expiry of the concession would prejudice the public interest.

The legal grounds and consequences for early termination of the concession contract are stipulated at the para. (D) of the UNCITRAL Legislative Guide. The legal philosophy of the documents is based on the idea that 'termination should … be regarded as a measure of last resort'[46]. The UNCITRAL Legislative Guide distinguishes two ways of early termination: (a) termination initiated by the contracting authority and (b) termination initiated by the concessionaire. The question that remains open and is not answered by the UNCITRAL Legislative Guide is the question of the legal availability of unilateral early termination of the concession contract by each of the parties.

The Legislative Guide states the following legal grounds for the termination of the contract by the Contracting authority:

(a) Serious breach ("fundamental breach", "material breach") by the concessionaire. The basic idea behind this legal ground stipulated by the UNCITRAL Legislative Guide is that 'it is not advisable to regard termination as a sanction for each and any instance of unsatisfactory performance by the concessionaire'[47]. Should the definition and the list of events proving the serious breach committed by the concessionaire be defined in the national law or in the concession contract?! The UNCITRAL Legislative Guide is silent with regard to the mentioned questions. It is likely that remaining these issues without due attention may lead to selective,

[45] Ibid.
[46] UNCITRAL Legislative Guide, 153.
[47] Ibid 155.

unreasonable or premature decisions by the contracting authority. Given the legal logic of the UNCITRAL Legislative Guide, the procedure that precedes the termination due to the serious breach is of higher practical importance than the list of legal grounds based on which the occurrence of the serious breach is justified.

(b) Insolvency of the concessionaire, In accordance to the UNCITRAL Legislative Guide 'most domestic laws stipulate that the agreement may be terminated if the concessionaire is declared insolvent or bankrupt'[48]. With regard to the analyzed legal grounds of the concession contract termination the Legislative Guide emphasizes on the potential way to secure the rights and interests of the contracting authority in this situation by granting him the right to appoint temporary administrator 'so as to ensure the continued provision of the relevant service'[49].

(c) Termination for reasons of public interest. From the prospectus of international law, the state through its state bodies being the contracting authority in concession contract preserves its sovereign rights including the right to terminate concession contract for reasons of public interest or even expropriate contractual rights observing the Hull formula. But such unpredictable behavior of the contracting authority makes the concession contract so fragile and vulnerable construction that hardly will be accepted by the concessionaires and their lenders. Referring to the UNCITRAL Legislative Guide 'a general and unqualified right to terminate the project agreement for reasons of public interest may represent an imponderable risk that neither the concessionaire nor the lenders may be ready to accept without sufficient guarantees that they will receive prompt compensation for the loss sustained'[50]. With this regard the UNCITRAL Legislative Guide highly recommends to expressly mention in the draft of the concession agreement, circulated before the concession tender takes place, the situations considered to be "reasons of public interests" and the legal consequences for the concessionaire in case the contracting authority makes use of this right.

The UNCITRAL Legislative Guide states the following legal grounds for the termination of the contract by the concessionaire:

(a) Serious breach by the contracting authority. It should be noted that pursuant to the Legislative Guide the 'serious breach' encompasses also the events when 'the

[48] Ibid 157.
[49] Ibid 158.
[50] Ibid 158.

contracting authority alters or modifies the original project in such a fashion as to cause a substantial increase in the amount of investment required and the parties fail to agree on the appropriate amount of compensation'[51]. The crucial practical issues that arise in this situation are how the concessionaire could fix the fact of 'the serious breach' by the contracting authority and what legal remedies are applicable in order to protect the interests of the concessionaire and lenders involved in the project. The expected legal measure of the concessionaire in this situation is his right to withhold performance of its obligations in the event of breach by the other party of a substantial part of its obligations. The UNCITRAL Legislative Guide states with this regard:

> [I]n the event of serious breach by the contracting authority, the concessionaire may sustain considerable or even irreparable damage, depending on the time required to obtain a final decision releasing the concessionaire from its obligations under the project agreement.[52]

Without providing any exact recommendations to the possible legal ways of protecting rights and interests of the concessionaire the UNCITRAL Legislative Guide underlines the 'importance of government guarantees in respect of obligations assumed by contracting authorities and the need for allowing the parties the choice of expeditious and effective dispute settlement mechanisms'[53].

(b) Occurrence of an unforeseen change in conditions. The UNCITRAL Legislative Guide does not provide profound investigation of the possible 'unforeseen changes', especially with regard to the stabilization clause widely recognized and implemented in national legislature of many countries. The main criteria for considering the unforeseen change to have place is the fact 'the concessionaire's performance has been rendered substantially more onerous'[54]. In order to compare under the Law of Ukraine "On Investment Activity" the concessionaire is protected by stabilization clause that guarantees him protection from legal changes if they make his standing in agreement more onerous than it was initially (except for changes to tax, currency and budgetary legislation).[55]

[51] UNCITRAL Legislative Guide, 159.
[52] Ibid 160.
[53] Ibid.
[54] Ibid.
[55] the Law of Ukraine "On Investment Activity", article 18.

Thus, the UNCITRAL Legislative Guide can be considered to be the primary legal guide with respect to the issues of the modification and early termination of concession agreement.

2.3. UNECE Guidebook on Promoting Good Governance in Public Private Partnerships

The United Nations Economic Commission for Europe has played an important role in the global promotion of PPPs since 2009, when it argued for a coordinated global promotion of PPPs at an international conference involving the World Bank, ADB, UNECE and various Asian governments.[56] UNECE elaborated a Guidebook on Promoting Good Governance in Public Private Partnerships for policymakers, government officials and the private sector.[57] It consists of three parts: the first one gives general information on PPPs like the definition of PPP, its types and stages of development; the second sets out principles of good Good Governance in PPP, requirements to the public policy in the sphere of PPP and recommendations on public authority support for PPP; the third provides successful examples of implementation of PPPs in different countries (Canada, France, Israel, USA, Tajikistan).

The Guidebook defines 'concession' as one of the contractual form of the PPP 'where the 'user pays''[58]. It states that:

> [B]y bringing private sector management, private funding and private sector know-how into the public sector, concessions have become the most established form of this kind of financing. They are contractual arrangements whereby a facility is given by the public to the private sector, which then operates the PPP for a certain period of time. Oftentimes, this also means building and designing the facility as well.[59]

Although the Guidebook is mainly focuses on the analyses of the best standards of the PPP (concessions) good governance and its promoting, it also contains useful recommendations with regard to the analyzed events: modification, renegotiation and

[56] DAVID HALL, WHY PUBLIC-PRIVATE PARTNERSHIPS DON'T WORK. The many advantages of the public alternative', Public Services International Research Unit University of Greenwich, UK 2015 16.
[57] Guidebook on Promoting Good Governance in Public Private Partnerships, UNECE, 2008 (furtheron – Guidebook).
[58] Guidebook, 1.
[59] Ibid.

early termination of the concession agreement. The third principle of the Guidebook emphasizes that:

> [I]nvestors in PPPs need predictability and security in legal frameworks, which means fewer, simpler and better rules. In addition, the legal framework needs to take account of the beneficiaries and empower them to participate in legal processes, protecting their rights and guaranteeing them access in decision-making.[60]

The analysed events of potential modification and early termination of the concession agreement as a rule are inconsistent with the principle of 'predictability and security in legal frameworks', particularly, if the grantor initiates these events. Turning to the Guidebook in order to solve the dilemma between 'stability and predictability of legal framework' and the understanding of the possible occurrence of the analyzed events, the following balanced approach can be found. Declaring the principle of 'secure, predictable, stable, consistent and commercially-oriented framework of law and regulation[61], it is also recognized by the Guidebook that:

> [G]overnments can change the conditions of the agreement because of the long duration of projects. Yet, it is important before the change is made, that the private partners are fully consulted. Similarly, a government can 'step in' or terminate the contract if it perceives the project to be going awry. Here the private sector's anxieties can be addressed by contractual clauses, which make termination and 'step in' measures of last resort.[62]

Repeating the ideas stipulated by the UNCITRAL Legislative Guide, referring to the early termination as to the measure of the last resort, the analyzed document emphasizes that the grounds for early termination of the concession contract should be serious enough, not just single violation committed by the concessionaire. There should be 'material service default' (which includes continuous or repeated non-material defaults)'.[63] The parties are recommended to 'seek to ensure that 'cure periods' are fair and that as far as possible, the conditions under which termination or government step–

[60] Ibid 29.
[61] Ibid 29.
[62] Ibid 37.
[63] Ibid 37.

in may occur, are clearly specified and limited to material defaults so as to avoid hair trigger termination events'[64].

It should be noted that the Guidebook is silent with respect to the potential modification of the concession agreement, including extension of the concession term.

2.4. OECD Basic Elements of a Law on Concession Agreements

In early 2000, under the auspices of the Organisation for Economic Cooperation and Development (OECD) the Basic Elements of a Law on Concession Agreements were elaborated. The main objective of this document was to provide a reference for governmental authorities and parliaments in preparing new laws or reviewing the adequacy of existing concession laws and regulations.[65]

The significant difference between previously analysed UNCITRAL Model Provisions, UNCITRAL Legislative Guide and OECD Basic Elements is that the latter one 'is aimed not just at infrastructure projects but also at projects concerning exploitation of natural resources, in other words the classical remit for concessions'[66].

In contrast to the UNCITRAL Model Provisions that contains no definition of 'concession' as well as 'concession agreement', the OECD Basic Elements proposes the following definition of the concession agreement:

> [a]n agreement pursuant to which a Contracting Authority grants rights and agrees the obligations to be undertaken in relation to the construction, refurbishment or provision of Infrastructure or the exploration for and/or exploitation of Natural Resources (including any related treatment or transport facilities).[67]

The provided definition is considered by experts to be 'very open-ended in the sense that it could encompass any public contract'[68]. For instance, under Ukrainian laws the concessions are not applied in the field of the exploration for and/or exploitation of Natural Resources. Still in comparison with the Concession Directive definition of the 'concession agreement', it is quite narrow and in fact 'is limited to certain activities,

[64] Ibid 37.
[65] Steven Van Garsse, 'PUBLIC-PRIVATE PARTNERSHIPS, CONCESSIONS AND PUBLIC PROCUREMENT LAW' 3rd INTERNATIONAL PUBLIC PROCUREMENT CONFERENCE PROCEEDINGS 28-30 August 2008, 233.
[66] Steen Brun Nielsen, 'Report on EU/International best Practices on Concession and PPP Legislation' EU-twinning Project - SR 07 IB FI 01, 18.03.2011, 8.
[67] OECD Basic Elements, 1999-2000, para. 13.2. (b).
[68] Steen Brun Nielsen, 'Report on EU/International best Practices on Concession and PPP Legislation' EU-twinning Project - SR 07 IB FI 01, 18.03.2011, 9.

namely projects concerning provision of infrastructure or natural resources exploration/exploitation'[69].

The mentioned issue of the scope of the application of the OECD Basic Elements should be taken into consideration with regard to the further analyses of its approaches to the events of modification and early termination of concession agreement. The OECD Basic Elements among the essential terms of the concession agreement mentions 'the circumstances under which either party may terminate or seek renegotiation of the Concession Agreement'[70]. The mentioned provision is the sole provision of the OECD Basic Elements that regulates the events of renegotiation and termination of the concession agreement. The conclusion, that could be drawn basing on such legal technique of the document, is that the mentioned events are not the subject of the Concession Law regulation and should be agreed mutually by the parties in each of the contract, on case by case basis. Such discretion of parties' in considering the grounds for legally unlimited contract renegotiation and early termination is likely to lead to unbalanced concession agreements. Implementation of such approach in countries with transitional economy may result in increasing of corruption. The analysed approach stipulated by the OECD is similar to the legal concept incorporated in Ukrainian legislation under which the law does not even treat in any way the phenomena of the concession contract renegotiation after its conclusion leaving it for the parties to agree in the concession contract. In practice such legal approach causes inevitably grave consequence for the project, its transparency and fairness while in this way the parties may change actually the initial terms and conditions of the concession project. The approach of OECD Basic Elements is not supported by the Concession Directive that clearly defines the circumstances under which the renegotiation of the concession contract is possible without leaving it to the discretion of the parties.[71]

Basing on the results of the legal analyses of the OECD Basic Elements, it is evident that OECD Basic Elements could not be considered as appropriate source of international best practice for the purposes of defining terms under the occurrence of which the renegotiation, modification of the concession agreement and its early termination are possible, as well as legal consequence of the mentioned events.

[69] Ibid 9.
[70] OECD Basic Elements, chapter V, para 15 (q).
[71] Concession Directive, article 43.

2.5. The Guide to Guidance[72] issued by the European PPP Expertise Centre

The European PPP Expertise Centre (EPEC) is a joint initiative involving the European Investment Bank (EIB), the European Commission, Member States of the European Union, Candidate States and certain other states.[73] This Guide to Guidance issued by the EPEC is of special significance because its recommendations and legal approaches are mostly based on the EU legislation and CJEU settled court practice. It does not state how to create sound legal framework but focuses mostly on how to implement EU concession legislation. It 'seeks to identify the "best of breed" guidance currently available from PPP guidelines worldwide and selected professional publications.[74]

The document refers to the concession contract as a primary source for determination of such essential terms as:

(i) the procedure for permitted modifications, as well as their scope and nature;

(ii) the conditions for termination (categorised by party and type of event) and compensation upon termination (for each type).The document also envisages the parties to define 'the condition of the assets when they are "handed over" to'[75]. The EPEC also admits that there can be circumstances causing concession agreement termination under which there will be no obligations of the grantor to pay. At the same time the document declares that 'termination payments for PPP Company defaults are a key issue in PPP contracts as they are fundamental to their bankability'[76]. Such different approaches towards termination payments in one document allows presuming that the issue of mandatory nature of termination payments in case of early termination of concession contract despite of the legal grounds that caused such termination is not definitely resolved. For sure such divergence of approaches will not contribute to the bankability of the project.

(i) step-in rights (both for lenders and, in emergency situations, the Authority)[77].

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[72] The Guide to Guidance How to Prepare, Procure and Deliver PPP Projects issued by the European PPP Expertise Centre 07/2011 (furtheron –' The Guide to Guidance').
[73] The material is available at the site of the EPEC by the following link: http://www.eib.org/epec/about/index.htm.
[74] The Guide to Guidance, 5.
[75] Ibid 39.
[76] Ibid 41.
[77] The Guide to Guidance, 23.

In comparison with UNSITRAL Legislative Guide that recognizes modifications (particularly with respect to the extension of the concession term) as potentially possible without rebidding and without termination of the contract, the Guide to Guidelines emphasizes that 'renegotiations of significant aspects of the PPP contract have considerable implications for the parties and are in principle forbidden under EU law'[78]. It can be presumed that such conclusion is drawn by the EPEC not because there is direct prohibition in Concession Directive for renegotiation of the concession contracts but due to the potential distortion of the competition and as a result violation of the acquis communataire principles.

The EPEC explains that the renegotiation of concession contracts are 'generally regarded as undesirable because of the following:

- competitive bidding may be distorted: the most likely winner is not the most efficient company but the one most skilled in renegotiation;
- as renegotiations are carried out bilaterally, the positive effects of competitive pressure are lost; and
- renegotiations often reduce the overall economic benefits of PPP arrangements and might have a negative impact.[79]

With regard to the legal approach to termination of the concession contract, the EPEC distinguishes the following scenarios:

(a) Expiry of the PPP contract term. The main issues discussed by the EPEC in the Guide to Guidance with respect to the mentioned ground for concession contract termination is the advisability of termination payment in favour of the concessionaire. The general rule stipulated by the EPEC is that there should be no termination payment in favour of the concessionaire making only one exception from this rule: 'where PPP assets have a particularly long life compared to the term of the PPP contract, the payment of a residual asset value upon expiry may be contemplated'[80]. It is quite unexpected that the document does not place this issue in dependence to the default of the party or the level of obligations' performance.

(b) Termination due to default by the Concessionaire. As it was defined through the analyses of the UNCITRAL Legislative Guide and UNECE Guidebook there should

[78] The Guide to Guidance, 39
[79] Ibid.
[80] Ibid 40.

be objective serious breach of the contract by the concessionaire in order the contracting authority obtains right to initiate the termination of the contract. The Guide to Guidelines also emphasize on the continuous or repeated non-material defaults naming them "persistent breaches".[81] It refers to breaches as being persistent in case of 'accumulation of a number of breaches, each of which would not in itself be enough to trigger termination but all of which together constitute fundamental non-performance'[82].

Unlike other analysed International Best Standards, the Guide to Guidelines provides the available methodology that allows objectively estimate the dimension of the breach committed by the concessionaire. In accordance to it the existence of a persistent breach is defined by reference to the accumulation of penalties, deductions, performance points or warning notices over a specified period of time.[83] Only overcoming certain threshold the contracting authority will be empowered to unilaterally terminate the concession agreement.

(b) Termination due to the default by the Authority. The Guide to Guidance does not dwell upon legal grounds and circumstances that prove the default by the grantor, neither it requires such default to be serious or persistent breach. It also does not contain any recommendations with regard to the fair procedure of the contract early termination by the concessionaire, nor define the possibility of unilateral termination of such contract by the concessionaire. Still it declares that the concessionaire should be remunerated in full and provides recommended methodology for calculation of such reimbursement.[84] This methodology is based on the following principle: 'the net present value of what the future remuneration to the equity investors would have been if termination had not occurred'[85]. It looks as the most financially convenient approach the concessionaire may ever expect because it allows to return not only actually incurred costs but also net profits.

(c) Termination based on a voluntary decision by the Authority. Announcing this scenario as one available for concession contract termination, the document remains silent with regard to disclosure of its meaning, procedure. The EPEC only defines financial consequence in case of such termination spreading over them the same

[81] Ibid.
[82] Ibid.
[83] Ibid.
[84] Ibid 41.
[85] Ibid.

procedure as the one defined for termination due to the default by the grantor. It may be assumed that this scenario encompasses the termination of concession agreement by the grantor for reasons of public interest defined by the UNCITRAL Legislative Guide. This scenario is investigated in details in the EPEC Guidance "Termination and force majeure provisions in PPP contracts'[86].

(d)Termination in the event of prolonged force majeure. The Public-Private Partnership in Infrastructure Resource Center (the 'PPP IRC') proposes the following definition of "Event of Force Majeure" in concession contract:

> [a]n event beyond the control of the Authority and the Operator, which prevents a Party from complying with any of its obligations under this Contract, including but not limited to: act of God (such as, but not limited to, fires, explosions, earthquakes, drought, tidal waves and floods); war, hostilities (whether war be declared or not), invasion, act of foreign enemies, mobilisation, requisition, or embargo; rebellion, revolution, insurrection, or military or usurped power, or civil war; contamination by radio-activity from any nuclear fuel, or from any nuclear waste from the combustion of nuclear fuel, radio-active toxic explosive, or other hazardous properties of any explosive nuclear assembly or nuclear component of such assembly; riot, commotion, strikes, go slows, lock outs or disorder, unless solely restricted to employees of the Supplier or of his Subcontractors; or acts or threats of terrorism.[87]

In accordance to the EPEC Guidance 'Termination and Force Majeure Provisions in PPP Contracts', the occurrence of a force majeure event will raise two important issues: the extent to which the private partner is compensated during force majeure events and whether the PPP contract should be terminated if a force majeure event persists for a significant period of time.[88] Without trying to define the exact way of parties' actions in the analysed situation, as well the answers to the mentioned questions, the EPEC provides the general rule of parties' fair treatment in this situation

[86] European PPP Expertise Centre 'Guidance 'Termination and Force majeure provisions in PPP contracts. Review of current European practice and guidance', March 2013.
[87] Information is available at the site of the PPP IRC - http://ppp.worldbank.org/public-private-partnership/ppp-overview/practical-tools/checklists-and-risk-matrices/force-majeure-checklist/sample-clauses.
[88] EPEC Guidance 'Termination and force majeure provisions in PPP contracts. Review of current European practice and guidance' March 2013, 55.

that can be applied to any concession project despite the time and period of the force majeure, that is:

> [t]he burden of termination should be shared. The compensation payable by the Authority will therefore normally be (i) higher than that owed in the event of PPP Company default but (ii) lower than that due on Authority default. The compensation would normally cover the outstanding debt (and the hedging breakage costs). It may sometimes also cover the value of the equity injected into the project (but exclude any return on that equity).[89]

This legal approach can be considered not only as a fair standard for equal treatment of parties but a significant input in project bankability because it illustrates that in case of force-majeure the concessionaire's and lender's interests are protected to the reasonable extent. In comparison pursuant to the recommendations of the PPP IRC in case of the occurrence of the force majeure event the parties shall be released from the 'liability to the other Party for any losses or damages of any nature whatsoever incurred or suffered by that other'[90].

It also should be noted that unlike the EPEC, the UNCITRAL Legislative Guide (chapter V 'Duration, Extension and Termination of the Project Agreement') does not consider and examine 'the prolonged force majeure' as the legal ground for concession contract termination, nor provide legal consequence for the parties in case of its occurrence.

[89] The Guide to Guidance, 42.
[90] Information is available at the site of the PPP IRC - http://ppp.worldbank.org/public-private-partnership/ppp-overview/practical-tools/checklists-and-risk-matrices/force-majeure-checklist/sample-clauses.

3. EU LAW WITH RESPECT TO CONCESSION CONTRACTS' TERMINATION AND RENEGOTIATION

3.1. Principles and recommendations established by European Union Directives, European Commission Communications

3.1.1. General Legal Background

During 1992 and 2007 more than one thousand PPP contracts have been signed in the EU, representing a capital value of almost 200 billion euro (BlancBrude/Goldsmith/Välilä 2007: 7).[91] Nevertheless, at the legislative level EU never felt very comfortable in concession domain and ignored PPP. Until 2014 there were only few articles in the Public Procurement Directive[92] dealing with concessions. In spite of the only few articles devoted to concessions, within this period the EU generated numerous soft law instruments with respect to concessions/PPP: Commission Interpretative Communication on Concessions Under Community Law dated 12 April 2000[93]; Green Paper on Public Private Partnerships and Community Law on Public Contracts and Concessions dated 30 April 2004[94]; Report on the public consultation on the Green Paper[95]; Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on Public-Private Partnerships and Community Law on Public Procurement and Concessions[96], European Parliament resolution on public-private partnerships and Community law on public procurement and concessions[97]; European Commission Guidelines for Successful Public-Private Partnerships[98]; Commission Interpretative Communication on the application of Community law on Public Procurement, and

[91] Claudia Reim, 'Challenges to Public Private Partnerships The Example of the London Underground PPPs', August 2009, University of Potsdam, 1.
[92] Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (furtheron - 'Public Procurement Directive').
[93] Commission Interpretative Communication on Concessions Under Community Law dated 12 April 2000OJ C 121, 29.4.2000, p. 2–13.
[94] Green Paper on Public Private Partnerships and Community Law on Public Contracts and Concessions dated 30 April 2004COM/2004/0327.
[95] Report of the European Commission on the Public Consultation on the Green Paper on PPP and Community Law on Public Contracts and Concessions, Brussels, 3.5.2005 SEC(2005) 629.
[96] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on Public-Private Partnerships and Community Law on Public Procurement and Concessions, Brussels, 15.11.2005.COM(2005) 569:
[97] European Parliament resolution on public-private partnerships and Community law on public procurement and concessions (2006/2043(INI)).
[98] European Commission Guidelines for Successful Public-Private Partnerships, March 2003.

Concessions to Institutionalised Public-Private Partnerships (IPPP)[99]. Among the other EU major documents/decision/recommendation on concessions for that period were Public Procurement Directive and Directive 2004/17/EC of 31 March 2004[100].

It was not before January 2014 that the EU finally adopted, as part of its major reform package of public procurement laws a separate Directive of the European Parliament and of the Council on the award of concession contracts (the "Concession Directive") in an effort to try to harmonise the legal framework and to promote competition for service concessions. Pursuant to the article 51 of the Concession Directive Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 18 April 2016. Before that date, the award of services concessions was nevertheless subject to the general principles set out by the CJEU in its case law, and the award of works concessions has fallen under the Public Procurement Directive.[101]

The Concession Directive is however for concession only as the EU does not recognise the PfI as a third public procurement mode in between traditional public procurement and concessions. The term PFI refers to "Private Finance Initiative", a programme of the British Government permitting the modernisation of the public infrastructure through recourse to private funding. The same model is used in other Member States, sometimes with major variants. For example, the PFI model inspired the development of the "Betreibermodell" in Germany.[102]

The Concession Directive does not deal with the requirement for Public-Private Partnerships (PPPs) to take the legal form of either a public contract, governed by the Public Procurement Directive, or a concession, subject to the Concession Directive.[103] So there can be drawn the conclusion that the notion of PPP, for instance widely used in Guidelines issued by the EPEC, covers both public procurement and concession in

[99] Commission interpretative communication on the application of Community law on Public Procurement and Concessions to institutionalised PPP (IPPP) Brussels, 2008/C 91/02 OJ C 91, 12.4.2008, p. 4–9.
[100] Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors OJ L 134, 30.4.2004, p. 1–113.
[101] Support for improvement in governance and management '2014 EU Directives: Concessions', Brief 31, July 2014, 2.
[102] Green Paper on Public Private Partnerships and Community Law on Public Contracts and Concessions dated 30 April 2004COM/2004/0327, para.23.
[103] Support for improvement in governance and management '2014 EU Directives: Concessions', Brief 31, July 2014, 3

context of EU legislation. The Concession Directive is therefore of limited interest for the benchmarking of best international practices for PPP but it cannot be ignored by acceding country's candidate as it is used by EU as part of pass/no pass tests accession.

The Concession Directive (article 5) defines two types of concessions:

'works concession' means a contract for pecuniary interest concluded in writing by means of which one or more contracting authorities or contracting entities entrust the execution of works to one or more economic operators the consideration for which consists either solely in the right to exploit the works that are the subject of the contract or in that right together with payment.[104]

and

'services concession' means a contract for pecuniary interest concluded in writing by means of which one or more contracting authorities or contracting entities entrust the provision and the management of services other than the execution of works referred to in works concession to one or more economic operators, the consideration of which consists either solely in the right to exploit the services that are the subject of the contract or in that right together with payment.[105]

Basing on the provided definitions of the 'concession' it is clear that in contrast to the public procurement the concession does not presume any payments from the contracting authority to the concessionaire. That is why the model, where the remuneration for the private partner does not take the form of charges paid by the users of the works or of the service, but of regular payments by the public partner, for instance PfI does not fall into the scope of Concession Directive application.[106]

3.1.2. The Overall Nature of Concessions

Basing on the definition of both of the types of 'concession' and the provisions of the Concession Directive the following key characteristics of concessions that fall in scope of the Concession Directive application can be accentuated:

(A) The transfer by the contracting authorities of an operating risk to the concessionaire encompassing demand risk or supply risk or both. In accordance to the recital 18 of the Concession Directive the main feature of a concession, the right to exploit the works or services, always implies the transfer to the concessionaire of an

[104] Concession Directive, article 5 (1a).
[105] Concession Directive, article 5 (1b).
[106] Green Paper on Public Private Partnerships and Community Law on Public Contracts and Concessions dated 30 April 2004COM/2004/0327, para.23.

operating risk of economic nature involving the possibility that it will not recoup the investments made and the costs incurred in operating the works or services awarded under normal operating conditions even if a part of the risk remains with the contracting authority or contracting entity. The concessionaire must be exposed to a potential loss on its investments and costs, and it should not be merely nominal or negligible risk.[107] In light of this characteristic of concessions it may look as if the transferring of operational risks means that it is for the concessionaire to bear the risks of events that may require potential modification or even early termination of the concession contract. Still the commentators of the Concession Directive using the recital 20 of the Concession Directive underline that:

> [R]isks linked to bad management, contractual defaults by the concessionaire, or instances of *force majeure* are not decisive for the purpose of classifying the works/services as a concession, since those risks are inherent in every contract.[108]

The EU settled court practice proves that transferring the operational risk to the concessionaire is essential characteristic of concession (Privater Rettungsdienst and Krankentransport Stadler[109], Norma-A and Dekom[110], and Eurawasser[111]).

> [T]he risk must be understood as the risk of exposure to the vagaries of the market, which may include the following:
>
> - competition from other operators;
> - insufficient supply of services to meet demand;
> - inability of those liable to pay for the services provided;
> - insufficient revenue to meet the cost of operating the services; • liability for harm or damage resulting from inadequate services.[112]

(B) The Concession Directive applies only to works and services concessions that have a value equal to or greater than EUR 5186 000.[113]

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[107] Crown Commercial Service 'Handbook for the Concession Contracts Regulations' 2016, para. 6.3.
[108] Support for improvement in governance and management '2014 EU Directives: Concessions', Brief 31, July 2014, 5.
[109] C-274/09 Privater Rettungsdienst und Krankentransport Stadler v Zweckverband für Rettungsdienst und Feuerwehralarmierung Passau OJ C 139 from 07.05.2011, p.3.
[110] C-348/10 Norma-A SIA and Dekom SIA v Latgales plānošanas reģions OJ C 25 from 28.01.2012, p.13.
[111] C-206/08 Wasser- und Abwasserzweckverband Gotha und Landkreisgemeinden (WAZV Gotha) v Eurawasser Aufbereitungs- und Entsorgungsgesellschaft GmbH OJ C 267 from 07.11.2009, p.20.
[112] Support for Improvement in Governance and Management 'SELECTED JUDGEMENTS OF THE COURT OF JUSTICE OF THE EUROPEAN UNION ON PUBLIC PROCUREMENT (2006-2014)' July 2014, 21.

(C) The Concession Directive covers limited list of sectors in which concession can be implemented.[114]

(D) Concession should have limited duration but the Concession Directive does not stipulate its maximum period. A concession contract must include an end date, it cannot be open ended as that would restrict the market and distort any future competition.[115]

(E) Selectivity basis as a way to choose concessionaire. Concession contracts are awarded on the basis of objective criteria that identify an overall economic advantage for the contracting authority or utility as opposed to a basis of price or cost using a best price-quality ratio.[116]

The Concession Directive does not stipulate other mandatory characteristics of concession. For the purposes of the further analyses the provided characteristics may be considered as the ones that define the 'overall nature of concession'. The term 'overall nature of concession' is frequently used by the Concession Directive without its definition and is of special interest with respect to the scope of allowed modifications to concession agreement. It serves as a guideline of the concession general principles in accordance with EU basic principles and to fix boundaries between concession and public procurement.

With regard to the events analysed in this MT, the Concession Directive covers and regulates all of them. Renegotiation of essential terms/conditions of concession and potential modification of concession contract are regulated by the article 43 of the Concession Directive. The article 44 of the Concession Directive covers the early termination cases.

As it was mentioned the Concession Directive recognizes both 'renegotiation of essential terms/conditions of concession' and 'modifications of concession contract'. It distinguishes these two potential events basing on the extent and significance of envisaged amendments. Consequently the significant changes cause the necessity to pass a new concession tender in order to make relevant amendments to concession contract.

3.1.3. Renegotiation v Modification of Concession Contract

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[113] The article 8 of the Concesson Directive stipulates the method of calculation of the threshold sum.
[114] Concession Directive, article 10.
[115] Crown Commercial Service 'Handbook for the Concession Contracts Regulations' 2016, para.9.1.
[116] Crown Commercial Service 'Handbook for the Concession Contracts Regulations' 2016, para.4.1.

Pursuant to the recital 75 of the Concession Directive 'material changes to the initial concession, in particular to the scope and content of the mutual rights and obligations of the parties, including the distribution of intellectual property rights' will lead to renegotiation procedure and new tender. It is also important in order to estimate 'if the amended conditions would have had an influence on the outcome of the procedure, had they been part of the initial procedure'[117].

The material change is also referred to as substantial change that 'renders the concession materially different in character from the one initially concluded'[118] in accordance to the article 43 of the Concession Directive.

The Concession Directive in its article 43 contains the exhaustive list of circumstances allowing modification of the concluded concession contract without new concession award procedure. The amendments allowed without new tender may be divided into following types:

First type of modifications - If concession agreements contain the "clear, precise and unequivocal" review clauses that describe the scope and nature of the possible modifications and doesn't allow for an alteration of the nature of the concession.[119] Value revision clauses are allowed and do not depend on the monetary value of concession. It should be stressed that under article 43 (1a) of the Concession Directive the review clauses should have been included in the initial concession documents.

From the wording of Article 43 (1a) of the Concession Directive it may look as if parties have unlimited discretion in modification of the concession agreement fully depending on the scope of included "clear, precise and unequivocal" review clauses. Still in the recital 78 of the Concession Directive, it is explained that such clauses should not give them unlimited discretion. It also states that:

> [s]ufficiently clearly drafted review or option clauses may for instance provide for price indexations or ensure that, for example, communication equipment to be delivered over a given period continues to be suitable, also in the case of changing communications protocols or other technological changes. It should also be possible under sufficiently clear clauses to provide for adaptations of the concession which are rendered necessary by technical difficulties which have

[117] Concession Directive, recital 75.
[118] Concession Directive, article 43 (4).
[119] Concession Directive, article 43 (1a).

appeared during operation or maintenance. It should also be recalled that concessions could, for instance, include both ordinary maintenance as well as provide for extraordinary maintenance interventions that might become necessary in order to ensure continuation of a public service.[120]

In spite of examples provided by the quoted recital the Concession Directive stipulates no limitations, restrictions or boundaries for review clauses. For the purposes of interpreting the wording of the "clear, precise and unequivocal" clauses, the case Case 496/00 Succhi di Frutta[121] is of special significance while it explains the mentioned requirements through the application of principle of transparency that should be observed on the stage of the concession tender as well as on the stage of concession contract performance. The CJEU stated that:

> [T]he principle of transparency which is its corollary is essentially intended to preclude any risk of favouritism or arbitrariness on the part of the contracting authority. It implies that all the conditions and detailed rules of the award procedure must be drawn up in a clear, precise and unequivocal manner in the notice or contract documents so that, first, all reasonably informed tenderers exercising ordinary care can understand their exact significance and interpret them in the same way and, secondly, the contracting authority is able to ascertain whether the tenders submitted satisfy the criteria applying to the relevant contract.[122]

Thus, the further amendments should not violate the rights of the tenderers that took part in the concession tender basing on the results of which the concession agreement was concluded.

Stipulating 'clear, precise and unequivocal' review clauses in concession agreement, the EU case law with respect to the modification of public procurement contracts should also be considered while the Public Procurement Directive contains the similar provisions concerning contract modification on basis of 'clear, precise and unequivocal" review clauses.[123] C-549/14 Finn Frogne[124] illustrates the attitude of ECJ towards 'clear, precise and unequivocal" review clauses. It serves as:

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[120] Concession Directive, recital 78.
[121] Case 496/00 Commission of the European Communities v CAS Succhi di Frutta SpA. OJ C 79 from 18.03.2000, p.8 (furtheron –'Case 496/00 Succhi di Frutta').
[122] Succhi di Frutta. para. 111.
[123] Public Procurement Directive article 72 (1a).
[124] C-549/14 Finn Frogne A/S v Rigspolitiet ved Center for Beredskabskommunikation OJ C 402 from 31.10.2016, p.4 (furtheron –'C-549/14 Finn Frogne').

> [a] reminder of the usefulness and importance of clear and robust change provisions in contracts and careful planning at the outset of a procurement process. A broadly drafted, general review clause will not be sufficient. Review clauses must state the scope and nature of possible modifications and the conditions under which they may be used and the modifications must not alter the overall nature of the contract.[125]

With regard to the scope of review clauses pursuant the Case C-337/98 Commission v. France[126], the change mechanism shall minimises re-negotiation of terms[127]. On the contrary open-ended and boiler plate review clauses would not meet required standard of precision in accordance to the case Law Society of England and Wales v Legal Services Commission[128].

The other issue that should be considered in order to outline the scope of allowed amendments under article 43 (1a) is the manner of stipulating the review clauses in the initial concession documents. Pursuant to the judgment upheld by the UK Supreme Court in the public procurement case of Edenred (Group UK) Limited v Her Majesty's Treasury, the Court held that:

> [t]he prohibition against modifying a contract to encompass services not initially covered does not prevent the extension of the contracted services beyond the level of services provided at the time of the initial contract if the advertised initial contract and related procurement documents envisaged such expansion of services, committed the economic operator to undertake them and required it to have the resources to do so. [129]

In order to define under what circumstances the concession nature will be altered, it is necessary to appeal to EU case law. With this regard the Pressetext case[130] is of

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[125] Susie Smith, 'Procurement Byte: Contract change provisions' 2016, article is available by the following link: https://www.bevanbrittan.com/insights/articles/2016/procurement-byte-contract-change-provisions/.

[126] C-337/98 Commission of the European Communities v French Republic, OJ C 335 from 25.11.2000, para.21.

[127] C-337/98 Commission of the European Communities v French Republic, OJ C 335 from 25.11.2000, p.21, para.53.

[128] Case No. CO/9207/2010 Law Society of England and Wales v Legal Services Commission dated 30 September 2010 para. 20, 114.

129 Edenred (Group UK) Limited v Her Majesty's Treasury dated 01 July 2015, [2015] UKSC 45, para. 36.

130 Case C-454/06 pressetext Nachrichtenagentur GmbH v Republik Österreich (Bund), APA-OTS Originaltext-Service GmbH and APA Austria Presse Agentur registrierte Genossenschaft mit

special interest because it 'provides a non-exhaustive list of three circumstances which would be regarded as constituting a material change to the contract which was originally awarded. This would have been the case if the modification:

- introduces conditions which would have allowed for the admission or acceptance of a different tender
- extends the scope of the contract considerably or
- changes the economic balance of the contract in favour of the contractor.'[131]

Pursuant to the Pressetext case the UK Supreme Court in Edenred (Group UK) Limited v Her Majesty's Treasury clarified that:

> [t]he review clause should have limits to its application that is a set of principles governing changes including (a) no increase in profit margin unless agreed; (b) no change in risk allocation; (c) charges for new services based on charges for similar existing services; (d) duration should not exceed term of the initial agreement.[132]

It is likely that the concession nature will be altered when the project will be deprived of the essential features of the concession analysed in paragraph 3.1.2. of the MT. For instance the operational risk will be transferred to the grantor as a result of the contemplated modifications. Still if the value of concession is reduced to the level that is below the threshold established by the Concession Directive, it hardly alters the nature of concession but will lead to the situation when the relations under such concession agreement will be out of the scope of the Concession Directive. Such concession contract will be subject to the TFEU[133] principles if it has cross-border interest.[134]

Concession nature will be altered if change pursuant to a review clause related to a "decisive factor" in award of contract in accordance to the Case C-91/08 Wall AG.[135] The CJEU stated in this case:

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beschränkter Haftung, Judgment of the Court (Third Chamber) of June 19, 2008 , OJ C 209 from 15.08.2008, p.8 (furtheron – 'Case C-454/06 Pressetext').

[131] Norton Rose Fulbright, 'Edenred (UK Group) Ltd v HM Treasury and Others [2015]' – December 2015, 2.

[132] Edenred (Group UK) Limited v Her Majesty's Treasury para. 13, 5.

[133] Consolidated Version of the Treaty on the Functioning of the European Union, Oct. 26, 2012, 2012 O.J. (C 326) 47.

[134] Support for Improvement in Governance and Management 'SELECTED JUDGEMENTS OF THE COURT OF JUSTICE OF THE EUROPEAN UNION ON PUBLIC PROCUREMENT (2006-2014)' July 2014, 20.

[135] Case C-91/08 Wall AG v Stadt Frankfurt am Main, Frankfurter Entsorgungs- und Service (FES) GmbH, dated 13/04/2010, OJ C 148 from 05.06.2010, p.4 (furtheron –'Case C-91/08 Wall AG').

> [A] change of subcontractor, even if the possibility of a change is provided for in the contract, may in exceptional cases constitute such an amendment to one of the essential provisions of a concession contract where the use of one subcontractor rather than another was, in view of the particular characteristics of the services concerned, a decisive factor in concluding the contract, which is in any event for the referring court to ascertain.[136]

It means that before stipulating the review clause the contracting authority should determine the decisive factor (criteria) for the selection of the concessionaire. So that the review clause was not the use as a way to circumvent the concession tender criteria and as a result to distort competition.

Second type of modifications – If additional works or services become necessary. Pursuant to the article 43 (1b) of the Concession Directive the mentioned amendments are subject to the following two cumulative conditions where a change of concessionaire: (i) cannot be made for economic or technical reasons such as requirements of interchangeability or interoperability with existing equipment, services or installations procured under the initial concession; and (ii) it would cause significant inconvenience or substantial duplication of costs for the contracting authority or contracting entity. Still the general rule provided by the Concession Directive is that 'increase in value shall not exceed 50 % of the value of the original concession'[137]. It should be noted that this rule applies only to the second type of modifications. This threshold is not applicable to the other types of modifications.

Some of EU countries noticed the misuse of the second type of allowed modifications. In Romania 'most concession contracts for works or services entered into by the contracting authority were amended with a significant number of such amendments being made in respect of additional works thus increasing the total contractual value'[138].

It is also notable that the issue of possible discrimination of the concession tender bidders due to the further modification/adjustment of concession contract particularly with respect to additional works was discussed in the Report on the Public Consultation

[136] Case C-91/08 Wall AG , para. 39.
[137] Concession Directive, recital 76, article 43 (1b).
[138] Adriana Almasan and Peter Whelan, 'The Consistent Application of EU Competition Law.Substantive and Procedural Challenges' 2017, 95.

on the Green Paper on PPP and Community Law on Public Contracts and Concessions. It states that:

> [A]mong those contributors who criticise the adjustment of PPP contracts and concessions over time, several say that readjustment clauses can have discriminatory effects. If the public authority agrees to the bidder's subsequent request to readjust the contract, this might discriminate against competitors who based their initial bids on more realistic estimates. Subsequent amendment of the contract, leading to an extension of the time limits for completion, would be unfair to those competitors who did not obtain the contract because they were more realistic in their estimates.[139]

Moreover, there arises the question how the modifications allowed by the Concession Directive comply with the EU competition legislation. The Romanian Competition Council came to conclusion that the above mentioned practice allowing the modifications to concession agreements is 'likely to distort competition and generate dysfunctionalities in the market'[140] even being in compliance with concession legislation.

Third type of modifications – where the need for modification is unforeseen by 'diligent contracting authority or contracting entity' and doesn't alter the overall nature of the concession, for contracting authorities this is subject to a 50% maximum increase in initial concession value.[141]

The well –known economist in the field of PPP J. Luis Guasch considers that 'contracting parties cannot define ex ante the contingencies that may occur after the signing of a contract. Thus the contracting parties may face unforeseen contingencies.'[142]

Fourth type of modifications - where a new concessionaire replaces the existing concessionaire because of insolvency, genuine restructuring, or use of the review clause etc.[143] This exemption from the tender is of great interest for lenders because it enables them to exercise their step-in right in the project in case of the concessionaire's default.

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[139] Report of the European Commission on the Public Consultation on the Green Paper on PPP and Community Law on Public Contracts and Concessions Brussels, 3.5.2005 SEC(2005) 629, 22.
[140] Ibid.
[141] Concession Directive, article 43 (1c).
[142] Jose Luis Guasch, 'Granting and Renegotiating Infrastructure Concessions. *Doing it Right'* The International Bank for Reconstruction and Development / THE WORLD BANK 2004, 73.
[143] Concession Directive, article 43 (1d).

Pursuant to the EPEC such approach 'removes concern that lenders' rights to step in to projects that are not performing and take action (e.g. to replace/restructure the SPV in the contract) might be at odds with the Procuring Authority's procurement duties'[144].

The concept of preserving concession agreement and allowing the concessionaire to 'to undergo certain structural changes during the performance of the concession, such as purely internal reorganisations, takeovers, mergers and acquisitions or insolvency' is emphasized at the recital 77 of the Concession Directive. It clearly states that such 'structural changes should not automatically require new award procedures for the concession performed by that tenderer'. The main requirement that shall be complied with is the observation of the principles of equal treatment and transparency.

Fifth type of modifications - where the modifications, irrespective of their value, are not substantial.[145]

Pursuant to the recital 75 of the Concession Directive modifications of the concession resulting in a minor change of the contract value up to a certain level value should always be possible without the need to carry out a new concession procedure (*minimis* thresholds). The aim of this approach allowing minor changes is 'to ensure legal certainty'.

Minimis thresholds are established by the article 43 (2) of the Concession Directive at the level of the threshold for concessions (currently EUR 5 186 000) and constitute 10% of the value of the initial concession. Thus any change exclusively with respect to the value of the concession up to 10% of its estimated value without altering the overall nature of concessions will be allowed without holding a new tender.

Under the article 43 (4) of the Concession Directive the modification shall be considered to be substantial where one or more of the following conditions is met: a modification will be considered "*substantial*" if, either (a) had it been known during the initial procurement, the modification would have encouraged other candidates to bid or caused a different bid to be chosen or (b) it changes the economic balance of the contract in favour of the contractor, or (c) it extends the scope "*considerably*", or (d) it sees a new contractor replace the contractor initially awarded the contract.[146] The

[144] European PPP Expertise Centre, 'PPPs and Procurement. Impact of the new EU Directives' 04/2016, 11.
[145] Concession Directive, article 43 (1e).
[146] European PPP Expertise Centre, 'PPPs and Procurement. Impact of the new EU Directives' 04/2016, 11.

concept of ‘change in economic balance as a material change of the contract‘ initially introduced by the Presstext case is still in the process of development and specification. Pursuant to the R (Gottlieb) v Winchester City Council[147] the court came to conclusion that ‘in considering changes to the economic balance, regard should be had to potential profits from third parties such as rental revenue, or profit from sale of the residential units that the developer may make’[148].

The above analyzed five types of modifications form the exhaustive list of modifications allowed without new tender under the Concession Directive. In order to observe the principle of transparency while making the allowed changes to the concluded concession agreement the EPEC recommends to granting authorities:

> [t]o consider publishing a voluntary *ex-ante* transparency (or VEAT) notice in OJEU, describing the change and the circumstances giving rise to it. This would mitigate the risk that the amended contract could be declared ineffective if successfully challenged.[149]

3.1.4. Termination of the Concession Agreement

The Concession Directive recognizes the right of the parties on early termination of the concession agreement stipulating common legal grounds for this procedure in its article 44. Basing on the wording of the analysed article, each of the party shall be entitled to initiate early termination of the concession agreement.

Still the Concession Directive remains silent with regard to the legal consequences of such termination. It also does not differentiate legal grounds for the concession agreement termination by the grantor and by the concessionaire. Pursuant to the article 44 (1) these issues as well as the conditions under which early termination is allowed are to be determined by the applicable national law. Nevertheless the recital 80 of the Concession Directive declares that obligations under Union law in the field of concessions prevail over the provisions of national concession legislature of the Member States.

In spite of the shared competence with the Member States with respect to the concession early termination issues, the Concession Directive provides the following

[147] R (Gottlieb) v Winchester City Council, Administrative Court of England and Wales dated 11 February 2015, [2015] EWHC 231.
[148] Hannah Kramer ‘When is a variation caught by procurement law?’ Property Law Journal May 2015, 15-16.
[149] European PPP Expertise, ‘PPPs and Procurement. Impact of the new EU Directives’ 04/2016, 13.

exhaustive list of circumstances under which the parties and other contracting entities are entitled to terminate the concession agreement:

1. If the concession agreement has been subject to a substantial modification that constitutes a new award;
2. If it is discovered after contract award that the concessionaire should have been excluded on mandatory exclusion grounds;
3. Where the CJEU has declared a serious infringement by the contracting authority of its obligations, meaning the contract should not have been awarded to the concessionaire.[150]

Among the stipulated grounds there are no such standard grounds for early termination of the contract as the material breach of the agreement by either of the parties, termination by granting authority due to reasons of public interest or force major events. The provided grounds reflect purely EU specific of the concession legislature that shall not interfere in the civil contractual relations that are subject to the regulation of national legislature.

Provisions of the Concession Directive listing the grounds for early termination of concession agreement lack rules with respect to the protection of the concessionaire's investments (costs) carried till the date of early termination. It causes serious risks to the lenders engaged in concession projects:

> [I]n the event of early termination of the contract – as a result of termination, resolution or invalidity of the contract decided by the administrative judge – the lenders must ensure that compensatory commitments made by the contracting authority remain effective and binding. For instance, lenders usually require that the financial costs incurred between the effective date of the contract and the date of early termination, are properly compensated.[151]

In order to overcome the reluctance of lenders to invest European concession projects caused by the existing version of Concession Directive, national authorities of some EU Member States settled these issues in their national concession laws while transposing the Concession Directive. For instance, the French government adopted two

[150] Concession Directive, article 44.

[151] Peter Smith 'Legal Certainty in French Procurement & Concession Contracts Post-Reform: Taking Into Account The Lenders' Perspective', article is available at http://publicspendforumeurope.com/2016/07/25/legal-certainty-in-french-procurement-concession-contracts-post-reform-taking-into-account-the-lenders-perspective/.

mechanisms[152] aimed at ensuring legal certainty for the parties to concession contract and, ultimately for their lenders: severability of contractual indemnification provisions and qualification of the financial costs as "necessary expenditure.[153] The severability of contractual indemnification provisions mean that these provisions remain valid even in case of the early termination of the concession agreement. As a consequence, the concessionaire may request to be indemnified for the expenses incurred under the concession contract which have been useful to the grantor, including financing expenses and costs.[154]

3.2. Relevant CJEU Case-Law

In accordance to the recital 18 of the Concession Directive, difficulties related to the interpretation of the concepts of concession have given rise to numerous judgments of the Court of Justice of the European Union. The Concession Directive repeatedly refers to the 'extensive case law of the Court of Justice of the European Union'[155]. Francisco L. Hernández González[156] has indicated that Concession Directive 'codifies ECJ case law'[157].

Although the existing CJEU court practice covers a lot of issues with respect of the implementation of concessions, for the purposes of the analyses in this MT the cases that relate to the nature of concession, modification and early termination of concession agreements will be investigated.

3.2.1. Material Change of the Concession Contract: Pressetext Case

Pressetext Case is considered to be 'the first significant CJ case to set out clear principles applying to changes in contract terms and changes in the contractual partner

[152] Ordinance No. 2015-899 du 23 juillet 2015 relative aux marchés publics , art. 89 and Ordonnance n° 2016-65 du 29 janvier 2016 relative aux contrats de concession , article 56.
[153] Peter Smith 'Legal Certainty in French Procurement & Concession Contracts Post-Reform: Taking Into Account The Lenders' Perspective', the article is available at http://publicspendforumeurope.com/2016/07/25/legal-certainty-in-french-procurement-concession-contracts-post-reform-taking-into-account-the-lenders-perspective/.
[154] Jacques Bouillon and François-Guilhem Vaissier, 'Transposition of the Concession Directive in France' 08 FEB 2016 the article is available at https://www.whitecase.com/publications/alert/transposition-concession-directive-france.
[155] Concession Directive, recitals 4, 21, 29, 45, 64, 65, 75.
[156] Professor of Administrative Law, University of La Laguna.
[157] Francisco L. Hernández González 'The Evolving Concept of Works and Service Concessions in European Union Law' Public Procurement Law Review (2016) 25 P.P.L.R., Issue 2 © 2016 Thomson Reuters (Professional) UK Limited and Contributors, 51.

and to examine whether those changes amounted to a new contract award'[158]. Some practitioners emphasize that Pressetext case has 'a profound impact on the way in which authorities go about negotiating and implementing changes to existing public sector contracts.[159]

The case is based on the request of the Bundesvergabeamt for preliminary ruling 'relating to the application of review procedures to the award of public supply and public works contracts'[160]. In its request the Bundesvergabeamt asks:

> [i]n which circumstances amendments to an existing agreement between a contracting authority and a service provider may be regarded as constituting a new award of a public services contract within the meaning of Directive 92/50.[161]

The cornerstone of the dispute was the lawfulness of numerous amendments signed to public service contract concluded by the Republik Österreich (Bund) with APA ('basic contract'). Pursuant to the para. 8 of the Case C-454/06 Pressetext it is definite that 'APA was the main operator on the news agencies market in Austria and traditionally provided the Republik Österreich (Bund) with various news agency services'[162]. There were changes made to the basic contract with respect to the remuneration amount, its indexation, the service provider was also changed due to the restructuring of the APA and the term of the contract was extended. In other words there were three group of modification 'concerned i) the contractual partner, ii) the price and indexation, and iii) other contract terms relating to the waiver of termination rights and the payment of rebates'[163].

The key findings of the CJEU that influenced the further contents and wording of the Concession Directive and preserve their relevance for the present moment are as follows:

(a) **Acquis Communataire principles shall apply in absence of specific regulation.** CJEU acknowledged that 'the Services Directive did not provide a specific

[158] Support for Improvement in Governance and Management 'SELECTED JUDGEMENTS OF THE COURT OF JUSTICE OF THE EUROPEAN UNION ON PUBLIC PROCUREMENT (2006-2014)' July 2014, 132.
[159] Alistair Maughan and Masayuki Negishi 'UK Public Procurement Law Digest: Contract Extensions and the New Remedies Regime' Morrison & Foerster LLP Alert, March 23, 2010, 1
[160] Case C-454/06 Pressetext, para. 1
[161] Case C-454/06 Pressetext, para. 29.
[162] Case C-454/06 Pressetext, para. 8.
[163] Support for Improvement in Governance and Management 'SELECTED JUDGEMENTS OF THE COURT OF JUSTICE OF THE EUROPEAN UNION ON PUBLIC PROCUREMENT (2006-2014)' July 2014, 139.

answer to the questions raised'.[164] The Concession Directive is supposed to provide general legal approach to the concession contract modifications allowed without a new tender. Nevertheless if there are doubts with respect to the legitimate way of making amendments to the concession contract, pursuant to the findings of the CJEU in the analysed case, the issue shall be considered 'in the context of the overall framework of Community rules governing public procurement, including freedom of movement and opening up of undistorted competition, non-discrimination, equal treatment and transparency'.[165]

(b)**Internal reorganisation does not tantamount to the change of the contractual partner.** CJEU stated that 'the internal reorganisation of the contractual partner, which does not modify in any fundamental manner the terms of the initial contract'[166] does 'not constitute a change to an essential term of the contract'[167]. The Concession Directive follows this approach in article 43 (1d (ii)). The essential characteristic of the change of contractual partner in the analysed case is that the previous contractor remained jointly and severally liable as a result there would be no change in the overall performance experienced.[168] The Concession Directive does not stipulate the joint responsibility of the initial concessionaire with its assignee as being a prerequisite for such change of the party.

(c)**Change of the partner's shareholder equals to the change of the contractual partner**. CJEU treats the change of the concessionaire shareholder as being 'an actual change of contractual partner, which would, as a rule, be an amendment to an essential term of the contract. Such an occurrence would be liable to constitute a new award of contract'[169]. At the same time the CJEU provides an exception from this rule for shares of traded on a stock exchange and equivalent situations. The sale of such shares 'does not affect the validity of the award of a public contract to such a company'[170]. The concept with respect to the change of the concessionaires introduced by the Pressetext case was further developed in the Case C-91/08 Wall AG in accordance to which

[164] Case C-454/06 Pressetext, para. 30.
[165] Support for Improvement in Governance and Management 'SELECTED JUDGEMENTS OF THE COURT OF JUSTICE OF THE EUROPEAN UNION ON PUBLIC PROCUREMENT (2006-2014)' July 2014, 139.
[166] Case C-454/06 Pressetext, para. 45.
[167] Ibid 43.
[168] Ibid 44.
[169] Ibid 47.
[170] Ibid 51.

substituting a key subcontractor could constitute a material amendment and require new tender:

> [A] change of subcontractor, even if the possibility of a change is provided for in the contract, may in exceptional cases constitute such an amendment to one of the essential provisions of a concession contract where the use of one subcontractor rather than another was, in view of the particular characteristics of the services concerned, a decisive factor in concluding the contract, which is in any event for the referring court to ascertain.[171]

(d) **Change of price.** CJEU emphasized that the 'price is an important condition of a public contract'[172] and alteration of such 'such a condition during the period of validity of the contract, in the absence of express authority to do so under the terms of the initial contract, might well infringe the principles of transparency and equal treatment as between tenderers'[173]. With respect to the prices adjustment because of euro conversion the CJEU comes to conclusion that:

> [t]he conversion of contract prices into Euros during the course of the contract may be accompanied by an adjustment of their intrinsic amount without giving rise to a new award of a contract, provided the adjustment is minimal and objectively justified.[174]

(e)**Material amendment.** The CJEU firstly introduced and explained the concept of 'material amendment' that shall be the basis for new tender. It states that:

> [a]n amendment to the initial contract may be regarded as being material when it extends the scope of the contract considerably to encompass services not initially covered. An amendment may also be regarded as being material when it changes the economic balance of the contract in favour of the contractor in a manner which was not provided for in the terms of the initial contract.[175]

The concept of 'material change' leading to a new tender was further developed in Case C-160/08 Commission v Germany176 and Case C-423/07 Commission v Spain[177].

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[171] Case C-91/08 Wall AG, para.39.
[172] Ibid 59.
173 Ibid 60.
174 Ibid 61.
175 Ibid paras 35, 37.
176 Case C-160/08 European Commission v Federal Republic of Germany, OJ C 161 from 19.06.2010, p.4 (furtheron – 'Case C-160/08 Commission v Germany').

In Case C-160/08 Commission v Germany the CJEU discussed the issue of the extension of existing contracts. 'With regard to one of the contracts, the CJ found that the local branch of the German Red Cross had been the provider of public administrative services in the district of Uelzen for many years. The contract for those services was subsequently extended to cover the operation of an additional ambulance station, without any prior publication of a contract notice'[178]. The extension applied to both geographical scope and value. The total value of the amended contract was EUR 4.45 million per year, and the value of the additional services was EUR 670 000 per year.[179] The CJ ruled, applying the principles established in C-454/06 Pressetext Nachrichtenagentur, that this extension was a material amendment, thereby constituting the new award of a contract. The amendments extended the scope of the contract considerably to encompass services that had not been covered originally.[180] The CJEU emphasised that the value of the extension was considerably higher than the threshold value for a services contract.[181] Finally, the CJEU held that:

> [i]t must be observed that an amendment to the initial contract may be regarded as being material and, therefore, as constituting the new award of a contract for the purposes of Directive 92/50 or of Directive 2004/18, inter alia, when it extends the scope of the contract considerably to encompass services not initially covered (see, to that effect, Case C-454/06 *pressetext Nachrichtenagentur* [2008] ECR I-4401, paragraph 36).[182]
>
> and
>
> [t]he extension of the contract ... must, as maintained by the Commission, be regarded as a material amendment of the original contract, which would have required compliance with the relevant provisions of European Union law on public contracts.[183]

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[177] Case C-423/07 European Commission v Kingdom of Spain, OJ C 161 from 19.06.2010, p.3 (furtheron – 'Case C-423/07 Commission v Spain').
[178] Support for Improvement in Governance and Management 'SELECTED JUDGEMENTS OF THE COURT OF JUSTICE OF THE EUROPEAN UNION ON PUBLIC PROCUREMENT (2006-2014)' July 2014, 20.
[179] C-160/08 Commission v Germany, para.32.
[180] C-160/08 Commission v Germany, para.98-99.
[181] Support for improvement in governance and management 'Public Procurement. Contract Modifications', Brief 38, September 2016, 11.
[182] C-160/08 Commission v Germany, para. 99.
[183] C-160/08 Commission v Germany, para. 101.

Thus, basing on the mentioned considerations the CJEU came to conclusion that covering a new ambulance station was a material change – the new ambulance station increased by 15% the value of the contract, which the court held was 'considerably above' the procurement threshold.[184]

The Case C-423/07 Commission v Spain related to motorway construction which initially encompassed construction of a new section of motorway, but the contract was materially amended to include works to other sections of motorway. As a result, the CJEU stated that:

> [i]t does not satisfy Directive 93/37 when, without any transparency, a public works concession contract is awarded which includes works referred to as 'additional' which of themselves constitute 'public works contracts' within the meaning of that directive and the value of which exceeds the threshold laid down therein. If the opposite were true, that would mean that those works referred to as 'additional' would avoid the advertising obligation and, consequently, any call for competition.[185]

In C-549/14 Finn Frogne the CJEU implementing the Pressetext test held that the terms of a settlement agreement the conclusion of which was not under intentions of parties can constitute an illegal modification to a public contract which therefore would require a new tendering procedure:

> [a] material amendment cannot be made to that contract without a new tendering procedure being initiated even in the case where that amendment is, objectively, a type of settlement agreement, with both parties agreeing to mutual waivers, designed to bring an end to a dispute the outcome of which is uncertain, which arose from the difficulties encountered in the performance of that contract. The position would be different only if the contract documents provided for the possibility of adjusting certain conditions, even material ones, after the contract had been awarded and fixed the detailed rules for the application of that possibility.[186]

[184] C-160/08 Commission v Germany, para. 100.
[185] Case C-423/07 Commission v Spain, para. 70.
[186] C-549/14 Finn Frogne, para. 40.

In this case 'the CJEU held that the parties' lack of a deliberate intention to renegotiate the terms of that contract was not a decisive factor'[187]. Actually in this case, the CJEU restated the principle outlined in the Pressetext case and held that it is not permissible to substantially amend a contract even if the "material" amendment arose not out of a desire of the parties to renegotiate the essential terms of the contract but out of 'objective difficulties with unpredictable consequences encountered in the performance of that contract'[188].

(f) **Waiver of right to terminate.** The CJEU treated the contract's clauses stipulating the parties' waiver of right to terminate the concession contract as the "at odds with the scheme and purpose of the Community rules governing public contracts"[189]. It commented that:

> [s]uch a practice might, over time, impede competition…and hinder the provisions of [the]…directives governing the advertising of procedures for the award of public contracts.[190]

Nevertheless the CJEU held that 'the presence of a waiver of the right to terminate the contract for a period of three years during the period of validity of a services contract concluded for an indefinite period does not constitute a new award of a contract'.[191]

(g) **Change in rebate.** The CJEU considered that 'the increase in the rate of the rebates from 15% to 25%, provided for by the second supplemental agreement, is tantamount to applying a lower price'[192] that 'does not shift the economic balance of the contract in favour of the contractor'[193]. Basing on these facts the CJEU came to an evident conclusion that increase in rebate does not entail a new tender.

3.2.2. Trans-Border Element in Concessions: Case C-388/12 Comune di Ancona [194], Case C-91/08 Wall AG, C-147/06 and C-148/06 SECAP and Santorso[195]

[187] A&L Goodbody 'CJEU finds that the Terms of a Settlement Agreement can Constitute a Prohibited Contract Modification under Procurement Rules (26 October 2016)' ; material is available by the link: http://www.algoodbody.com/insightspublications/cjeu_settlement_agreement_terms_procurement_rules;
[188] C-549/14 Finn Frogne, para.32.
[189] Case C-454/06 Pressetext, para.73.
[190] Case C-454/06 Pressetext, paras. 73-80.
[191] Case C-454/06 Pressetext, para.80.
[192] Case C-454/06 Pressetext, para. 83.
[193] Case C-454/06 Pressetext, para. 85.
[194] Case C-388/12 Comune di Ancona v Regione Marche, OJ C 9 from 11.01.2014, p.12 (furtheron – 'Case C-388/12 Comune di Ancona').

Seven years after the Pressetext was settled the other two significant concession cases were held by the CJEU - Case C-388/12 Comune di Ancona and Case C-91/08 Wall AG. In Case C-388/12 Comune di Ancona the CJEU 'considered cross-border interest in the context of an award of a concession. The CJ concluded that an arrangement is not precluded from having cross-border interest merely because it is incapable of generating sufficient profit'.[196] In Case C-91/08 Wall AG CJEU stated that 'award procedure should ensure that an undertaking located in another Member State has access to sufficient information on that concession before it is awarded'.[197] 'In this case, the CJ concluded that the contract was of cross-border interest from the simple fact that it had been announced as a tender at "EU-wide" level. The notice advertising the contract was published in the official gazette of the City of Frankfurt'.[198]

In C-147/06 and C-148/06 SECAP and Santorso CJEU comes to conclusion that it is for national legislation:

> [t]o lay down objective criteria, at national or local level, indicating that there is certain cross-border interest. Such criteria could be, inter alia, the fact that the contract in question is for a significant amount, in conjunction with the place where the work is to be carried out. The possibility of such an interest may also be excluded in a case, for example, where the economic interest at stake in the contract in question is very modest (see, to that effect, Case C-231/03 *Coname*[199]). However, in certain cases, account must be taken of the fact that the borders straddle conurbations which are situated in the territory of different Member States and that, in those circumstances, even low-value contracts may be of certain cross-border interest.[200]

In order to illustrate the relevance of the cross-border element in concession projects, Case C-388/12 Comune di Ancona will be analyzed furtheron. The Case C-

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[195] Joined cases C-147/06 and C-148/06 SECAP SpA (C-147/06) and Santorso Soc. coop. arl (C-148/06) v Comune di Torino, OJ C 171 from 05.07.2008, p.3 (furtheron – 'C-147/06 and C-148/06 SECAP and Santorso').
[196] Support for Improvement in Governance and Management 'SELECTED JUDGEMENTS OF THE COURT OF JUSTICE OF THE EUROPEAN UNION ON PUBLIC PROCUREMENT (2006-2014)' July 2014, 135.
[197] Case C-91/08 Wall AG, para.43.
[198] Support for Improvement in Governance and Management 'SELECTED JUDGEMENTS OF THE COURT OF JUSTICE OF THE EUROPEAN UNION ON PUBLIC PROCUREMENT (2006-2014)' July 2014, 22.
[199] Case C-231/03 Consorzio Aziende Metano (Coname) v Comune di Cingia de' Botti, OJ C 217 from 03.09.2005, p.7, para. 20.
[200] C-147/06 and C-148/06 SECAP and Santorso, para. 31.

388/12 Comune di Ancona involved a concession for management of European Regional Development Fund that is port infrastructure directly awarded by the Comune di Ancona to the local fishermen cooperative. The conditions of the concessions excluded a profit for either of the parties, so the justification provided for the direct award was that 'it was not necessary, for the purposes of granting a concession for management of the slipway, to publish a call for tenders, in so far as no operators apart from the Pescatori cooperative were interested in that concession'[201].

This case is also of special interest with regard to its approach towards the allowed legal grounds for modification of the concession contracts. Moreover, it provides interpretation of the meaning of the term 'substantial modification'. The CJEU explains that 'the existence of an undue advantage is one of the factors which potentially constitute a substantial modification'[202].

The other question that was discussed by the CJEU is:

> [w]hether EU law precludes a municipality from directly awarding concession to a third party – that is to say, without publishing a call for tenders – a public service concession relating to works, where that concession is incapable of generating either substantial revenue or an undue advantage for that third party or for the public contracting authority.[203]

Although the issues of concession tender are regulated on the EU level by the Concession Directive, the judgement in this case still preserves its relevance because of the clarification of the meaning of cross-border interest in concessions. The CJEU held that:

> [M]ore specifically, it has been held that, to the extent that a concession may also be of interest to an undertaking located in a Member State other than the Member State of the contracting authority, the award, in the absence of any transparency, of that concession to an undertaking located in the latter Member State amounts to a difference in treatment to the detriment of the undertakings located in other Member States. In the absence of any transparency, the undertakings located in

[201] C-388/12 Comune di Ancona, para. 16.
[202] C-388/12 Comune di Ancona, para. 31.
[203] Ibid para. 43.

those other Member States have no real possibility of manifesting their interest in obtaining the concession in question.[204]

In support of this idea the CJEU clarified that 'the fact that a concession is not capable of generating substantial net revenue or an undue advantage for an undertaking or for a public body does not, in itself, support the inference that the concession is of no economic interest for undertakings located in Member States other than that of the contracting authority'[205]. The CJEU also underlined that 'the award of such a concession contract could enable a firm to establish itself in the Member State where the concession is awarded, thereby providing a basis for future activity'[206].

The other CJEU finding that is still preserves general significance is its position on applicable law in case of the lack of special legal provisions. For instance, shall there be a public concession tender if the concession project is out of material scope of the Concession Directive because its value is below the threshold determined by the directive. Pursuant to the CJEU 'in the absence of legislation, the law applicable to service concessions must be assessed in the light of primary law and, more specifically, the fundamental freedoms laid down in the Treaty on the Functioning of the European Union (see Case C-324/98 *Telaustria and Telefonadress*[207])'[208]. So whatever the expected value of concession project the contracting authority is always under 'a duty of transparency, consisting in the duty to ensure, for the benefit of any potential tenderer, a degree of publicity sufficient to enable the award procedure to be opened up to competition and the impartiality of that procedure to be reviewed, without necessarily implying an obligation to call for tenders'[209]. There prevails the opinion that 'a dual legal regime will persist between 'Directive concessions' and 'Ancona concessions' the CJEU will continue pointing out the potential existence of cross-border interest for

[204] Ibid para. 47.
[205] Ibid para. 51.
[206] Support for Improvement in Governance and Management 'SELECTED JUDGEMENTS OF THE COURT OF JUSTICE OF THE EUROPEAN UNION ON PUBLIC PROCUREMENT (2006-2014)' July 2014, 23.
[207] Case C-324/98 Telaustria Verlags GmbH and Telefonadress GmbH v Telekom Austria AG, joined party: Herold Business Data AG. OJ C 95 from 22.03.2001, p.3, para.60.
[208] C-388/12 Comune di Ancona, para. 45.
[209] C-388/12 Comune di Ancona, para. 46.

concessions with a value below 5 million euro (or in the excluded and preferential sectors, such as water or social services)'[210].

3.2.3. Operational Risk and Concessionaire's Remuneration: C-274/09 Privater Rettungsdienst and Krankentransport Stadler, C-348/10 Norma-A and Dekom, and C-206/08 Eurawasser

As it was discussed in this MT that the definition of concession and its key features are extremely important in order to define the scope of modifications to the concession agreement allowed without a tender The main rule is that such modification shall not change the overall nature of concession. With this respect, the cases C-274/09 Privater Rettungsdienst and Krankentransport Stadler, C-348/10 Norma-A and Dekom, and C-206/08 Eurawasser focused on defining 'operational risk' and on 'the method of remuneration of the concessionaire' allow to define the major mandatory requirements for concessions. The disputes in the mentioned cases are based on the classification of the project as being concession contract of public procurement contract depending on the risk transfer and the method of remuneration of the concessionaire.

Based on the findings in the mentioned cases, the operational risk may be characterized as follows:

(a) The risk of exposure to the vagaries of the market[211];

(b) The risk that 'may consist in the risk of competition from other operators, the risk that supply of the services will not match demand, the risk that those liable will be unable to pay for the services provided, the risk that the costs of operating the services will not fully be met by revenue or for example also the risk of liability for harm or damage resulting from an inadequacy of the service'[212];

(c) Certain sectors of activity, in particular sectors involving public service utilities, such as the distribution of water and the disposal of sewage, are subject to rules which may have the effect of limiting the financial risks entailed.[213] Even if the risk run by the contracting authority is very limited, it is necessary that the contracting authority

[210] Sanchez Graells, 'The Continuing Relevance of the General Principles of EU Public Procurement Law After the Adoption of the 2014 Concessions Directive' European Procurement and Public Private Partnership Law Review , 2015, 10(3), 130-139, 6.
[211] C-274/09 Privater Rettungsdienst and Krankentransport Stadler, para.37.
[212] C-274/09 Privater Rettungsdienst and Krankentransport Stadler, para.37.
[213] C-206/08 Eurawasser, para. 72.

transfer to the concession holder all, or at least a significant share, of the operating risk which it faces, in order for a service concession to be found to exist.[214]

(d) Only the national court is in a position, on the one hand, to interpret the provisions of its national law and, on the other hand, to assess the part of the risk which is actually borne by the contractor in the light of national law and the contractual terms at issue.[215]

The transferring of the operational risk is not sufficient for the contract to constitute a concession. Pursuant to the following findings of the ECJ the method of concessionaire's remuneration shall also be considered:

(a) **A**ccording to that case-law, a service concession existed where the agreed method of remuneration consisted in the right of the service provider to exploit for payment his own service (see, to that effect, Telaustria and Telefonadress, paragraph 58; order in Case C-358/00 Buchhändler-Vereinigung[216] ; Case C-382/05 Commission v Italy[217] ; and C-437/07 Commission v Italy[218])**.'**[219]

(b) Method of remuneration means that the provider takes the risk of operating the services in question.[220]

(c) In the case of a contract for the supply of services, the fact that the supplier is not remunerated directly by the contracting authority, but is entitled to collect payment from third parties, meets the requirement of concession directive**.**[221]

(d) Where the economic operator selected is fully remunerated by persons other than the contracting authority which awarded the contract concerning rescue services, where it runs an operating risk, albeit a very limited one, by reason inter alia of the fact that the amount of the usage fees in question depends on the result of annual negotiations with third parties, and where it is not assured full coverage of the costs incurred in managing its activities in compliance with the

[214] C-206/08 Eurawasser, para.77.
[215] C-348/10 Norma-A and Dekom, para 58.
[216] Case C-358/00 Buchhändler-Vereinigung GmbH v Saur Verlag GmbH & Co. KG and Die Deutsche Bibliothek, OJ C 191 from 10.08.2002, p.12, paras. 27 and 28.
[217] Case C-382/05 Commission of the European Communities v Italian Republic. OJ C 235 from 06.10.2007, p.7, para. 34.
[218] C-437/07 Commission of the European Communities v Italian Republic OJ C 6 from 10.01.2009, p.8, para. 29.
[219] C-206/08 Eurawasser, para. 54.
[220] C-206/08 Eurawasser, para. 59.
[221] C-348/10 Norma-A and Dekom, para 42.

principles laid down by national law, that contract must be classified as a 'service concession''.[222]

[222] C-274/09 Privater Rettungsdienst and Krankentransport Stadler, para.48.

4. UKRAINIAN LEGISLATION WITH RESPECT TO THE CONCESSION CONTRACTS, ITS TERMINATION AND RENEGOTIATION

4.1. General Legal Background

Ukrainian concession legislation began its formation in 1999 with the adoption of the Concession Law. The Concession Law defines all major mechanisms, procedures, and principles for implementation of concessions and regulation of relations between the concessionaire and the grantor. Since then, three other concession laws have been adopted, all of them area-specific:

- Law of Ukraine "On Concessions for Construction and Operation of Highways" dated 14 December 1999 No. 1286-XIV, which establishes special procedures for the execution and implementation of concession projects in the area of construction and operation of highways;
- Law of Ukraine "On Peculiarities of Transfer into Lease or Concession of Municipally-Owned Heating, Water Supply and Sanitation Facilities" dated 21 October 2010, No. 2624-VI which, inter alia, provides specific regulation of water supply concessions;
- Law of Ukraine "On Peculiarities of Transfer into Lease or Concession of State-Owned Assets of Fuel-Energy Complex" dated 8 July 2011No. 3687-VI

The correlation of these three laws with the Concession Law is unclear, and their provisions often contradict each other. While most countries which have adopted PPP legislation (e.g. Croatia, Egypt, France, Kenya, Kosovo, Kuwait, Moldova, Morocco, Slovenia, South Korea, Tanzania) did so by adopting a PPP law (which may mention concessions as one of PPP models), some countries have adopted laws in respect of concessions and have not adopted any legislation on PPP in general (e.g. Cambodia, the Czech Republic, Georgia, Lithuania, the Philippines), and other countries (e.g. Kazakhstan, the Russian Federation) have adopted different laws governing concession agreements and PPP agreements. Unlike other countries with dual regimes for concessions and PPPs, Ukraine does not clearly delineate concessions from other PPPs[223], which is a major gap. From the analysis of the current legislation, it is not clear at all whether the provisions of the PPP Law shall apply to concession projects (and, if

[223] PPP is regulated by the Law of Ukraine “On Public-Private Partnership” dated 1 July 2010 № 2404-VI (furtheron – ‘PPP Law”).

so, which ones of them may apply and which may not), which creates significant risks. For example, the PPP Law provides for specific procedures of appraising and approving PPP projects, which are not provided by the concession laws.[224]

The Concession Law defines a concession as follows:

> [C]oncession is provision of a right to create (construct) and/or manage (operate) a concession facility (leased) for the purpose of satisfying public needs by an authorized executive government agency or a local self-governance body under a concession agreement on a paid basis for a limited period of time to a legal entity or individual (business entity) on condition that the business entity (concessionaire) assumes the obligations to create (construct) and/or manage (operate) the concession facility, material liability, and possible commercial risk.[225]

This definition does not comply with the international best practices and does not meet the EU requirements that were discussed in details in previous chapters of this MT.

Firstly, this definition provides that concessions may be provided only in exchange of payments from the concessionaire. However, many concessions in foreign countries do not involve such payments. In some projects, a concessionaire shall pay to grantor, and in other projects, concessionaires will not pay and may, on the contrary, receive public financial support. Secondly, concession under this definition is equated to lease, which completely contradicts the legal nature of concession. Thirdly, this definition does not reflect the EU criteria for concessions. Under Concession Directive, a contractual arrangement may be deemed as a concession if and only if the concessionaire is remunerated in a significant part:

- by users;
- by a public authority in a way that is substantially indistinguishable from (a) in terms of the cash flows received by the private partner; or
- by a combination of (a) and (b).

Ukrainian concession laws do not follow these requirements. Fourthly, the lower limit on concession duration is set at ten years, which is not in line with the international best practice as well as with Concession Directive that does not limit minimum term of

[224] PPP Law, article 11.
[225] Concession Law, article 1.

concession and provides special terms for concessions lasting more than 5 years.[226] Most International Best Standards and recommendations either provide no requirements to concession duration at all, or simply say that concessions should be "long-term projects", or establish limits which are lower than the current limit of the Concession Law (not ten years, but three or five years). Fifthly, the Concession Law does not allow for the private ownership of concession facility. In theory, the concessionaire may obtain ownership rights to other facilities that he constructs under the respective concession agreement, but, in practice, this does not work due to gaps in the regulation of the registration of legal titles to real estate. On the contrary, in many jurisdictions including the EU, private ownership of the facility is often allowed at least for the term of concession agreement.

International Best Standards tends not to define exhaustive lists of eligible sectors for concessions[227]: often, the list of such sectors is open or is not provided at all. In some jurisdictions, PPP/concession laws include a restrictive list of industries for their application. Under Principle 3 from the EBRD Core Principles, if a concession law includes such a list, it should be made non-exhaustive.

However, there are some sectors which may not be subject to PPP/concession mechanisms by their nature (e.g. oil & gas). They are generally explicitly excluded from the scope of concession regulation.

In addition, Concession Directive defines sectors that are not eligible for concessions in the EU (i.e. air transport services based on the issuance of an operating license, projects in the field of defence and security, etc.).[228]

The list of sectors eligible for concession mechanisms is contained in the Concession Law, which is not completely in line with the best practices.

First, the Concession Law includes a list of sectors which is non-exhaustive.[229] However, all sectors not expressly listed in the Concession Law may become eligible for concession only upon a special decision made by the Government of a municipal entity (in case of municipal concessions).[230] As of today, to the best of our knowledge,

[226] Concession Directive, article 18.
[227] OECD Basic Elements, UNCITRAL Legislative Guide.
[228] Concession Directive, articles 10, 11, 12.
[229] Concession Law, article 3.
[230] Concession Law, article 4.

there have been no precedents of such decisions and it is unclear which form they should take.

As regards the sectors which are explicitly named in the Concession Law, their list is clearly insufficient (for example, it does not mention education facilities or sport facilities). Besides, this list does not contain exemptions such as oil & gas sphere and other exemptions provided by Concession Directive[231]. On the contrary, "search, exploration of mineral deposits and their extraction" is one of the spheres deemed as eligible for the application of concession mechanisms under the Concession Law.

Moreover, some areas directly excluded from the scope of concessions in the EU (such as national defence or air transport services based on the granting of an operating licence) may in theory be implemented as concessions in Ukraine.

4.2.Legal Basis for Modification of the Concession Agreement

The Concession Law stipulates a general rule that the parties may amend the provisions of concession agreement, including the extension of its term, by their agreement or through a court procedure.[232] Concession laws do not prohibit amendments to concession agreements after their execution. In particular, Article 9 of the Concession Law directly stipulates the right of the parties to modify the duration of the concession agreement within the time limits specified in this law (10 to 50 years) upon agreement between the parties. Moreover, section 56 of the Model Concession Agreement for Construction and Operation of Motorways specifies that:

> [i]n case of circumstances that require the terms of this agreement to be amended, a party must notify the other party in writing /x/ days in advance. In such case, the parties sign a supplementary agreement about amendment of the terms of such agreement which becomes an indispensable part of this agreement.[233]

At the same time, according to the procedure of the concession bidding under the Concession Law, after the selection of the winning bidder and before the execution of the respective concession agreement, the parties may agree to make amendments and additions to the draft concession agreement to the extent not related to material terms and conditions specified in the bidding documents and in the winning bidder's bid.[234]

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[231] Concession Directive, article 7 (1), Annex 1.
[232] Concession Law, article 9.
[233] The Regulation of the Cabinet of Ministers of Ukraine 'On Approval of the Model Concession Contract on Construction and Operation of the Motorways' dated November 4, 2000 N 1519.
[234] Concession Law, article 7 (4).

Still, it is not clear whether the parties may change the material terms and conditions of the concession agreement specified in the bidding documents and in the bid after its signing.

4.3.Early Termination of Concession Agreement

The grounds for termination of the concession agreement set out by the Concession Law do not correspond to the international best practice. For instance, article 15 of the Concession Law provides the following grounds for the termination of a concession agreement:

- Expiration of the concession agreement;
- Court liquidation of the concessionaire, including in connection with bankruptcy;
- Revocation of a business license issued to the concessionaire;
- Termination of the subject matter of the concession (destruction of road or damage which precludes its further use);
- Termination of the concession agreement by parties' agreement;
- Termination of the concession agreement by the court at the request of either party in the event of default of the parties and for other reasons as prescribed by the laws of Ukraine.

Ukrainian model concession agreement[235] as well as model concession agreement to build and operate a motorway[236] do not provide for any other grounds for termination of the concession agreement apart from the above. The Supreme Economic Court of Ukraine ruled that the parties could not envisage any additional grounds for unilateral termination of the agreement in the concession agreement, unless such grounds were prescribed by the law and by the relevant model contract.[237] Therefore, there is a risk of court invalidating the provisions of the concession agreement involving other grounds for the termination of the contract rather than the ones established in the Concession Law and in the model contracts.

[235] The Regulation of the Cabinet of Ministers of Ukraine 'On Approval of the Model Concession Contract' dated April 12, 2000 N 643 (furtheron –'Model Concession Agreement').
[236] The Regulation of the Cabinet of Ministers of Ukraine 'On Approval of the Model Concession Contract on Construction and Operation of the Motorways' dated November 4, 2000 N 1519.
[237] Texts of the rulings of the Higher Economic Court of Ukraine of June 22, 2010, in cases No. 10/454/09 and 15/201/09, stipulating the legal standpoint described, are available at: http://www.reyestr.court.gov.ua/Review/10275432; http://www.reyestr.court.gov.ua/Review/10275430.

However, the foregoing court policy may be deemed as inconsistent with Article 651 of the Civil Code[238], which stipulates for the right of the parties to the contract to agree on the reasons for its termination and, in particular, the right to establish a possibility to unilaterally terminate the contract.

The concession legislature grants the concessionaire with the following rights in case of contract termination[239]:

1. after termination/expiry of concession agreement to separate the movable objects that concessionaire constructed at his expense and if it is expressly allowed by the contract and if they were not reimbursed through depreciation charges;
2. the concessionaire may request compensation upon early termination. He may receive the old equipment if he installed new one (i.e. in case of concession of heating, water supply, and sewage infrastructure);
3. the concessionaire may request compensation for the costs of construction of new facilities if it was not compensated through depreciation charges, and if such a right was foreseen in the concession agreement.

Pursuant to the article 20 of the Concession Law:

> [I]f the concessionaire considerably improved the property granted into concession, created the property as required under the concession contract, the principal shall be obliged to reimburse all expenses that arose in connection with substantial improvements or for the value of the created property to the extent, which was not recovered by the concessionaire as a result of the concession activities in accordance with conditions of the concession contract.

Ukrainian legislation does not provide for any other cases of compensation for loss sustained as a result of termination. There have been cases of early termination of concession contracts in Ukraine (concession on construction of highways Lviv-Brody, Lviv – Krakovets), Lugansk Water Concession, Berdyansk Water Concession, Palace in Lviv region etc. The obtained experience reveled the following: (a) such termination is possible only on the basis of court decision as far as the law does not empower the grantor as a state body on these actions; (b) the grantor is less protected by legislation

[238] The Civil Code of Ukraine dated January 16, 2003 № 435-IV.
[239] Model Concession Agreement, para. 7.

then concessionaire as far as there are no legal grounds to prove and reimburse losses caused by inactivity of concessionaire during 10 years

5. RENEGOTIATING OF CONCESSION CONTRACT: COMPARING INTERNATIONAL BEST STANDARDS, EU LAW APPROACH WITH UKRAINIAN LEGISLATION

5.1. Modification of Concession Agreement: Similar and Divergent Approaches

As it was considered in previous chapters, the International Best Standards, Concession Directive and Ukrainian Concession Legislation treat differently the phenomena of the 'renegotiating of concession contract' focusing on its certain aspects and ignoring the other.

The scope of the issues regulated by the mentioned law sources differs in the following manner:

(a) International Best Standards mostly focus on the legal manner of providing legal grounds for contract modification and legal boundaries for the possible modification of the concession agreement providing the recommendations with respect of their incorporation in the national legislature. For instance, UNCITRAL Legislative Provisions state that concession contract shall set forth the legal grounds and boundaries for its revision. The Model provision 40 of the UNCITRAL Legislative Provisions stipulates that:

> [T]he concession contract shall further set forth the extent to which the concessionaire is entitled to a revision of the concession contract with a view to providing compensation in the event that the cost of the concessionaire's performance of the concession contract has substantially increased or that the value that the concessionaire receives for such performance has substantially diminished, as compared with the costs and the value of performance originally foreseen, as a result of: (a) Changes in economic or financial conditions; or (b) Changes in legislation or regulations not specifically applicable to the infrastructure facility or the services it provides; provided that the economic, financial, legislative or regulatory changes: (a) Occur after the conclusion of the contract; (b) Are beyond the control of the concessionaire; and (c) Are of such a nature that the concessionaire could not reasonably be expected to have taken them into account at the time the concession contract was negotiated or to have avoided or overcome their consequences.[240]

[240] UNCITRAL Legislative Provisions, part 2 , model provision 40, p.27.

So the model provision just contains the set of principals basing on which the relevant clause of the concession contract with regard to its potential modification shall be prepared.

The OECD Basic Elements declaring parties autonomy in determination of the terms of concession agreement[241] also refer to the concession agreement as the document that shall stipulate 'the circumstances under which either party may terminate or seek renegotiation of the Concession Agreement'[242].

The International Best Standards remain silent with respect to the procedure that shall be complied with in order to make legitimate amendments to the concession agreement. It shall be noted that the International Best Standards do not contain any prohibition on alteration of the essential terms of the concession agreement. The concession contract (not a national legislation) is expected to define the legal boundaries for the possible amendments.

(b) Concession Directive being the legislative act of the supranational organisation (European Union) stipulates the exhaustive list of allowed amendments to the concession agreement[243] (the detailed analyses of which is provided in chapter 3 of the MT) aiming at distinguishing legal grounds that will lead to a new tender from those that are exempted from tender. In comparison with International Best Standards, the cornerstone of the Concession Directive is to observe and establish the procedure[244] and principles of equal treatment, non-discrimination and transparency[245] that are fundamental basis for the concession contract conclusion and execution including its potential modification. Such focus of the Concession Directive is explained by its aim to 'eliminate persisting distortions of the internal market'[246].

(c)Ukrainian concession legislation also refers to the concession agreement as the only possible legal source of the conditions for its modification[247] without providing legal boundaries for such modification. In comparison with Concession Directive that declares principles of transparency and specifies the conditions under which the

[241] The OECD Basic Elements, chapter V para. 14.
[242] The OECD Basic Elements, chapter V para. 15 (q).
[243] Concession Directive, article 43.
[244] Concession Directive, article 2.
[245] Concession Directive, article 2.
[246] Concession Directive, recital 4.
[247] Concession Law, article 10 (1).

modifications to the concession agreement will alter its overall nature[248], the Ukrainian concession legislation neither mentions this principles nor established limitations to the modifications that may amount to the new concession, based on manifestly new terms.

The main distinguishing peculiarity of the Ukrainian Concession law is that it allows parties to extend the term of the concession agreement without exceeding the total period of 50 years.[249] At the same time the law does not provide the list of conditions under occurrence of which such extension would be legitimate. The Concession Directive introduces contrary legal approach in accordance to which the parties to the concession agreement are not empowered to review the term of concession and extend it. In accordance to the recital 52 of the Concession Directive the maximum duration of the concession should be indicated in the concession documents unless duration is used as an award criterion of the contract. The UNCITRAL Legislative Guide stipulates the possible options towards the potential extension of the concession agreement either subordinating them to certain conditions or totally prohibiting.

In spite of the different focuses and issues that are regulated by the analyzed legal sources, the only issue interpreted uniformly is that the concession contract shall include the 'clear, precise and unequivocal review clauses'.

Nevertheless the issues that are regulated crucially different by the analyzed documents include the following:

- The parties autonomy in right to extend the term of the contract;
- The legal boundaries for legitimate amendments to concession contracts;
- The meaning and significance of the principles of equal treatment, non-discrimination and transparency and their observance while modifying the concession contract
- The procedure that shall be passed prior to the making modifications to the concession contract.

5.2. Replacement of the Concessionaire. Lender's Rights to Step-In

The legal issue that is closely related to the substantial modification of the concession agreement is the grantor's or lender's right to replace the concessionaire preserving the concession contract in force. This issue is contradictory treated by the analyzed legislative sources.

[248] Concession Directive, article 43 (1 (a), (c)), 43 (2).
[249] Concession Law, article 9 (3).

The UNCITRAL Legislative Guide acknowledges the right of the grantor and the lender to replace the concessionaire but under certain conditions (i.e. serious breach of the concession agreement).[250] The document contains explicit recommendation 'to define as clearly as possible the circumstances in which step-in rights can be exercised'[251]. It is important to limit the contracting authority's right to intervene to cases of serious failure of services and not merely in case of dissatisfaction with the concessionaire's performance'. The UNCITRAL Legislative Guide emphasizes that the contracting authority's right to intervene, its "step-in right", is an extreme measure.[252] The more attention is drawn by the document to the lender's right to replace the concessionaire. The execution of this right by the lender may be subject to the following conditions recommended by the UNCITRAL Legislative Guide[253]:

- the consent of the contracting authority;
- there should be a new concessionaire to perform under the existing project agreement (the document does not mention the requirements with which a new concessionaire shall comply with);
- direct agreement between the contracting authority and the lenders who are providing finance to the concessionaire;
- the concessionaire's failure to provide the service shall be recurrent or can reasonably be regarded as irremediable.

EBRD emphasizes that lenders have following expectations from the direct agreements with the granting authority[254]:

- formal recognition by the granting authority that lenders are financing this project, have an interest in the concession agreement, and are relying on representations from the granting authority regarding the validity of the concession agreement;
- acknowledgement by the granting authority that the lenders have a lien on the concession agreement and the other rights associated with the project;

[250] The UNCITRAL Legislative Guide Para 141, p.146.
[251] The UNCITRAL Legislative Guide Para 144, p.147.
[252] Ibid.
[253] The UNCITRAL Legislative Guide Para 148, p.148-149.
[254] Walid Labadi and Anita Ramasastry, 'A favourable concessions regime: a lender's perspective and perceptions from transition countries', EBRD; material is available at the site of EBRD at the link: http://www.ebrd.com/downloads/legal/concessions/labadi.pdf.

- commitment to notify lenders in the event a concessionaire is breaching its obligations under a concession agreement;
- granting authority agreement not to terminate the concession agreement without permitting the lenders an opportunity to cure breaches which give rise to such termination rights;
- permission for lenders to introduce a substitute concessionaire in the event that the existing concessionaire is not performing its obligations under relevant financing agreements;
- agreement that any termination payments due to the concessionaire shall be payable to lenders; and
- clear waiver of sovereign immunity by the granting authority in the event disputes arise under a concession agreement or the relevant direct agreement. For instance, the Ukrainian PPP Law explicitly provides the waiver of sovereign immunity of Ukraine[255], while Ukrainian Concession Law is silent with this respect.

In its turn the Concession Directive explicitly forbids the replacement of the concessionaire by a new economic operator:

> [I]n line with the principles of equal treatment and transparency, the successful tenderer should not, for instance where a concession is terminated because of deficiencies in the performance, be replaced by another economic operator without reopening the concession to competition. However, the successful tenderer performing the concession should be able, in particular where the concession has been awarded to a group of economic operators, to undergo certain structural changes during the performance of the concession, such as purely internal reorganisations, takeovers, mergers and acquisitions or insolvency. Such structural changes should not automatically require new award procedures for the concession performed by that tenderer.[256]

The Concession Directive recognized only structural changes that will lead to the 'following corporate restructuring, including takeover, merger, acquisition or insolvency, of another economic operator that fulfils the criteria for qualitative selection

[255] PPP Law, article 19 (3).
[256] Concession Directive, recital 77.

initially established provided that this does not entail other substantial modifications to the contract and is not aimed at circumventing the application of this Directive'[257].

Before the adoption of the Concession Directive, the Commission requested opinion from various public stakeholders with respect to the expedient approach to various issues of concessions. One of the addressed questions concerned step in rights and was stipulated as follows:

> [D]o you share the Commission's view that certain "step-in" type arrangements may present a problem in terms of transparency and equality of treatment? [258]

This question reveals the initially negative attitude of the Commission towards implementation of the step in rights into concession legislation. Surprisingly nearly all stakeholders explained that:

> [t]hat step-in clauses are of crucial importance for the financing of PPPs without raising particular procurement problems, as these clauses allow the parties to avert termination of the PPP contract or concession if the private PPP contractor is in breach of the contract.[259] And only few contributors 'considered "step-in" type arrangements to present a problem in terms of transparency and equality of treatment'[260].

As regards Ukrainian concession legislation, it does not contain any legal provisions referring to the replacement of the concessionaire. Still Ukrainian PPP Law stipulates the right of the lender to participate on the side of the private partner in PPP agreement[261]. In case of the private partner's failure to perform its obligations in accordance to the PPP agreement, the lender is allowed to initiate the replacement of the concessionaire in accordance to the regulation adopted by the Cabinet of Ministers of Ukraine[262].

Basing on the results of the comparative analyses of the Best International Standards, Concession Directive and Ukrainian concession legislation, the conclusion may be drawn that the concessionaire's replacement in concession project is highly disputable and rather contradictory issue. It is likely that the level of the economical and

[257] Concession Directive, article 43 (1d).
[258] Report of the European Commission on the Public Consultation on the Green Paper on PPP and Community Law on Public Contracts and Concessions Brussels, 3.5.2005 SEC(2005) 629, 23.
[259] Ibid.
[260] Ibid.
[261] PPP Law, article 17.
[262] The Regulation of the Cabinet of Ministers of Ukraine 'On Approval of the Procedure of the Replacement of the Private Partner in accordance to the PPP Contract' dated April 26, 2017 № 298.

political development should be taken in consideration before the introduction of the analyzed concept into national legislature. For countries with the low level of legal transparency and with high risk of corruption, the introduction of the concept of the concessionaire substitution may lead to the circumvention of the law.

6. TERMINATION OF CONCESSION PROJECT: COMPARING INTERNATIONAL BEST STANDARDS, EU LAW APPROACH WITH UKRAINIAN LEGISLATION

6.1. Legal Grounds for Termination

Generally, a private or public partner (granting authority) has the right to terminate a PPP (concession) agreement if the other party defaults on one of its key obligations. In many countries (e.g. Germany, the UK, Turkey)[263] private partners (concessionaires) have a unilateral termination right in the case of public partner (granting authority) default. Typically, a public partner (granting authority) default is a failure to make agreed payments to a private partner (concessionaire) or failure to issue licences required for the operation of the facility or expropriation of private partner's assets, etc.[264] Usually, the public partner (granting authority) may also invoke termination but only in specifically set out private partners' default events (itemised list).[265] Such lists, as a rule, include material breach of the PPP (concession) agreement by the private partner (e.g. a failure to reach certain construction milestones or project completion); insolvency or bankruptcy of the private partner; and termination due to public policy matters (e.g. where major subsequent changes in governmental plans and policies require the integration of the project into a larger network).[266]

Moreover, either party can invoke termination of a PPP (concession) agreement in the event of an impediment of performance (circumstances defined in the PPP agreement which make performance of an obligation impossible) or mutual consent (usually subject to the approval of a higher authority).[267]

Some International Best Standards stipulate that termination of the concession agreement should require a decision by a judicial or another dispute settlement body.[268] As an example we may refer to the recommendations of the UNCITRAL Legislative

[263] Termination and Force Majeure Provisions in PPP Contracts (Review of the current European practice and guidance) // The European PPP Expertise Centre, March 2013, 15.
[264] UNCITRAL Legislative Guide, para. 29, p.159.
[265] Such approach has been adopted in the majority of jurisdictions (e.g. Germany, France, Greece, etc.). See page 35 of the Termination and Force Majeure Provisions in PPP Contracts (Review of the current European practice and guidance) // The European PPP Expertise Centre, March 2012.
[266] UNCITRAL Legislative Guide, para. 14, p. 155 of the.
[267] UNCITRAL Legislative Guide, paras. 34-35, p. 160-161.
[268] UNCITRAL Legislative Guide, para. 13, p. 154; Model Law on PPPs for the CIS Member States adopted by the regulation of the CIS Member States dated 28.11.14 #41-9, article 16(3).

Guide. Thus, in accordance to the Recommendation 63[269] of the UNCITRAL Legislative Guide the contracting authority should have the right to terminate the project agreement:

(a) in the event that it can no longer be reasonably expected that the concessionaire will be able or willing to perform its obligations, owing to insolvency, serious breach or otherwise;

(b) for reasons of public interest, subject to payment of compensation to the concessionaire.

According to Recommendation 64[270] of the UNCITRAL Legislative Guide the concessionaire should have the right to terminate the project agreement under exceptional circumstances specified in the law, such as:

(a) in the event of a serious breach by the contracting authority or other public authority of their obligations under the project agreement;

(b) in the event that the concessionaire's performance is rendered substantially more onerous as a result of variation orders or other acts of the contracting authority, unforeseen changes in conditions or acts of other public authorities and that the parties have failed to agree on an appropriate revision of the project agreement.

Concession Directive prescribes for Member State to incorporate in their national legislation the right of the contracting authorities and contracting entities to terminate a concession during its term, where one or more of the following conditions is fulfilled:[271]

- Substantial modification requiring a new concession award procedure;
- The concessionaire should have been excluded, at the time of the concession award, from the concession award procedure due to mandatory grounds for exclusion (e.g. final conviction for a criminal offence);[272]
- The CJEU finds, in an infringement procedure, that the contracting authority has awarded a concession in breach of its obligations under the TFEU and under the Concession Directive.

[269] UNCITRAL Legislative Guide, Chapter V, "Duration, extension and termination of the project agreement", paras. 9-35.
[270] UNCITRAL Legislative Guide, Chapter V, "Duration, extension and termination of the project agreement", paras. 9-35.
[271] Concession Directive, article 44.
[272] Support for Improvement in Governance and Management '2014 EU Directives: Concessions', Brief 31, July 2014, 12.

Although the Concession Directive provides exhaustive list of the above mentioned grounds for termination of concession agreement, it should 'be understood as a minimum requirement and does not hinder a Member State or a contracting authority from establishing further reasons for the (early) termination of a contract, this provision is subject to national (contract) law'[273].

Ukrainian concession legislation providing the list of grounds for early termination of the concession agreement does not consider the specific nature of long-term concession relations that require stability from one side and shall not hinder competition and transparency from the other side[274]. The stability of this contractual relations is under questions due to the provisions of the article 15 (4) of the Concession Law in accordance to which the concession agreement may be invalidated by the court. The Law does not provide the exact grounds basing on which the court may proceed with the concession agreement invalidation. The other strange ground for the termination of concession agreement provided by the Concession Law is the expiration of the license.[275] Almost all license has term limitation (for instance 5 years) while the minimum term for concession is 10 years. So it should be quite expected that the license will terminate and the concessionaire is to renew it. But it shall not be the immediate legal ground for the termination of the concession agreement.

6.2. Financial Arrangements upon Termination

According to the International Best Standards early termination of a concession agreement leads to a compensation obligation of one of the parties. In most of the countries, the public partner is obliged to pay compensation to the private partner as a result of the public partner's default.[276] This compensation obligation may be derived from the principle of material liability of the parties for a breach of a concession agreement.[277] Usually, the public partner is liable for concession agreement termination on the ground of public interest. However, if a concession agreement was terminated as a result of a private party default, the public party is not required to pay compensation,

[273] Support for Improvement in Governance and Management '2014 EU Directives: Concessions', Brief 31, July 2014, 12.
[274] Concession Law, article 15.
[275] Concession Law, article 15 (1).
[276] Termination and Force Majeure Provisions in PPP Contracts (Review of the current European practice and guidance) // The European PPP Expertise Centre, March 2013, 21.
[277] Model Law on PPPs for CIS Countries, article 23.

save for the senior debt compensation (including interests).[278] Nevertheless, termination due to breach should not result in unjust enrichment of either party. Thus, termination does not necessarily entail a right for the public partner to take over assets without making any payment for them to the private partner.

The amount of compensation for early termination can be set in the concession agreement. If there are no such provisions, the amount of compensation may be determined by the public partner with consent of the other party. Alternatively, the amount may be determined by the court taking into account the need for equitable distribution between the parties of expenses incurred by them in connection with the project, as well as the income derived or reasonably anticipated by the party.[279]

The concessionaire is generally entitled to full compensation of its losses incurred as a result of termination on grounds attributable to the public partner. It may include compensation for the value of the works and installations, as well as for the loss caused to the private partner, including loss of profits, which are usually calculated on the basis of the private partner's revenue during previous financial years or are based on a projection of the expected benefit during the duration originally envisaged.[280]

According to the UNCITRAL Legislative Guide, if the public partner terminates a concession agreement for reasons of public interest, the compensation payable to a private party usually covers compensation upon termination for breach by a public partner.[281] Thus, in this case, the degree of public partners' default does not matter: the public partners should fully reimburse the private partner and the lenders for damages and loss of profits. This practice increases the attractiveness and bankability of concession projects.

In its turn the Concession Directive is silent with respect to the principles of the grantor's compensation for the investments carried by the concessionaire in case of the early termination of the concession agreement. Still in light of the Concession Directive the question with respect to the compensation is of special interest because it will influence the allocation of risks between the parties[282] including the operational risk the transfer of which is essential characteristic of the concession agreement. The full

[278] Termination and Force Majeure Provisions in PPP Contracts (Review of the current European practice and guidance) // The European PPP Expertise Centre, March 2013, 45.
[279] Model Law on PPPs for the CIS Member States, article 16 (10).
[280] UNCITRAL Legislative Guide, para. 46, page 166 .
[281] UNCITRAL Legislative Guide, para. 49, page 167.
[282] EPEC Guidance 'Termination and force majeure provisions in PPP contracts' March 2013, 3.

compensation may totally eliminate the concessionaire risks that will obviously cause the question whether the nature of the concession is altered. In its Preamble the Concession Directive provides an indirect answer to this question mentioning that the fact that the risk is limited by means of contractual arrangements providing for partial compensation including compensation in the event of early termination of the concession for reasons attributable to the contracting authority or contracting entity or for reasons of force majeure from the outset should not preclude the qualification of the contract as a concession.[283]

The Concession Directive also contains no provisions with respect to the other possible legal consequences of early termination of the concession agreement. It is quite obvious that these issues should be regulated by national laws of the Member States.

The Ukrainian Concession legislation consisting of three special and one general laws (as it was analyzed in previous chapter in details) does not contain any provision with respect to the compensation of the concessionaire's investments in case of the early termination of the concession agreement. Everything in such cases will depend on the court's ruling. The lack of compensation provisions for the early termination of te concession contract is a serious gap of Ukrainian concession legislation that will discourage investors to enter such projects.

6.3 Early Termination Tantamount to Expropriation

As it was established in previous chapters neither Concession Directive, nor Ukrainian concession legislation defines legal consequences and financial arrangements in case of early termination of concession agreement by the grantor. The mentioned issues are of special interest in so far as foreign investors are often engaged in concession projects as well as international financing organizations being lenders in concessions. That is why the scope of State's responsibility either under national or international law will in most cases be decisive for the implementation of concession. Any investor and lender is presumed to be interested in full, prompt and adequate compensation in case of the grantor's default under concession agreement as well as in protection by means of international law than by relevant national law. Therefore for the purposes of legal certainty it is necessary to determine whether the mentioned approach

[283] Concession Directive, recital 19.

based on international law protection of the concessionaire will be possible in case of any early termination of the concession agreement by the state.

In order to interpret the mentioned question the first issue that should be determined with this respect if the conclusion and execution of the concession agreement by the contracting authority is the act attributable to the state.

Concession Directive in its article 6 (1) defines 'contracting authorities' as meaning the State, regional or local authorities, bodies governed by public law or associations formed by one or more such authorities or one or more such bodies governed by public law other than those authorities, bodies or associations.

Under the Ukrainian legislation there is no unified approach to the definition of the grantor. In accordance to the Concession Law "Concession Grantor" means the respective government authority or respective local authority empowered by the Cabinet of Ministers of Ukraine or local council to conclude concession agreement. Pursuant to legal analyses of Concession Law provisions, that state of Ukraine or local councils are not considered grantors.[284]

Special definition of the "concession grantor" is provided by the Law of Ukraine "On Concessions on Construction and Operation of Highways":

> [**C]oncession grantor for highways** - State on behalf of the Cabinet of Ministers of Ukraine or governmental state body empowered by the Cabinet of Ministers of Ukraine to carry out concession tender, conclude concession agreement, and execute obligations that arise from it. In accordance to the PPP Law public partners are State of Ukraine, the Autonomous Republic of Crimea, or territorial communities, as represented by respective state or local self-government authorities.[285]

Thus the conclusion may be drawn that conclusion and execution of the concession contract is the act attributable to the state.

In so far as the state is the party to concession agreement, the question is arisen whether the state is empowered to abrogate the concession contract by virtue of exercising its sovereign rights particularly if concession contract does not stipulate this right. The opinions with respect to this question differ. Some scholars consider that:

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[284] Concession Law, article 1.
[285] The Law of Ukraine "On Concessions on Construction and Operation of Highways" dated December 14, 1999, article 1.

> [t]he State is concerned with the moral and economic welfare of its citizens, it cannot bind itself to relationships with individuals that might in time derogate from that welfare; that by reason of the fundamental importance of self-preservation, a State is presumed not to have undertaken obligations toward private individuals in derogation of this vital interest.[286]

The other prevailing opinion rejects the State sovereignty right to unilaterally terminate concession contract and abrogate the vested right. They insist that:

> [T]he arguments against the right of a State to abrogate a concession contract have been put on several grounds. One such argument is based on the principle of acquired or vested rights. Thus, a concession which has duly come into force has been called a "vested private right" and considered to be under the protection of international law against unlawful seizure on the part of the grantor.[287]

With this regard one may argue that any early termination of the concession contract due to the default of the state being a concession grantor will lead to the abrogation of concession and international responsibility of the state in accordance to the international law. In this context settled court practice proves that 'not every failure by a government to perform a contract amounts to an expropriation even if the violation leads to a loss of rights under the contract'[288]. In Waste Management v Mexico the ICSID tribunal held:

> [T]he mere non-performance of a contractual obligation is not to be equated with a taking of property, nor (unless accompanied by other elements) is it tantamount to expropriation. Any private party can fail to perform its contracts, whereas nationalization and expropriation are inherently governmental acts.[289]

The tribunal in Waste Management adopted a number of criteria to distinguish mere contractual non-performance from expropriation[290] including:

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[286] Leo T. Kissam and Edmond K. Leach, 'Sovereign Expropriation of Property and Abrogation of Concession Contracts' 28 FordhamL. Rev. 177 (1959), 198.
[287] Leo T. Kissam and Edmond K. Leach, 'Sovereign Expropriation of Property and Abrogation of Concession Contracts' 28 FordhamL. Rev. 177 (1959), 205.
[288] Rudolf Dolzer and Christoph Schreuer, 'Principles of International Investment law', Oxford [u.a.] : Univ. Press, 2008, 117.
[289] ICSID Case No. ARB(AF)/00/3 Waste Management Inc v United Mexican States, para.174.
[290] Christoph Schreuer 'The Concept of Expropriation under the ETC and Other Investment Protection Treaties' 20 May 2005, 27.

(a) cases where a whole enterprise is terminated or frustrated because its functioning is simply halted by decree or executive act, usually accompanied by other conduct[291];

(b) cases where there has been an acknowledged taking of property, and associated contractual rights are affected in consequence[292]

(c) cases where the only right affected is incorporeal[293].

Christoph Schreuer[294] came to conclusion that:

> [n]ot every breach of contract by a State that results in economic loss to the investor is an expropriation. The most important criterion for distinguishing between the simple breach of a contract and the expropriation of a contract rights is whether the State acts in its commercial role as a party to the contract or in its sovereign capacity.[295]

The other essential condition of the expropriation is total or substantial deprivation of investment. Measures that affect an investment without amounting to a "taking" in this sense but merely reduce its value or profitability are usually not seen as expropriatory. For expropriation to exist, the investment must have been essentially destroyed.[296] It means that the concessionaire shall be fully deprived from the rights that arose from the concession agreement. Following this approach the modification of the concession agreement even if it causes losses to the concessionaire is not likely to be considered as 'expropriation' of contractual rights.

In order to illustrate when the state acts may be qualified as expropriation, the further analyses will be focused on the investigation of the legal grounds for concession contract termination provided by the UNICITRAL Legislative Guide.

The UNICITRAL Legislative Guide stipulates the following grounds for early termination of concession contract that directly link to the acts or omissions of the grantor:

First Situation - Termination of concession contract by the grantor for reasons of public interest. Recognizing the 'public interest' reasons as being allowed grounds for

[291] ICSID Case No. ARB(AF)/00/3 Waste Management Inc v United Mexican States, para.172.
[292] Ibid para.173.
[293] Ibid para. 174.
[294] Counsel, Wolf Theiss, Vienna; former Professor of Law, University of Vienna.
[295] Christoph Schreuer 'The Concept of Expropriation under the ETC and Other Investment Protection Treaties' 20 May 2005, 1.
[296] Ursula Kriebaum 'Partial Expropriation' The Journal of World Investment and Trade Vol.8 #1 February 2007, 69.

early concession contract termination by the grantor, the UNCITRAL does not interpret its meaning leaving it for national governments to decide. Nevertheless the UNCITRAL recommends 'to limit the exercise of the right to terminate the project agreement to situations where such termination is needed for a compelling reason of public interest, which should be restrictively interpreted (for example, where major subsequent changes in governmental plans and policies require the integration of a project into a larger network or where changes in the contracting authority's plans require major project revisions that substantially affect the original design or the project's commercial feasibility under private operation)'[297]. Terminating the concession agreement due to the public interest the grantor is likely to act in 'its sovereign capacity'. In so far the concessionaire being in status of foreign investor may be entitle to protect his interests under international law envisaging full adequate and prompt compensation. Still in absence of the unified definition of 'public interest' each dispute with respect to such termination of the concession agreement shall be examined individually.

Second Situation - Termination of the concession agreement by the concessionaire due to the serious breach by the contracting authority. In accordance to the UNCITRAL Legislative Guide:

> [t]he contracting authority is found to be in breach of a substantial part of its obligations (such as failure to make agreed payments to the concessionaire or failure to issue licenses required for the operation of the facility for reasons other than the concessionaire's own fault).[298]

The mentioned list of the grantors acts qualified by the UNCTRAL as default is obviously relate to commercial role of the state in concession. Under the occurrence of these events the concessionaire is unlikely to prove that the state expropriated his contractual rights. The UNCITRAL also outlines the group of events that are indirectly linked to the serious breach of the concession agreement by the grantor. It states that:

> [I]n addition to serious breach by the contracting authority itself, it may be equitable to authorize termination by the concessionaire should the latter be rendered unable to provide the service as a result of acts of public authorities other

[297] UNCITRAL Legislative Guide, p.159.
[298] UNCITRAL Legislative Guide, p.159.

than the contracting authority, such as failure to provide certain measures of support required for the execution of the project agreement.[299]

If the relevant court determines that the state's omission based on political motives hindered the concessionaire to execution the contract, it is likely that this case will be qualified as expropriation of the concessionaire's contractual rights.

[299] UNCITRAL Legislative Guide, p.159.

7. CONCLUSIONS

Basing on the results of the comparative legal analyses of Ukrainian legislation with International Best Standards and EU Law, the following conclusions may be drawn with respect to the initially stated research questions:

7.1. What shall be the legal grounds for modification of concession contracts without launching new tender? Shall the Law stipulate such grounds in order to prevent abuse of the rights by the grantor or by both of the parties?

7.1.1. Best International Standards Approach

The Best International Standards unanimously refer to the concession contract as the primary legal source for introducing legal grounds, circumstances, events under occurrence of which the parties are entitled to modify the concession contract. Pursuant to the International Best Practices, particularly, OECD Basic Elements of a Law on Concession Agreements, the concession legislature shall not restrict the right of the parties to alter the concession agreement.[300]

In accordance to such approach the conclusion may be draw that there is no uniform list of grounds for alteration of the concession agreement pursuant to the Best International Standards.

7.1.2. Concession Directive Approach

Concession Directive expressly limits the rights of the parties to make amendments to the concession agreement.[301]The key principle that shall be complied with in order to preserve concession agreement and avoid new tender is that the modification of the concession agreement shall not lead to the alteration of the overall concession nature. Basing on this principle the following legal grounds might be considered to be sufficient for the alteration of the concession contract without holding new tender[302]:

- the existence of suitable "clear, precise and unequivocal" review clauses in the contract that describes the scope and nature of the possible modifications and doesn't allow for an alteration of the nature of the concession;
- additional works or services "have become necessary" and a change of concessionaire would not be practicable (for economic, technical or interoperability reasons) and would involve substantial inconvenience/duplication of costs (for

[300] OECD Basic Elements of a Law on Concession Agreements, chapter V para 15.
[301] Concession Directive, article 43.
[302] Crown Commercial Service 'Handbook for the Concession Contracts Regulations 2016' para. 20.1.

contracting authorities this is subject to a 50% maximum increase in concession value);

- where the need for modification is unforeseen and doesn't alter the nature of the concession, for contracting authorities this is subject to a 50% maximum increase in concession value;
- where a new concessionaire replaces the existing concessionaire because of insolvency, genuine restructuring, or use of the review clause etc.;
- the modifications are not substantial.

It shall be noted that nothing in Concession Directive says that it deprives the Member States from implementing other legal grounds for concession contract termination.

7.1.3. Ukrainian Concession Legislation Approach

The Ukrainian concession legislation follows the concept implemented by the International Best Standards recognizing the parties' autonomy in determining terms of the concession agreement. Taking into consideration the EU-Ukraine Association Agreement (Chapter 8) Ukrainian concession legislation shall be approximated to EU legislation. The responsibilities of the Ministry of the Economy of Ukraine on the implementation of provisions of Concession Directive are stipulated by the Strategy of Reforming Public Procurement System (a road map) adopted by Regulation No.175-p of the Cabinet of Ministers of Ukraine on 24 February 2016.

As it was mentioned the Concession Directive establishes absolutely other approach towards the definition of legal boundaries for the modification of the concession agreement. It means that Ukrainian Concession Law should be respectively amended so to be in line with the provisions of the article 43 of the Concession Directive.

7.2. Shall the grantor have the right on unilateral termination of the concession contract and on which grounds?

7.2.1. Best International Standards Approach

Best International Standards recognize the right of the grantor to terminate the concession contract basing on its unilateral decision in the following cases: serious breach by the concessionaire, insolvency of the concessionaire, for reasons of public interests.[303] Still the UNCITRAL Legislative Guide contains the precaution that 'giving

[303] UNCITRAL Legislative, Guide title V chapter D.

the contracting authority the unilateral right to terminate the project agreement would not be an adequate substitute for well-designed contractual mechanisms of performance monitoring or for appropriate guarantees of performance.[304]

7.2.2. Concession Directive Approach

Declaring the principal of equal treatment[305] the Concession Directive does not provide the contracting party (grantor) with any special right with respect to the early termination of the concession contract. Moreover thee conditions for early termination of the concession contract shall be determined by the applicable national law.[306]

7.2.3. Ukrainian Concession Legislature Approach

Ukrainian Concession Legislature does not stipulate the right of either of the parties to unilaterally terminate the concession agreement.[307] The concession agreement may be terminated only basing on the court decision in case of the breach of the concession agreement by one of the parties or in accordance to other conditions stipulated by the law.[308]

This strict provision of Ukrainian law forbidding unilateral termination of the concession agreement correlates to the approach provided by the Concession Directive essentially varying from the approach established by the Best International Standards.

7.3. In case of the concession contract early termination shall the grantor be obliged to return investments to the concessionaire if the early termination caused by (a) the concessionaire default; (b) by unilateral decision of the grantor?

7.3.1. Best International Standards Approach

The concessionaire is generally entitled to full compensation of its losses incurred as a result of termination on grounds attributable to the public partner. It may include compensation for the value of the works and installations, as well as for the loss caused to the private partner, including loss of profits, which are usually calculated on the basis of the private partner's revenue during previous financial years or are based on a projection of the expected benefit during the duration originally envisaged.[309]

7.3.2. Concession Directive Approach

[304] UNCITRAL Legislative Guide, title V chapter D para.11 p.154.
[305] Concession Directive, article 3 (1).
[306] Concession Directive, article 44 (1).
[307] Concession Law, article 15 (2).
[308] Concession Law, article 15 (2).
[309] UNCITRAL Legislative Guide, para. 46, page 166.

The Concession Directive is silent with respect to the compensation of the investments made by the concessionaire in case of early termination of the concession agreement. The main requirement is that such compensation stipulated by the agreement shall not change the overall nature of the concession agreement due to the alteration of the operational risk transferred to the concessionaire.[310]

7.3.3. Ukrainian Concession Legislation Approach

Ukrainian Concession Legislature explicitly provides only for the right of the grantor to claim damages from the concessionaire for the deterioration of the concession facilities occurred due to the fault of the concessionaire.[311] The Ukrainian Concession Legislation contains no provisions with respect to the rights of the concessionaire to claim damages from the grantor in case the latter will breach the concession agreement.

7.4. How may the lenders perform their step-in rights in concession project?

7.4.1. Best International Standards Approach

The International Best Standards explicitly recognize the right of the lender to step-in the concession project and replace the concessionaire as an extreme measure applied in order to preserve concession agreement.[312]

The performance of the step-in right by the lender shall be subject to the following conditions recommended by the UNCITRAL Legislative Guide[313]:

- the consent of the contracting authority;
- a new concessionaire to perform under the existing project agreement (the document does not mention the requirements with which a new concessionaire shall comply with);
- direct agreement between the contracting authority and the lenders who are providing finance to the concessionaire;
- the concessionaire's failure to provide the service shall be recurrent or can reasonably be regarded as irremediable.

7.4.2. Concession Directive Approach

The Concession Directive neither deals with the legal standing of the lenders in the concession projects nor stipulates their step-in rights that is rights of the lenders to

[310] Concession Directive, recital 76, article 43.
[311] Concession Law, article 17 (1).
[312] UNCITRAL Legislative Guide, para 148, p.148-149; OECD Basic Elements of a Law on Concession Agreements p.27.
[313] UNCITRAL Legislative Guide, para. 148, p.148-149.

replace the concessionaire. From the overall context of this document it is quite logical because the Concession Directive does not allow replacing the concessionaire for new economic operator. It allows the internal restructuring of the concessionaire in certain cases.

7.4.3. Ukrainian Concession Legislation Approach

Similarly to the Concession Directive and as opposed to the International Best Standards, the Ukrainian Concession Legislation neither recognizes the lender's right to step in into concession project nor provides for the right of the grantor to replace the concessionaire. With this respect Ukrainian concession legislation correlates with the Concession Directive. This approach shall be assessed with respect to its influence on the interests of the potential lenders and their eagerness to participate in concession project in terms of the absence of the step-in right.

7.5. In which cases termination of concession contract is tantamount to expropriation of contractual rights of foreign concessionaire?

Settled court practice (particularly, cases resolved by ICSID) proves that 'not every failure by a government to perform a contract amounts to an expropriation even if the violation leads to a loss of rights under the contract'[314].

The most important criterion for distinguishing between the simple breach of a contract and the expropriation of a contract rights is whether the State acts in its commercial role as a party to the contract or in its sovereign capacity.[315] The other essential condition of the expropriation is total or substantial deprivation of investment. Measures that affect an investment without amounting to a "taking" in this sense but merely reduce its value or profitability are usually not seen as expropriatory. For expropriation to exist, the investment must have been essentially destroyed.[316] It means that the concessionaire shall be fully deprived from the rights that arose from the concession agreement. Following this approach the modification of the concession agreement even if it causes losses to the concessionaire is not likely to be considered as 'expropriation' of contractual rights.

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[314] Rudolf Dolzer and Christoph Schreuer, 'Principles of International Investment law', Oxford [u.a.] : Univ. Press, 2008, 117.
[315] Christoph Schreuer 'The Concept of Expropriation under the ETC and Other Investment Protection Treaties' 20 May 2005, 1.
[316] Ursula Kriebaum 'Partial Expropriation' The Journal of World Investment and Trade Vol.8 #1 February 2007, 69.

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II. ANEXES

ABSTRACT

Concessions are considered to be financial engine for development of infrastructure. Although there are almost no tangible assets in concession projects, international financial institutions are eager to provide project financing for such projects but expect projects to comply with Best International Standards in the field of concessions. Standards commonly acknowledged as "best international practice" in terms of concession regulatory framework will include principles and recommendations established by European Union Directives, European Commission Communications, and other documents (e.g. EC Green Paper on Public-Private Partnership, EC Interpretative Communication on Concessions, etc.) relating to PPP/concessions, common international standards applicable to concessions, including the UNIDO Guidelines for Infrastructure Development through Build-Operate Transfer Projects, the UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects, the OECD Basic Elements of a Law on Concession Agreements, the UNCITRAL Model Legislative Provisions on Privately Financed Infrastructure Projects, the EBRD Core Principles of the Modern Concession Law.

In accordance to the International Best Standards the major legal risks of the concession projects encompass early termination and renegotiation of the concession agreements that affect sector's performance and welfare and compromise the credibility of the country involved. These events are inevitable for the majority of long-term projects. That is why it is quite important for any country to reasonably and fairly manage these events in order to safeguard the stakeholders' rights and prevent the distortion of the competition. The aim of this Master Thesis is to find out the fair and balanced legal approach towards the events of concession contract renegotiation and its early termination and their consequences for parties involved in concessions. This Master Thesis contains comparative legal analyses of the International Best Standards, EU acquis communautaire and Ukrainian legislation that was provided with respect to the events of concession contracts' renegotiation, modification and early termination. Based on the results of legal comparative analyses, in this Master Thesis there were determined the main legal approaches with respect to the mutually advantageous

scenarios of management of the mentioned events and their consequence for the granting authority and concessionaire. In the course of legal analyses the main divergences between International Best Standards, EU acquis communautaire and Ukrainian legislation with respect to the analyzed events were also fixed.

ABSTRAKT

Konzessionen gelten als Finanzmotor für die Entwicklung der Infrastruktur. Obwohl es in Konzessionsvorhaben fast keine konkreten Vermögenswerte gibt, sind internationale Finanzinstitute bemüht, Projektfinanzierungen für solche Projekte vorzusehen, aber erwarten Projekte, um die besten internationalen Standards im Bereich der Konzessionen einzuhalten. Standards, die gemeinhin als "beste internationale Praxis" im Hinblick auf den regulatorischen Rahmen der Konzessionen anerkannt werden, umfassen Grundsätze und Empfehlungen, die von den Richtlinien der Europäischen Union, der Mitteilung der Europäischen Kommission und anderen Dokumenten (z. B. EG-Grünbuch über öffentlich-private Partnerschaft, EG-Interpretative Mitteilung über Konzessionen, Etc.) in Bezug auf PPP / Konzessionen, gemeinsame internationale Normen für Konzessionen, einschließlich der UNIDO-Richtlinien für Infrastruktur-Entwicklung durch Build-Operate Transfer-Projekte, die UNCITRAL Legislative Guide für privat finanzierte Infrastruktur-Projekte, die OECD Grundelemente eines Gesetzes über Konzessionsvereinbarungen , Die UNCITRAL-Modellgesetzgebung für privatfinanzierte Infrastrukturprojekte, die EBRD-Kernprinzipien des modernen Konzessionsgesetzes.

Entsprechend den International Best Standards umfassen die wesentlichen rechtlichen Risiken der Konzessionsvorhaben die vorzeitige Kündigung und Neuverhandlung der Konzessionsvereinbarungen, die die Leistungsfähigkeit und das Wohlergehen des Sektors beeinträchtigen und die Glaubwürdigkeit des betroffenen Landes beeinträchtigen. Diese Ereignisse sind für die Mehrheit der langfristigen Projekte unvermeidlich. Deshalb ist es für jedes Land sehr wichtig, diese Ereignisse vernünftig und fair zu verwalten, um die Rechte der Stakeholder zu wahren und die Verzerrung des Wettbewerbs zu verhindern. Ziel dieser Masterarbeit ist es, den fairen und ausgewogenen Rechtsansatz für die Ereignisse der Konzessionsvertragsverhandlung und deren vorzeitige Beendigung und deren Konsequenzen für die an Konzessionen beteiligten Parteien herauszufinden. Diese Masterarbeit enthält vergleichende rechtliche Analysen der International Best Standards, des EU-Besitzstandes und der ukrainischen Gesetzgebung, die in Bezug auf die Ereignisse der Neugründungen, der Modifikation und der vorzeitigen Kündigung der Konzessionsverträge erbracht wurden. Auf der Grundlage der Ergebnisse der rechtlichen Vergleichsanalysen wurden in dieser Masterarbeit die wichtigsten

rechtlichen Ansätze in Bezug auf die gegenseitig vorteilhaften Szenarien der Verwaltung der genannten Ereignisse und deren Konsequenz für die Bewilligungsbehörde und den Konzessionär bestimmt. Im Zuge der rechtlichen Analysen wurden auch die wichtigsten Abweichungen zwischen den internationalen Best Standards, dem EU-Besitzstand und der ukrainischen Gesetzgebung in Bezug auf die analysierten Ereignisse festgelegt.