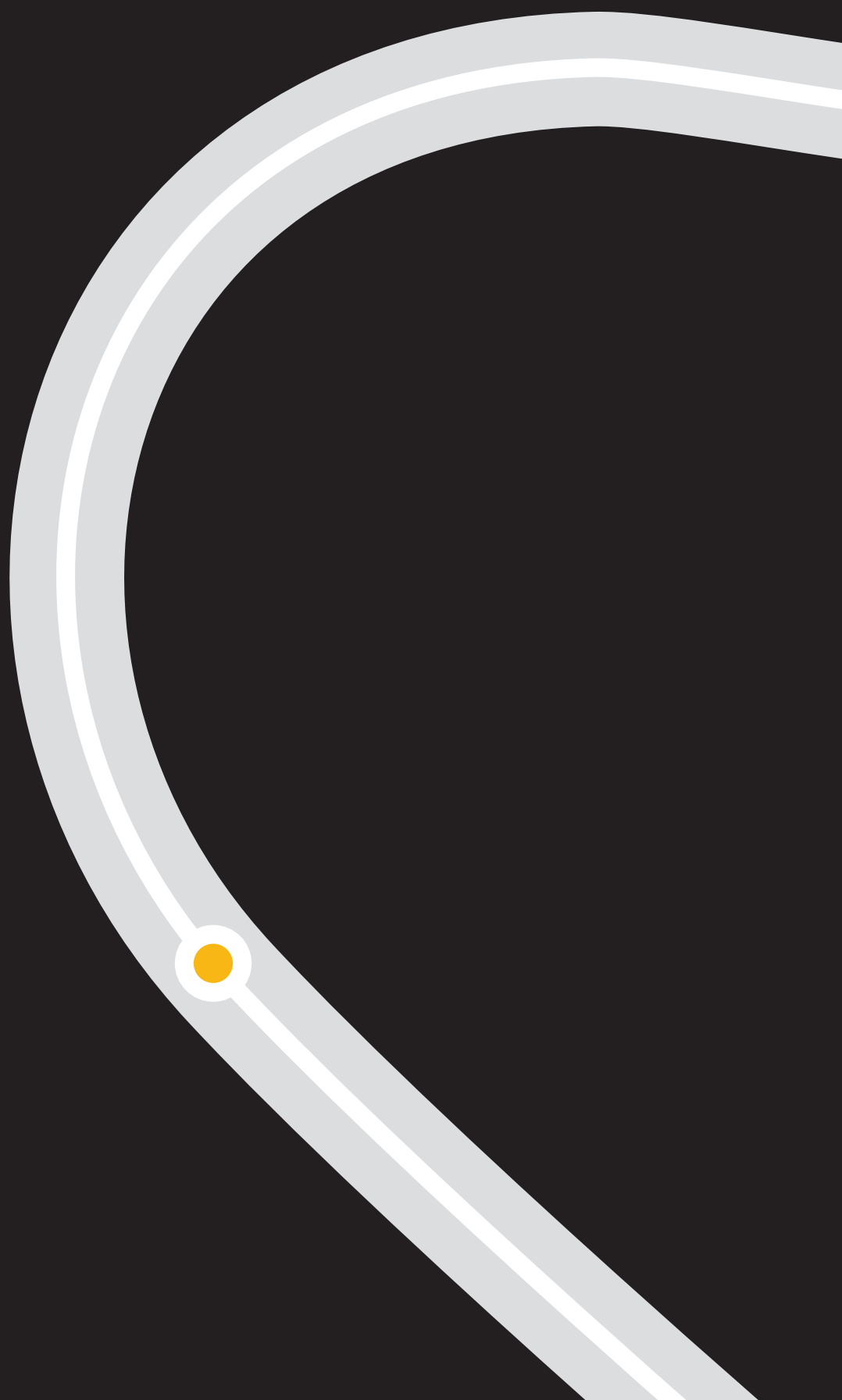




BORDER MANAGEMENT IN UKRAINE:

searching for optimal
models

KYIV 2021



KYIV 2021

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INTRODUCTION

Since 2010, Ukraine has been implementing the concept of integrated border management (IBM), which had been developed in the European Union. A new stage in the IBM progress in Ukraine was the adoption in 2019 of a new government Strategy for Integrated Border Management and the launch of the Interdepartmental Working Group (IWG) on Integrated Border Management, chaired by the Deputy Prime Minister of Ukraine for European and Euro-Atlantic Integration.

The IBM strategy and IWG work are based on best European practices, but their proper functioning is facing a number of obstacles. This is the first attempt in Ukraine to develop a border management system based on a holistic approach. For many years before that, this system was formed as a set of fragmentary, sometimes random practices, under the influence of phenomena, circumstances and entities that were not always interested in the proper functioning of the border-related entities.

The problems caused by such state of affairs include the limited development of border infrastructure in terms of both transit and protection, incomplete demarcation and delimitation processes, low level of interaction between different authorities. In particular, regional and local authorities are just starting to join border management, gaining new resources and powers through decentralization, administrative reform and the implementation of European cross-border cooperation practices at the regional level.

The main goal of this study is analysis of the de facto existing model of border management in Ukraine and the review of alternative ways to address border management - both in neighboring countries and in related areas. It is aimed at formulating meanings and taking the first steps towards a new, holistic, rational and highly effective model of Ukrainian border management.

The study consists of three parts, the first of which deals with the administrative aspect of IBM - interagency relations and communication, the second - mechanisms for building and maintaining border infrastructure in Ukraine and other countries, and the third - concessions and other examples of partnership between the state and the private sector as possible models for investing and attracting business to the border.



PART I

STRATEGIC PRINCIPLES INTEGRATED BORDER MANAGEMENT IN UKRAINE AND THE EU

The Ukrainian model of integrated border management (IBM) began to develop in 2010 with the adoption of the first IBM Concept. In 2015, the second Concept deepened the understanding of the challenges facing this area, and in 2019 the Ukrainian government adopted a comprehensive *Strategy for Integrated Border Management until 2025*.

According to the IBM Strategy, integrated border management is a coordinated activity of the competent state bodies of Ukraine and military formations aimed at creating and maintaining a balance between ensuring an adequate level of border security and maintaining the openness of the state border for legal cross-border cooperation and travelers¹. The Ukrainian IUC model currently has *nine functional components*, according to which the objectives of the Strategy are formed:

¹ Order of the Cabinet of Ministers of July 24, 2019 #687-r «On approval of the Strategy of integrated border management until 2025» <https://zakon.rada.gov.ua/laws/show/687-2019-%D1%80#top>

STRATEGY ARE FORMED:

1. COORDINATION OF ACTIVITIES IN THE FIELD OF INTEGRATED BORDER MANAGEMENT AND INTERAGENCY COOPERATION
2. CHECKPOINT CONTROL
3. BORDER PROTECTION OUTSIDE OF THE CHECKPOINTS
4. PROTECTION OF MARITIME BORDERS, SEARCH, RESCUE AND OTHER ACTIVITIES AT SEA
5. RISK ANALYSIS
6. DEVELOPMENT OF INTERNATIONAL COOPERATION
7. PREVENTION OF CROSS-BORDER CRIME
8. RETURN OF ILLEGAL MIGRANTS
9. ASSESSMENT OF THE IMPLEMENTATION OF INTEGRATED BORDER MANAGEMENT TASKS

The benchmark for the Ukrainian IBM Strategy was *the European model of integrated border management*. In particular, the Strategy takes into account 11 nationally adapted components of the IBM that were outlined in Regulation (EU) 2016/1624². This Regulation expired at the end of 2020 and was replaced by the new Regulation (EU) 2019/1896 of 13 November 2019 on European Border and Coast Guard³.

² Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard and amending Regulation (EU) 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) No 863/2007 of the European Parliament and of the Council, Council Regulation (EC) No 2007/2004 and Council Decision 2005/267/EC <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32016R1624>

³ Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624 <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A32019R1896>

COMPARISON OF UKRAINIAN AND EUROPEAN IBM MODELS

An analysis of the new EU regulation on the European border and the IBM Strategy up to 2025 suggests that the **components of the Ukrainian model in general correspond to the components of the European one (Table 1).**

However, these two models also have a number of differences. In particular, the component of border control in the EU is considered more comprehensively and includes procedures for identifying persons in need of international protection or wishing to apply for such protection. This mechanism is not considered in the Ukrainian strategy.

An important difference is that Ukraine is only planning to develop a system for assessing the implementation of tasks in the field of IBM. Back in 2017, the TWINNING project prepared a draft Instruction on evaluation and monitoring of operational and service activities of bodies/units of the State Border Guard Service, which complied with the Schengen evaluation mechanism and included the best practices of EU member states as well as took into account the specifics of the national IBM⁴. However, this document was not approved. Currently, one of the strategic goals in the Action Plan for 2020-2022 for the implementation of the IBM Strategy is the introduction of an evaluation system that determines the actual state of implementation of integrated border management. The EU currently has a number of quality control mechanisms in place:

- Schengen evaluation mechanism - covers all aspects of the Schengen acquis (Schengen legislation), including effective accompanying measures by member states at the external borders, visa pol-

icy, Schengen Information System, data protection, police cooperation, judicial cooperation in criminal matters, etc.⁵

- Vulnerability assessment, which is carried out by the Frontex European Border and Coast Guard Agency. It is based on objective criteria for assessing the ability and willingness of member states to meet the challenges arising on their external borders and to contribute to the permanent corps and the technical equipment reserve. Vulnerability assessments should include assessments of the equipment, infrastructure, personnel, budget and financial resources of member states, as well as their contingency plans to respond to possible crises arising on their external borders. Member states should address any shortcomings identified in this assessment⁶.

- National mechanisms to ensure the implementation of EU legislature in the field of border management.

Also, there is a separate component of the EU regulation, titled "Use of advanced technologies and large-scale information systems", while in the Ukrainian strategy this topic is included in other functional areas: "Checkpoint control" and "Border protection outside of the checkpoints". Additionally, the European model reflects the EU specifics, and therefore includes the exchange of information and cooperation between member states, cooperation between relevant institutions, bodies, offices and agencies of the Union, as well as solidarity mechanisms.

⁴ The State Border Guard Service has taken its first steps in implementing the Schengen mechanism for monitoring and assessing the state of integrated border management. SBGS: <https://dpsu.gov.ua/ua/news/Derzhprikordonsluzhboyu-zrobleni-pershi-kroki-shchodo-zaprovadzhennya-SHengenskogo-mehanizmu-monitoringu-ta-ocinyuvannya-stanu-integrovanogo-upravlinnya-kordonami/>

⁵ Council Regulation (EU) No 1053/2013 of 7 October 2013 establishing an evaluation and monitoring mechanism to verify the application of the Schengen acquis and repealing the Decision of the Executive Committee of 16 September 1998 setting up a Standing Committee on the evaluation and implementation of Schengen https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.L_.2013.295.01.0027.01.ENG&toc=OJ%3AL%3A2013%3A295%3ATOC

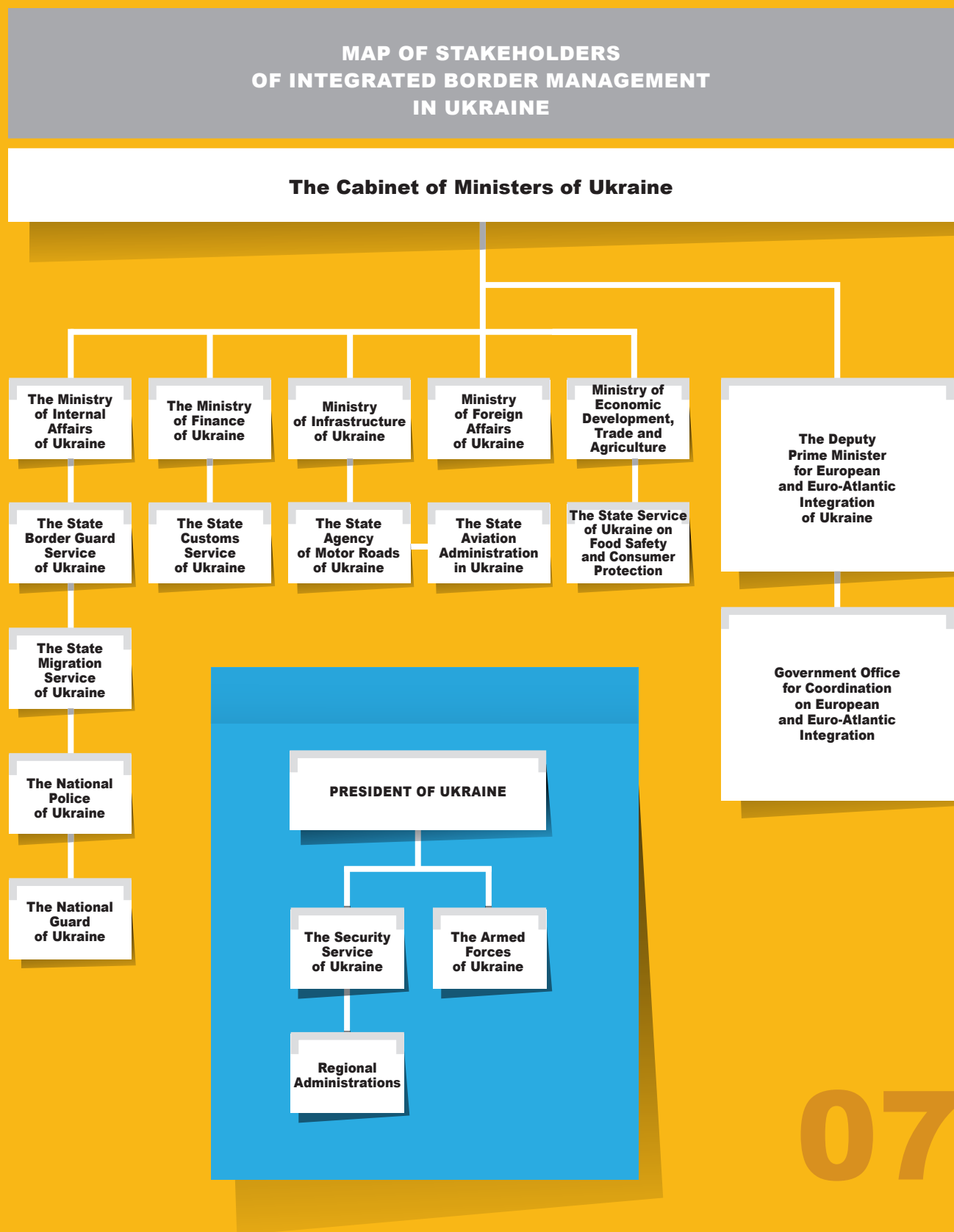
⁶ Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624 <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A32019R1896>

Table 1.
Comparison of functional components of Ukrainian and European IBM models

| Components of Ukrainian IBM model | Components of European IBM model |
|--|--|
| <p>Similar components. Checkpoint control. Border protection outside of the checkpoints</p> | <p>Border control, as well as measures to facilitate the legal crossing of borders and, where appropriate, measures to prevent and detect cross-border crime at the external borders, including the smuggling of migrants, human trafficking and terrorism; mechanisms and procedures for the identification of vulnerable persons and unaccompanied minors, as well as for the identification of persons in need of international protection or wishing to seek such protection, the provision of information to and information on such persons</p> |
| <p>Protection of maritime borders, search, rescue and other activities at sea. Risk analysis</p> | <p>Search and rescue operations for people in distress at sea. Analysis of risks to internal security and analysis of threats that may affect the functioning or security of external borders</p> |
| <p>Coordination of activities in the field of integrated border management and interagency cooperation</p> | <p>Interagency cooperation between the national authorities in each member state responsible for border control or other tasks performed at the border, as well as between the authorities in each member state responsible for return, including the regular exchange of information through available means of information exchange and, in some cases, cooperation with national authorities responsible for the protection of fundamental rights</p> |
| <p>Development of international cooperation</p> | <p>Cooperation with third countries with a particular on neighboring third countries and those ones that have been identified through risk analysis as countries of origin or transit of illegal immigration</p> |
| <p>Prevention of the cross-border crime</p> | <p>Technical and operational measures within the Schengen area, which are related to border control and are designed to more effectively combat illegal immigration and combat cross-border crime</p> |
| <p>Return of illegal migrants</p> | <p>Returns of third-country nationals subject to related decisions issued by an EU member state</p> |
| <p>Assessment of the implementation of the tasks of integrated border management <i>(currently not in place)</i></p> | <p>Quality control mechanism, in particular the Schengen evaluation mechanism, vulnerability assessment and possible national mechanisms to ensure the implementation of the EU legislation in the field of border management</p> |
| <p>Mechanism and monitoring of the Strategy implementation. Differing components</p> | <p>Exchange of information and cooperation between member states in the fields covered by the Regulation, as well as exchange of information and cooperation between member states and the European Border and Coast Guard Agency, including support, coordinated by the by the European Border and Coast Guard Agency. Cooperation between bodies, offices and agencies in the fields covered by the Regulation, including via the regular information exchange. Use of advanced technologies and large-scale information systems. Solidarity mechanisms, in particular the EU funding instruments.</p> |

MAP OF STAKEHOLDERS

The IBM strategy up to 2025, approved by the Order of the Cabinet of Ministers of Ukraine, defines the list of subjects of integrated border management, which are essentially the main stakeholders in this area of public policy. IBM entities interact at the departmental, interagency, state and international levels. Communication between the entities takes place during joint meetings, conferences, within the framework of the interdepartmental working group on the coordination of integrated border management and the virtual contact think tank.



LET US CONSIDER THE FUNCTIONS OF STAKEHOLDERS IN ACCORDANCE WITH THE COMPONENTS OF THE UKRAINIAN MODEL OF INTEGRATED BORDER MANAGEMENT.

COMPONENT 1. COORDINATION OF ACTIVITIES IN THE FIELD OF INTEGRATED BORDER MANAGEMENT AND INTERAGENCY COOPERATION

The Cabinet of Ministers of Ukraine implements measures to protect and defend the state border of Ukraine and the territory of Ukraine as well as approves concepts and strategies for integrated border management and action plans for their implementation. In 2019, the Cabinet of Ministers decided to establish **an inter-agency working group on the coordination of integrated border management**. The tasks of this group are the IBM coordination, the preparation of proposals for the formation of public policy and the development of regulations in the field of the integrated border management. This working group consists of representatives of the following authorities:

- *Deputy Prime Minister for European and Euro-Atlantic Integration*, who presides over the Interagency Working Group.

- *The State Border Guard Service of Ukraine*, which is the central body implementing the state policy in the field of protection of the state border and sovereign rights of Ukraine in its exclusive (maritime) economic zone.

- *The State Customs Service of Ukraine*, which is the main body implementing the state customs policy and state policy in the field of combating customs-related offenses.

- *The Ministry of Internal Affairs of Ukraine*, which is the main body shaping the state policy in the areas of state border protection and migration, including combating illegal migration. Through the Minister of the Internal Affairs, the Cabinet of Ministers coordinates the work of the State Border Guard Service and the State Migration Service.

- *The Ministry of Finance of Ukraine*, which is the central body ensuring the formation and implementation of a unified state customs policy and state policy in the field of combating offenses against the state according to the customs legislation. Through the Minister of Finance, the Cabinet of Ministers of Ukraine directs and coordinates the activities of the State Customs Service⁷.

- The State Migration Service of Ukraine implements state policy in various areas of migration, including combating illegal migration as well as in matters dealing with citizenship, registration of individuals, refugees and other statutory categories of migrants.

- The State Service of Ukraine for Food Safety and Consumer Protection, which implements state policy in the field of health regulation and sanitary norms.

- *The Ministry of Infrastructure of Ukraine*, which carries out work related to the equipment, maintenance and repair of premises at border crossings⁸.

⁷ Resolution of the Cabinet of Ministers of Ukraine of August 20, 2014 #375 «On approval of the Regulation on the Ministry of Finance of Ukraine» <https://zakon.rada.gov.ua/laws/show/375-2014-%D0%BF/conv#Text>

- **The Ministry of Foreign Affairs of Ukraine**, which participates in the formation and implementation of state policy on visa and migration issues, in particular develops rules for issuing visas to foreigners and stateless persons for their entry to Ukraine and also for transit.

- **The Security Service of Ukraine**, which assists the State Border Guard Service of Ukraine in protecting the state border of Ukraine.

- **The Armed Forces of Ukraine**, which are responsible for the defense of Ukraine, protection of its sovereignty, territorial integrity and inviolability.

- **The National Guard of Ukraine**, which ensures state security and protection of the state border in cooperation with law enforcement agencies.

Additionally, through mutual agreement, the authorized representatives of the following governmental bodies may join the interdepartmental group: **the Office of the President of Ukraine, the Verkhovna Rada Committee on Ukraine's Integration with the European Union and the Verkhovna Rada Committee on National Security, Defense and Intelligence, the National Security and Defense Council, international organizations and institutions.**

It should be noted that the interdepartmental group does not include representatives **of the Ministry of Economic Development, Trade and Agriculture, the Ministry of Justice, representatives of regional state administrations and the State Agency of Motor Roads of Ukraine:**

- When it comes to IBM, **the Ministry of Economy** directs and coordinates the activities of the State Service of Ukraine for Food Safety and Consumer Protection and ensures the implementation of a unified customs and tariff policy, prepares proposals for improving the regulatory framework for customs and tariff regulation.

- **The Ministry of Justice** is involved in the activities outlined in the IBM Strategy on the components of border protection outside of the checkpoints and international cooperation.

- The functions of the **regional state administrations** include facilitating the activities of customs authorities and border services, as well as creating appropriate conditions for the checkpoints to operate across the state border of Ukraine.

- **The State Agency of Motor Roads of Ukraine** is involved in building and reconstructing roads to checkpoints.

As part of the implementation of the coordination component of the IBM Strategy Action Plan, **the State Border Guard Service, the State Customs Service, the Ministry of Internal Affairs, the State Migration Service, the Security Service, the National Guard and the National Police** are working together to: improve the coordination mechanism; raise the level of awareness of the representatives of authorities, involved in IBM, about upholding human rights, additionally taking into account the principle of gender equality; adapt the approaches to training personnel in a rapidly changing operating environment, which is based on the best European practices; improving the efficiency of personnel management. At the same time, **the Deputy Prime Minister for European and Euro-Atlantic Integration**, who presides over the interagency working group, is not necessarily involved in the tasks under the coordination component of the IBM Strategy.

COMPONENT 2. CHECKPOINT CONTROL

The State Border Guard Service is in charge of border control and passage through the state

8_ Resolution of the Cabinet of Ministers of Ukraine of June 30, 2015 #460 «On approval of the Regulations on the Ministry of Infrastructure of Ukraine» <https://zakon.rada.gov.ua/laws/show/460-2015-%D0%BF?find=1&text=%D0%BA%D0%BE%D1%80%D0%B4%D0%BE%D0%BD#Text>

border of Ukraine and to the temporarily occupied territory and back of persons, vehicles, cargo, as well as of detecting and preventing illegal movement across the border.

The State Customs Service controls the legality of the movement of goods across the customs border of Ukraine and also maintains customs control and customs clearance operations.

The State Service of Ukraine for Food Safety and Consumer Protection conducts medical and sanitary control on state level in order to prevent entry of vehicles, import of goods, commodities and other items, including medicine, biological, chemical and radioactive substances, as well as materials and wastes that may pose a danger for the life and health of Ukrainian citizens onto Ukrainian territory.

The National Police, in cooperation with the State Border Guard Service, ensures orderly conduct at checkpoints in the areas where car queues are formed, as well as takes assist in forming orderly queues of vehicles leaving Ukraine.

The State Border Guard Service, the State Customs Service, the State Food and Consumer Service, the National Police, the Ministry of Internal Affairs, the Ministry of Finance and the Security Service of Ukraine are implementing the following tasks of the IBM Strategy Action Plan: introducing modern technologies and data exchange mechanisms; applying joint control and the “single stop” principle; re-equipping the checkpoints with upgraded technical means; adapting national control systems to European ones (particularly Schengen systems); developing mechanisms for the exchange of information on goods with the customs services of neighboring countries; conducting measures for joining the New Computerized Transit System (NCTS); implementing pilot projects on electronic queuing at checkpoints; introducing the status of authorized economic operator; improving the mechanism of functioning of the “single window”, etc.

COMPONENT 3.

BORDER PROTECTION OUTSIDE OF THE CHECKPOINTS

The State Border Guard Service protects the state border in order to prevent illegal movement

across its line as well as to ensure compliance with the state border regime and the borderside regime. The Security Service of Ukraine assists the State Border Guard Service in protecting the state border of Ukraine.

The National Guard of Ukraine ensures state security and protection of the state border in cooperation with law enforcement agencies. Also, the Armed Forces of Ukraine may be deployed to strengthen the protection of the state border if necessary.

The State Border Service Administration, the National Guard of Ukraine, the Security Service of Ukraine, the Armed Forces of Ukraine, the Ministry of Internal Affairs, the Ministry of Infrastructure, the Ministry of Finance, the State Customs Service, the National Police, the Ministry of Foreign Affairs, the Ministry of Justice, the State Migration Service and the State Aviation Service within the framework of the IBM Strategy are carrying out the following tasks: modernizing the border protection system outside the state border, creating a mechanism for effective cooperation in border protection outside of the checkpoints and counteracting the use of unmanned aerial vehicles.

COMPONENT 4.

PROTECTION OF MARITIME BORDERS, SEARCH, RESCUE AND OTHER ACTIVITIES AT SEA

The State Border Guard Service protects the state border of Ukraine on land, sea, rivers, lakes and other bodies of water, as well as the sovereign rights of Ukraine in its exclusive (maritime) economic zone.

The Armed Forces of Ukraine may be deployed to protect Ukraine’s sovereign rights in its exclusive (maritime) economic zone and on the continental shelf and to ensure the security of Ukraine’s national maritime navigation on the high seas or anywhere outside the jurisdiction of any state.

The State Border Guard Service, the Armed Forces of Ukraine, the Ministry of Internal Affairs and the Ministry of Infrastructure perform the following tasks of the IBM Strategy Action Plan: reducing response time at sea and conducting effective joint interagency and international activities and operations.

COMPONENT 5.

RISK ANALYSIS

Since 2018, *the State Border Guard Service* has been conducting risk analysis in the field of state border security, taking into account the common integrated model of risk analysis employed by the EU member states – CIRAM 2.0⁹.

Additionally, the virtual contact think tank is conducting joint analytical studies to assess threats and risks in the field of state border security and the effectiveness of the IBM. This analytical center includes divisions of *the State Border Guard Service, the Ministry of Internal Affairs, the Ministry of Foreign Affairs, the Ministry of Infrastructure, the State Migration Service, the State Customs Service and the Security Service of Ukraine*¹⁰. The coordinator of this analytical center is the Department of Analysis and Evaluation of Information of the State Border Guard Service Administration.

Also, risk analysis is carried out within the framework of the Unified information and analytical system for managing migration processes, which is managed by *the State Migration Service*.

The State Border Guard Service, the Ministry of Internal Affairs, the Ministry of Foreign Affairs, the Ministry of Infrastructure, the State Migration Service, the State Customs Service, the Security Service of Ukraine and the National Police perform the following tasks: improving the regulatory framework and updating the risk analysis model to the standard of the European CIRAM 2.0 model, increasing the capacity of relevant authorities to conduct risk analysis, ensuring the development of the system of interaction of integrated border management entities on risk analysis. It is worth noting that the National Police, which performs some of tasks outlined in the IBM Strategy in the field of risk analysis, is not part of the virtual contact analytical center.

⁹ Decree of December 11 2017 #1007 «On approval of the Instruction on risk analysis by the State Border Guard Service of Ukraine» <https://zakon.rada.gov.ua/laws/show/z0091-18#Text>

¹⁰ Decree of September 1 2015 #1050/254/341/749/562 on approval of the Procedure for exchange of information and analytical materials between the subjects of integrated border management <https://zakon.rada.gov.ua/laws/show/z1094-15#Text>





COMPONENT 6. DEVELOPMENT OF INTERNATIONAL COOPERATION

The Ministry of Internal Affairs, the State Border Guard Service, the State Customs Service, the State Migration Service, the National Police, the Ministry of Foreign Affairs and the Ministry of Justice are involved in international cooperation under the IBM. These bodies participate in the development of projects and signing of international agreements with Ukraine that deal with issues within their competence as well as the interaction and exchange of information with government agencies of foreign countries and international organizations. The National Police represents and ensures the fulfillment of Ukraine's obligations in the International Criminal Police Organization – Interpol and the European Police Office – Europol.

As part of the IBM Strategy implementation, these authorities are working to: expand the network and improve the work of joint contact posts; improving joint patrols with neighboring states; expanding the geography of joint operations with the FRONTEX European Border and Coast Guard Agency; improving the activities within the Black Sea Border Cooperation Forum; ensuring coordinated development of the infrastructure of checkpoints on the border with the EU; extending the practice of joint control to other checkpoints across the Ukrainian-Moldovan state border; expanding customs cooperation (including the one within the framework of the World Customs Organization). It should be noted that the implementation of the IBM Strategy in this area does not include *the Deputy Prime Minister for European and Euro-Atlantic Integration, as well as the Government Office for European and Euro-Atlantic Integration*, which the Deputy Minister commands.

COMPONENT 7. PREVENTION OF CROSS-BORDER CRIME

The Ministry of Internal Affairs, the State Border Guard Service, the National Police, the Security Service of Ukraine, the Ministry of Foreign Affairs, the Ministry of Finance and the State Customs Service are involved in preventing and combating cross-border crime and cooperating with relevant bodies and military formations of foreign countries.

These authorities are tasked with the following objectives of the IBM Strategy Action Plan: ensuring the joint activities of law enforcement agencies in preventing and detecting cross-border crimes; improving the regulatory framework; increasing the capacity of law enforcement agencies, particularly, improving the training system for the personnel from the operational units; creating of a system for detecting terrorist challenges and threats.

COMPONENT 8. RETURN OF ILLEGAL MIGRANTS

The following procedures for the return of illegal migrants are currently active in Ukraine: voluntary return, forced return and forced expulsion. The procedure of voluntary return of foreigners and stateless persons is carried out by **the State Migration Service** in cooperation with international and/or public organizations on the basis of concluded bilateral or multilateral agreements on cooperation and interaction on voluntary return¹¹.

Decisions on forced return or forced expulsion of foreigners to the country of origin or third country may be made by **the State Migration Service, the State Border Guard Service or the Security Service of Ukraine**. Compulsory expulsion may be carried out on the basis of the administrative court decision on compulsory expulsion issued at the request of these bodies/their subdivisions.

The State Migration Service, the State Border Guard Service, the Security Service of Ukraine, the Ministry of Internal Affairs, the Ministry of Foreign Affairs, the State Customs Service and the National Police are working to improve the return mechanism for illegal migrants and ensure rights and freedoms when implementing protection and detention procedures in Ukraine.

COMPONENT 9. ASSESSMENT OF THE IMPLEMENTATION OF INTEGRATED BORDER MANAGEMENT TASKS

The State Border Guard Service is responsible for organizing the work on monitoring and evaluating the results of the implementation of the IBM Strategy. In 2021 the priority task of the State Border Guard Service was to establish a working group to develop a national methodology for quality control of integrated border management and a national catalog of quality assessment. According to the IBM Strategy Action Plan, this working group includes **the State Migration Service, the State Customs Service, the Ministry of Internal Affairs, the Ministry of Foreign Affairs, the Ministry of Finance and the National Police**. By the end of 2022, these authorities should approve quality control methods and conduct trainings to prepare the quality control experts, as well as develop regulations on the evaluation of time indicators that indicate the time passage for control procedures and prepare expert trainers to conduct this assessment.

¹¹__Resolution of the Cabinet of Ministers of March 7, 2012 #179 «On approval of the Procedure for applications of the foreigners and stateless persons for the voluntary return»: <https://zakon.rada.gov.ua/laws/show/179-2012-%D0%BF#Text>

STAKEHOLDER MAP – CONCLUSION

The Ukrainian model of integrated border management has an extensive network of stakeholders among the government agencies. The leading role among them is carried out by the State Border Service Administration, the Ministry of Internal Affairs, the State Customs Service, the Ministry of Finance, the National Police, the Security Service of Ukraine, the State Migration Service and the Ministry of Foreign Affairs.

A significant achievement in developing sustainable engagement amongst the stakeholders is **the interagency working group on the coordination of integrated border management**. This working group includes most of the government bodies involved in the IBM implementation and it serves as a platform for communication and policy development in this area. **At the same time, this group does not include rep-**

resentatives of the Ministry of Economy, the Ministry of Justice, State Agency of Motor Roads of Ukraine and regional state administrations, which also perform functions related to the IBM.

The role of **the Deputy Prime Minister for European and Euro-Atlantic Integration**, who presides over the interagency working group should be noted as well, but they are not tasked by the IBM Strategy in the area of coordination, international cooperation and monitoring and evaluation of results. At the same time, the State Border Guard Service is responsible for monitoring and evaluating this area, which is involved in the implementation of tasks within all nine components of the IBM Strategy. **In order to ensure an objective assessment of the implementation of the IBM Strategy, sustainable coordination and enhanced international cooperation with the EU countries, it is important to involve the Deputy Prime Minister for European and Euro-Atlantic Integration and the Government Office for European and Euro-Atlantic Integration, which the Deputy Minister commands.**

The IBM Strategy and its Action Plan are aimed at state public authorities. However, local authorities are also involved in integrated border management. In particular, regional councils may adopt Border Infrastructure Development Programs and allocate funds from the regional budgets. Regional state administrations and local self-government bodies (LCOs) should facilitate the activities of border and customs authorities and create appropriate conditions for the functioning of checkpoints across the state border of Ukraine. The interaction of state and local authorities and the involvement of regional state administrations and local self-government bodies in the implementation of the IBM Strategy is a priority for further development of the integrated border management model in Ukraine.

REPORT

CONSTRUCTION AND MAINTENANCE OF CROSSING POINTS

MECHANISMS FOR PLANNING, FINANCING, MAINTENANCE AND DEVELOPMENT OF BORDER INFRASTRUCTURE IN UKRAINE (WITH VEHICLE CHECKPOINTS AS AN EXAMPLE)

The problem with the slow development of border infrastructure and unjustifiably underestimated role of local authorities in solving this issue was voiced by the Ukrainian government as far back as 1994. The Cabinet of Ministers of Ukraine then noted in their Resolution¹² that the shortcomings in the development of the state border¹³ are primarily caused by the lack of coordination between central and local bodies of executive branch. One of the reasons for such miscommunication was the lack of financial allocations for the maintenance of troops on the border¹⁴, customs authorities and the construction of checkpoints across the state border.

¹² Постанова КМУ від 22 лютого 1994 р. N 100 «Про стан виконання рішень Президента України і Уряду з питань додержання вимог прикордонного і митного законодавства» <https://zakon.rada.gov.ua/laws/show/100-94-%D0%BF#Text>

¹³ На той час основним викликом була розбудова "з нуля" кордону з Росією, Білоруссю та Молдовою, якого до 1991 року не існувало

¹⁴ До 2003 року охороною кордону займалася військова структура - Прикордонні війська, керування якими здійснював Державний комітет у справах кордону. У 2003 році була створена Держприкордонслужба як правоохоронний орган спеціального призначення <https://dpsu.gov.ua/ua/chas-reform/>

Has the situation changed since then? Anyone crossing the road border (especially with the EU) can give an unequivocal answer by comparing the state of infrastructure on both Ukrainian and European sides.

So what's the reason for such state of affairs? Improper use of funds, insufficient funding or something else? Part of the answer lies in the approaches, established by the authorities

in managing issues, which have acquired certain features when Ukraine gained its independence. It is also important to consider the experience of other countries with effective governance models and their feasibility in Ukraine. However, first of all, it is important to consider the role and functions of central and local governments in the process of planning, financing and building border infrastructure.

WHO IS RESPONSIBLE FOR THE MAINTENANCE AND CONSTRUCTION OF VEHICULAR CHECKPOINTS?

Back in 1994, paragraph 8 of the above-mentioned Resolution of the Cabinet of Ministers #100 established that all work related to equipping, maintaining and repairing checkpoints across the state border is entrusted to the Ministry of Transport (checkpoints for railroad, sea, river, ferry and aerial types of transport) and the State Customs Committee (vehicular checkpoints). This model lasted for almost twenty years.

In October 2014, the government decided to change the body responsible for equipping, maintaining and repairing motor road checkpoints, designating the Ministry of Infrastructure as a responsible body. Thus, in the Resolution of the Cabinet of Ministers of October 1, 2014 #502, the State Fiscal Service was required to provide an inventory of real estate owned by the state and used to ensure the operation of vehicular border crossings.

However, six months later, on May 20, 2015, the government once again changed the body responsible for constructing, reconstructing, repairing and maintaining vehicular border crossings, assigning appropriate functions to the State Border Guard Service. Relevant changes were made both in the Resolution of the Cabinet of Ministers #100 and in the Regulation on the SBGS Administration.

However, two months later, on July 22, 2015, by the Resolution of the Cabinet of Ministers of Ukraine #548, these responsibilities were again assigned to the State Fiscal Service. Currently, such powers are exercised by the State Customs Service of Ukraine, as the successor of the reorganized SFS, although the relevant amendments to the Resolution of the Cabinet of Ministers #100 have not been made.

AUTHORITIES RESPONSIBLE FOR MAINTENANCE, REPAIR AND CONSTRUCTION OF UKRAINIAN VEHICULAR CHECKPOINTS



It should be noted that the change of responsible bodies has not changed the situation in any way, moreover, the frequency of transfer of these functions in 2014-2015 from one agency to another is a sign of weak political will to implement new approaches to border management. The chronic lack of resources allocated to the responsible agencies and the risks of image deterioration due to inability to fulfill all obligations have demotivated the relevant authorities.

WHO IS RESPONSIBLE FOR THE MAINTENANCE AND CONSTRUCTION OF VEHICULAR CHECKPOINTS IN NEIGHBORING COUNTRIES?

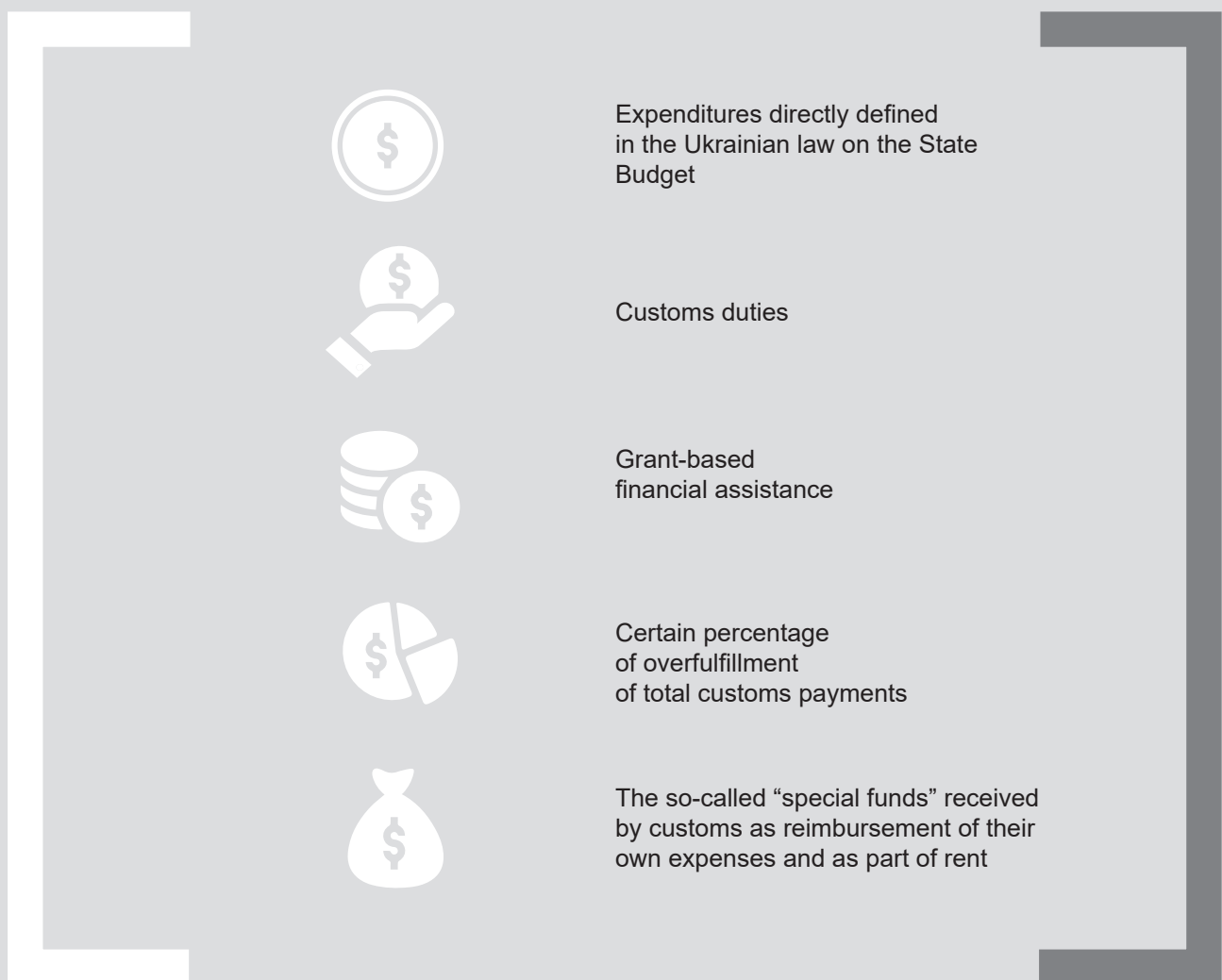
Subparagraph 19 of Part 2 of Article 544 of the Customs Code of Ukraine stipulates that in carrying out customs affairs, customs authorities perform, among others, management of infrastructure facilities used by the customs authorities and the development of the customs border. However, it should be noted that such a function is not typical of the vast majority of customs for the EU member states. Moreover, assigning these functions to Ukrainian customs makes it difficult to perform other tasks, directly related to customs control and registration and fight against customs offenses.

Thus, the analysis of the experience of building checkpoints in the EU and neighboring countries shows the following:

- In the Republic of Poland, the relevant powers are exercised by the Office of Border Crossing Services in the respective administrative region (województwo);
- In Hungary, these powers are delegated to the police that performs the functions of state border protection;
- In the Slovak Republic, these powers are delegated to the Customs Division of the Financial Directorate of the Slovak Republic;
- In Romania, construction of checkpoints is carried out by those governmental bodies where the funding has been allocated;
- In Lithuania, Latvia and Estonia, the state-owned enterprises (specialized or nationwide ones) perform a centralized function of maintaining and building checkpoints.

WHAT ARE/WERE THE SOURCES OF FUNDING FOR THE MAINTENANCE AND DEVELOPMENT OF BORDER INFRASTRUCTURE AND ARE SUFFICIENT FUNDS ALLOCATED FOR THE MAINTENANCE AND CONSTRUCTION OF VEHICULAR CHECKPOINTS?

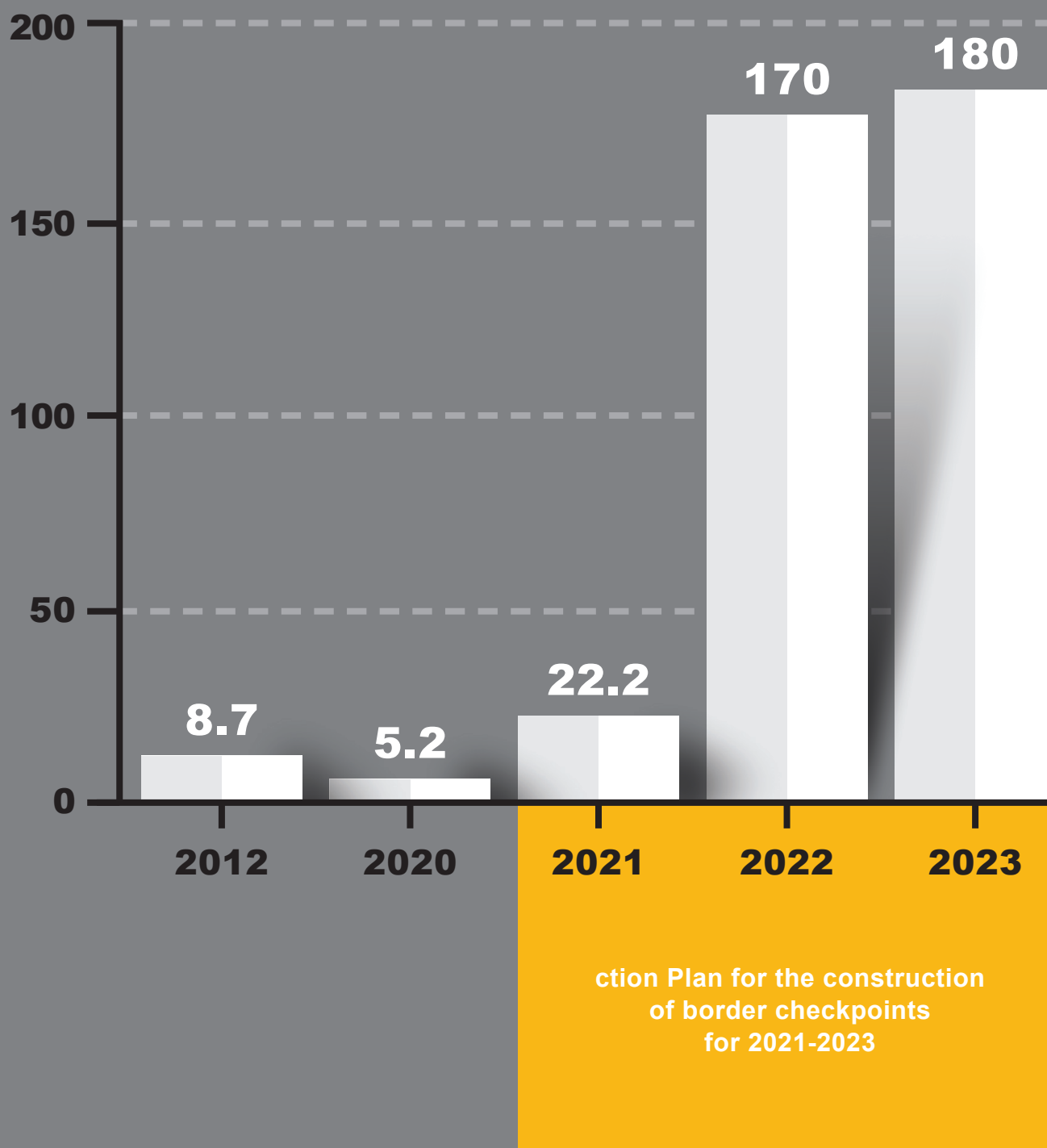
SOURCES OF FUNDING FOR THE MAINTENANCE AND CONSTRUCTION OF VEHICULAR CHECKPOINTS



EXPENDITURES FOR THE DEVELOPMENT OF THE STATE MIGRATION SERVICE OF UKRAINE,*

US dollars, mil*

* 2022 and 2023 based on the currency rates of November 2021



1. General Fund of the State Budget.

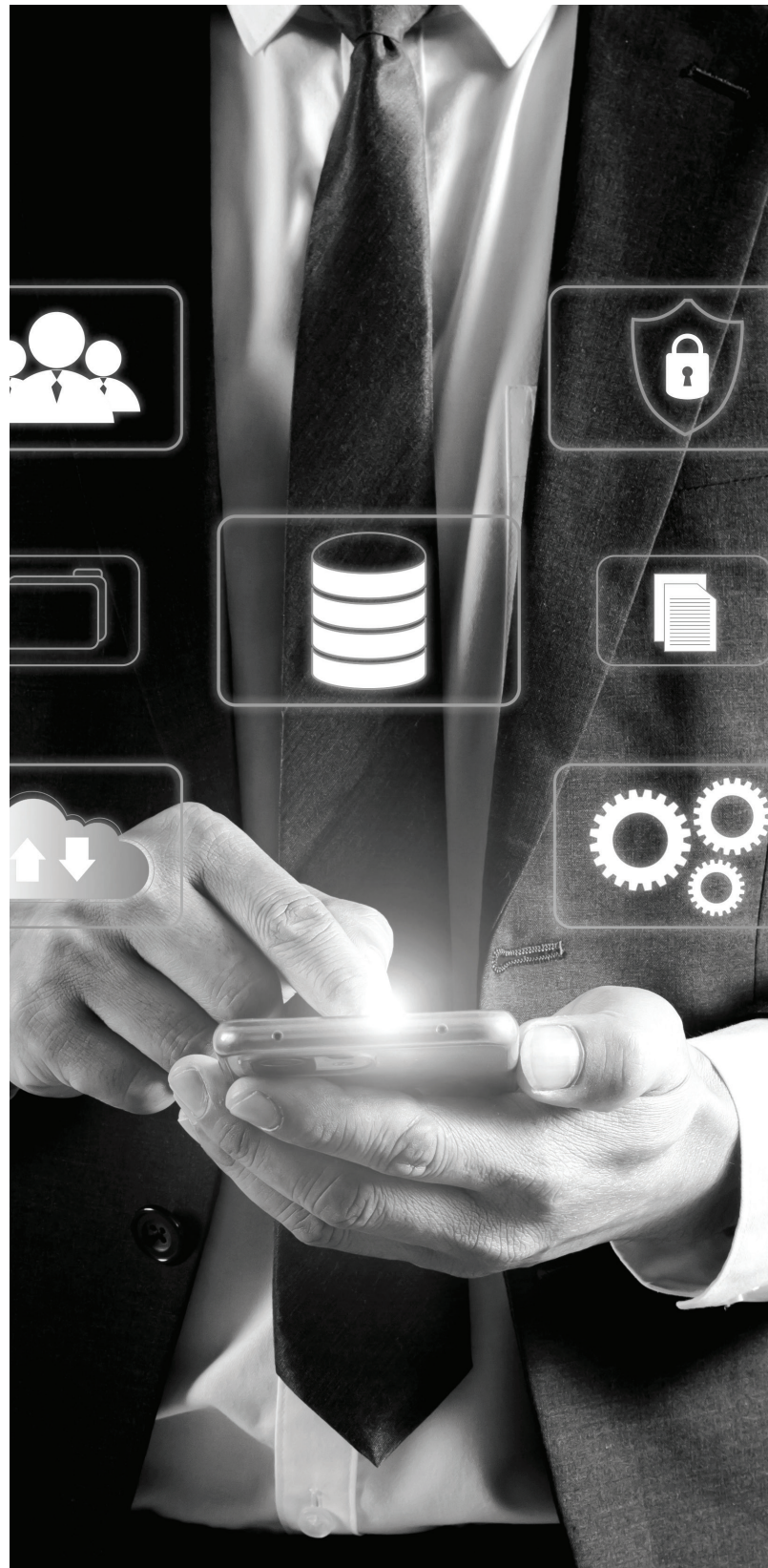
The 1991 Customs Code established a list of customs duties assigned to customs and the services related to the customs¹⁵. At the same time, Article 80 of the Customs Code of Ukraine stipulates that customs duties are used to develop the system of customs authorities of Ukraine, and the State Customs Committee of Ukraine prepares and publishes an annual report on spending funds received as customs duties. As of January 1, 2000, Article 80 became invalid on the basis of the Law on the State Budget of Ukraine for 2000.

Subsequently, the vast majority of customs duties were also abolished in connection with Ukraine's accession to the World Trade Organization.

Another source of funding for these costs have been the allocations from the State Budget. At the same time, the analysis of the distribution of State Budget expenditures for the respective years (except for certain years, such as 2018, 2019 and 2021) shows underfunding for this specific purpose. For example, the expenditures of the State Customs Service of Ukraine in 2012 amounted to 69.5 million UAH or 8.7 million USD (at the weighted average rate this year), while the expenditures for the development of the State Customs Service in 2020 amounted to 140 million UAH or 5.2 million USD.

Some positive developments regarding this issue have occurred in 2021. The State Budget for 2021 provides for development expenditures in the amount of 616 million UAH or 22.2 million USD. Moreover, much larger amounts for the construction of priority checkpoints for 2021-2023¹⁶ are provided by the Action Plan, approved by the order of the Cabinet of Ministers of Ukraine of March 24, 2021 #246-r, where the projected funds for 2022 come to almost 4.5 billion UAH and 2023 – of 4.76 billion UAH.

Whether these funds will simply remain on paper or whether they will actually be allocated and used for the relevant needs we can only tell at the end of 2021 based on the data on the use of allocated funds and the State Budget for 2022.



¹⁵ Chapter 2 of the Customs Code of Ukraine of December 12, 1991 N1970-XII <https://zakon.rada.gov.ua/laws/show/1970-12#Text>

¹⁶ <https://www.kmu.gov.ua/npas/pro-zatverdzhennya-planu-zahodiv-z-a246r>

**2.
The funds received
as a result of the so-called
“customs experiment”
(percentage of overfulfillment
of the Customs Revenue Plan)**

The Ukrainian law “On the State Budget of Ukraine for 2017” stated that 10% of the amount of overfulfillment of total customs payments (customs duties, excise tax on excisable goods/products imported into the customs territory of Ukraine, VAT on goods/products imported into the customs territory Ukraine), determined by the monthly list of revenues of the general fund of the state budget, was allocated to ensure the functioning of bodies that directly exercise customs control. This amount was allocated, inter alia, for the remuneration of officials and the implementation of infrastructure projects for the construction, reconstruction, technical and information support of customs by the state. This norm allowed to accumulate funds in the amount of slightly less than 2 billion UAH. The following is the list of ways these funds have been spent:

- building 7 stationary scanners for the freight transport at checkpoints with the EU member states;
- buying 11 weighting complexes;
- going ahead with the long-awaited construction of the cargo section of the checkpoint “Porubne” (commissioned in 2019) and the reconstruction of checkpoints “Luzhanka” and “Uzhhorod”;
- carrying out the most urgent renovations of infrastructure facilities on the checkpoints.

**3.
Special fund of the State Budget,**

**which is formed at
the expense of the so-called
“customs own funds”**

1. part of the customs’s own property through the State Property Fund of Ukraine is leased to other enterprises and 50% of the funds received are directed to the customs’s own needs, while the rest goes to the State Budget;
2. also, the customs may also use the funds received from the storage of property and reimbursement of the costs of storage of property in cases of violation of customs regulations.

The law stipulates that these funds are used exclusively for the needs of customs, but they fund its actual needs only at a minimum level.

**4.
Grant-based
financial assistance**

In 2017, the European Commission officially stopped funding a number of infrastructure projects on the Ukrainian border due to significant delays in their implementation. In particular, the reconstruction of two checkpoints on the border with Romania – “Dyakivtsi” and “Krasnoilsk” – was suspended, as well as the modernization and reconstruction of four more checkpoints: “Ustyluh” and “Rava-Ruska” on the border with Poland, “Uzhhorod” on the border with Slovakia and “Luzhanka” on the border with Hungary. The State Fiscal Service of Ukraine has been identified as the main recipient of € 29.2 million in EU funding¹⁷.

For various reasons, the grant funds were not fully utilized, and thus the projects were not completed. To resolve this situation, in 2020 the Cabinet of Ministers adopted Resolution #497 “Implementation of projects under the joint operational programs of cross-border cooperation of the European Neighborhood Instrument 2014-2020”¹⁸.

¹⁷ The EU has confirmed the cessation of funding for infrastructure projects in Ukraine. DW <https://cutt.ly/SWg9XwK>

¹⁸ <https://zakon.rada.gov.ua/laws/show/497-2020-%D0%BF#Text>

WHO IS RESPONSIBLE FOR MAINTAINING AND BUILDING OTHER CHECKPOINTS?

In addition to vehicular checkpoints, Ukraine has border crossings for railroad, sea, river, aerial transport as well as the ones for pedestrians. The Ministry of Infrastructure is responsible for the construction, reconstruction, repair and maintenance of railway, sea, river and aerial checkpoints. However, the construction of pedestrian or bicycle checkpoints is not currently stated directly in any of the key documents that define the rules for the development of border infrastructure¹⁹. The lack of plans for the construction of exclusively pedestrian or bicycle checkpoints on the state level is **a barrier for the development for a comprehensive checkpoint system at the state border.**

ISSUES RELATED TO THE PLANNING, FINANCING, MAINTENANCE AND CONSTRUCTION OF ROAD CHECKPOINTS.

In conclusion, we can identify the following issues related to the planning, financing, maintenance and construction of road checkpoints:

- 1. Insufficient funding and analysis of needs**
- 2. Significant number of reorganizations**

- 3. Significant number of inefficient premises**

- 4. Need to finance construction over several budget periods²⁰.**

INSUFFICIENT FUNDING

The level of funding for the maintenance of road checkpoints can be measured by comparing the corresponding costs in Ukraine and neighboring countries. An 2018-2019, the expenditures of the Republic of Poland for the maintenance of joint road checkpoints with Ukraine (“Krostenko”, “Budomezh” or “Dolgobychuv”) corresponded to the amount allocated for the maintenance of 3 large checkpoints located in Lviv region in the (“Rava-Ruska”, “Krakivets”, “Shehyni”).

REORGANIZATIONS

The State Customs Service is going through a difficult period of reform, starting from its founding and development in the 90s and for a decade after that, which was determined by the period of modernization and the search for new forms of efficiency. The name of the institution itself has been changed numerous times: the Customs Service, the Ministry of Revenue and Duties, the Fiscal Service and, lastly, full circle back to the original name – the Customs Service. When the Association Agreement with the EU was signed in 2014, a need arose to develop the institution in accordance with modern international practice.

After the collapse of the Soviet Union, there were 26 customs offices and 49 customs checkpoints in Ukraine. In 1992, the management of the customs authorities was significantly reorganized (the number of customs offices was increased from 26 to 52, and customs checkpoints – to 225). In 1993, 13 more customs offices and 20 customs checkpoints were established. In 1994, 8 territori-

¹⁹ Resolution of the Cabinet of Ministers of February 22, 1994 #100 «On the state of implementation of decisions of the President of Ukraine and the Government on compliance with border and customs legislation» <https://zakon.rada.gov.ua/laws/show/100-94-%D0%BF#Text>. Procedure for coordinating the activities of executive bodies and bodies of local self-government on compliance with regimes at the state border, approved by the resolution of the Cabinet of Ministers of Ukraine of January 18, 1999 #48 <https://zakon.rada.gov.ua/laws/show/48-99-%D0%BF/conv#Text>. Resolution of the Cabinet of Ministers of August 18, 2010 № 751 «On approval of the Regulations on state border crossings and checkpoints» <https://www.kmu.gov.ua/npas/243610554>

²⁰ The standard budget period in Ukraine is a calendar year.

al customs offices were established, each of them having executive control over 5 to 15 customs offices. In 1996, territorial customs administrations were abolished, whereas regional customs offices were established, and the number of customs offices was reduced from 69 to 55 units, while the number of customs checkpoints was reduced from 268 to 199 units. In 2005, regional customs offices were abolished, however, in 2006 their activities were resumed (5 regional customs offices were re-established), and in 2008 these regional customs offices were abolished again. In 2010, the number of customs offices was reduced from 46 to 27 units, and the structure of customs authorities was adjusted according to the administrative and territorial division of Ukraine. In 2019, 16 customs offices were established instead of 26, and in 2021 the customs offices were merged into a single legal entity with separate regional divisions.


Such reorganizations quite often led to the loss of qualified specialists in the relevant fields. Additionally, they led to changes of recipient bodies regarding the financial grants, which was also one of the reasons for the inability for the institution to complete the relevant projects.

INEFFICIENT PREMISES


It should be noted that the development of infrastructure for customs in general or customs checkpoints in particular has some specifics due to the need for a different numbers of administrative staff. When border crossings functioned as customs, much larger premises were built than was needed simply for customs checkpoints. For example, in the Lviv region at a certain time there were 4 customs offices that needed their own administrative buildings. As a result, a significant part of the premises of the “Krakovets” or “Rava-Ruska” customs checkpoints remains vacant, and in “Mostysky Two” there is a three-story building that is used by only two or three employees. Instead, the need to maintain them is not eliminated, and part of the funds is used for upkeep of these inefficient premises.

ISSUES RELATED TO THE BUDGET PERIOD

The issues with the reconstruction and construction lie within the requirements of budget legislation on the development of funds and the lack of the mechanism that allows automatic preservation of unused funds at the end of the year. Construction and reconstruction often have a scheduled duration of more than one year, so because the budget process is tied to a calendar year, there are difficulties with the implementation and financing the work each year.



The issue of allocating the appropriate funds in the second half or even at the end of the budget year is especially difficult. The relevant agencies do not have time to use the funds received and, thus, to comply with the requirements of budget legislation on the use of funds. As funding needs are usually not prolonged for the next fiscal year, construction projects at checkpoints often cannot be completed.



In practice, the financing of the relevant needs is often halted in the next budget year, which results in a significant number of unfinished “long-term” construction at vehicular checkpoints.

3 PART III

PARTNERSHIP MODELS BETWEEN THE STATE AND THE PRIVATE SECTOR MECHANISMS OF ATTRACTING INVESTMENTS TO THE PORT INFRASTRUCTURE OF UKRAINE: LEASE, PRIVATIZATION, INVESTMENT AGREEMENT, CONCESSION

The port infrastructure in Ukraine functions in a peculiar way. On the one hand, the state owns its facilities, on the other it needs the need to attract private investment for maintaining and developing this infrastructure, so there is need for a partnership model between the state and the private sector. As of 2021, Ukraine has 4 models for attracting such investments: lease, privatization, investment agreement and concession.

The latter – concession – is relatively new and is, in fact, currently in the “test mode”. This section will consider the specifics of each model and the challenges the implementation of concession model faces.

LEASE

Lease model is the main form of private operation and investment when it comes to the state-owned port infrastructure in Ukraine. It is the main mechanism that currently allows private companies to operate and develop state property. **Almost all private investors, which invest in public infrastructure, are using the lease model.**

As of September 6, 2021, the Database of Active Lease Agreements of the State Property Fund included 289 such agreements on state-owned real estate in seaports and the total monthly profit the state received from them amounted to 24.6 million UAH. Of the aforementioned 289 agreements, 137 were signed directly with stevedoring companies²¹ and the total monthly profit under these agreements was 23.6 million UAH.

The new lease legislation, which came into force in early 2020, introduced more transparent rules and procedures for leasing state assets.

Previously, the main factor of deterrence when it came to investing in the leased object was the issue of maintaining such investment after the expiration of the lease agreement. However, the new lease law provided a number of tools to protect and compensate investors for repairs or improvements.

Firstly, when renewing the lease agreement at an online auction, the current lessee is given the preemptive right to renew their lease agreement.

Secondly, if the lessee has not exercised their preemptive right and there is a new lessee as a result of the auction, the latter will be forced to reimburse the previous cost of permanent improvements, provided that the former has previously received permission to carry them out from the state and they were made in full compliance with the law. Similarly, the previous lessee will be reimbursed for the cost of permanent improvements if the lease holder refuses to extend the lease agreement with them, citing the need to use the leased property for their own purposes and providing justification for such a need in accordance with legal procedures.

Thirdly, if the lessee carried out major repairs at the facility with the prior consent of the lease holder, they are entitled to credit the cost of the repairs as a monthly rent and receive a 50% discount up to six months.

However, the relevant law contains a provi-



sion under which even the extension of the lease agreement after its expiration is **possible only through a tender**. Today, this norm is ineffective and is essentially an obstacle for attracting investments.

For example, there is a company that has a lease expiring in three years. The company declares that it is ready to invest tens of millions of dollars in the development of the terminal it currently leasing, so it wants to extend the lease for 25 years. And the state cannot outright give the company such an opportunity, since the law does not allow it. The law requires that the contract is terminated and a new tender is announced. Naturally, the lessee will not be investing in the development of the terminal during these three years, as they are not sure that they will win the competition. As a result, the state loses time to attract investment, create new jobs, etc.

Therefore, if the lease expires in a few years, and the company operates successfully, does not violate the terms of the contract and is ready to continue investing, then the current lessee should have priority to sign a new lease, rather than just participate in the tender on general terms.

PRIVATIZATION

Another priority direction for the development of port infrastructure is privatization. **If the lessee that invested a lot of money in some property wants to invest in it further and is ready to buy it from the state at the market price, they should have this right.** Especially when the law allows it. This relates mostly to small-scale privatization, which makes it possible to buy such objects. But currently this norm de facto does not work.

As a result, many assets have now lost their appeal to private companies. After all, while the state was deciding whether to launch a concession, privatization or extend the lease, some private businesses built their own private port terminals without waiting for the decision of the state.

As a result, **the usage of state assets currently has less than 30% of a market share, which can be attributed to the shares of state stevedoring companies.** At the same time, the flow of goods at state facilities is not increasing, transit has been reduced to 10-15%. Everything else can be attributed to export (if import is growing, then it does so at a slow pace). And port capacities are in great surplus, up to 30% are not used at all. That is, the demand for stevedoring capacity is falling, and this is the most significant downward trend today.

Therefore, if the state does not offer its assets to operators and investors right now and does not do so in a quick, clear, simple and transparent way, in the nearest future there will be even more objects, which will fail to attract investors. Along with these assets, there is also a risk of losing thousands of jobs.

²¹ Stevedoring company (port operator) is a business entity that carries out cargo operations in the port or outside of it as well as receives and stores goods, maintains vehicles and performs other related economic activities (Decree of the Ministry of Infrastructure of Ukraine "On the Rules of transportation of dangerous freights via Ukrainian inland waters" of April 04, 2017 #126 <https://ips.ligazakon.net/document/TM056413>)



The most striking example of this is the Chernomorsk port. Due to the inefficiency of public administration, the port is going through difficult times. Port expenditures are four times higher than its revenues. The Ministry of Infrastructure has intensified its collaboration with companies that still want to operate within the port's terminals. In the near future, two tenders will be announced for the lease of two large facilities and they will be facilitated through ProZorro. They will include berths #7, #8, #9. There is also a plan to transfer, most likely through the concession model, two more terminals, so that private companies, which are ready to save jobs and invest, can begin their operations on this property. The pre-feasibility study on the transfer of

the first and fifth terminals and the container terminal to concession is currently carried out. But interest in the Black Sea port in 2021, and, for example, in 2013, is completely different. During these eight years, 90% of companies which expressed their wish to operate the Black Sea port terminals, have already built their own facilities outside the state infrastructure. Now the investor must be convinced this is a safe investment and the risks are minimal. Therefore, it is now necessary to start the commercialization process as soon as possible and attract companies that will keep employing a significant part of the staff once they receive their assets. But some cuts inevitable, which is currently the most painful part of the process.

CONCESSION

Concession is one of the most common forms of partnership models between the state and the private sector in developed countries. With the adoption of the Law on Concession²², Ukraine officially green lit this business-friendly investment mechanism. However, in practice it has not entered into full force, although two years have passed since the law's adoption.

Nota bene. Concession is a form of partnership between the state and the private sector, which provides the concessionaire with the right to create and/or build (i.e. new construction, reconstruction, restoration, repairs and technical re-equipment), and/or manage (i.e. use, operate, maintain) the object of concession, and/or provide socially significant services in the manner specified in the concession agreement, and also allocates most of the operational risk, including demand and/or supply risk, to the concessionaire²³.

In domestic ports, where other forms of partnership between the state and the private sector have become widespread, private stevedoring companies operating under lease and other investment agreements are considering the possibility of switching to concession. By this we mean the transformation of the lease into a concession, i.e. a non-competitive transition to a new investment instrument.

Currently, the first two concession projects in "Olvia" and Kherson ports are being finalized, as the concessionaires have not yet received state property to manage. The transfer is expected to occur by the end of 2021.

On December 22, "Ukrainian Special Export" (Ukrspetsexport) signed a Memorandum of Understanding and Cooperation with the concessionaire company QTerminals W.L.L., which details the co-operation during the concession project.

On August 20, 2020 specialized port "Olvia" in Mykolaiv – second seaport in Ukraine – was transferred into concession for 35 years. In just 35 years, the concession will attract up to 17.3 billion UAH in investments.

On June 26, Kherson seaport was transferred to concession, its concessionaire company Ri-soil-Kherson LLC will be investing about 300 million UAH in the port development.

The reason for such state of affairs lies partly in the imperfect concession legislation, which very imperfect compared to the European practices. It is more complex in Ukraine. And this became evident during a long transition period by unveiling difficulties associated with the re-issuance of land, licenses, etc. An additional set of proposals regarding the modernization of concession legislation is already in development. It is expected that the drafts of the necessary regulations will be ready after the completion of the two aforementioned projects.

MODELS OF CONCESSION

Concession can be implemented by using two fundamentally different models. First and main one includes the concession **of the entire port or its separate structural unit** as a whole and through a tender to select a concessionaire (like it happened with "Olvia" and Kherson ports).

The second one provides for turning individual terminals and complexes that are already operated by private operators into objects of concession. The first model can be successful in small ports or when it comes to the individual port terminals, which have not previously attracted significant private investment. As for the large ports, where private port operators have been active for decades (mostly under the lease agreements) and have already invested hundreds of millions of dollars in state port infrastructure, the first concession model cannot be used there. In such ports, it is not be the whole port, but only its individual terminals, which are currently being used by various stevedoring companies, that may become an object of partnership between the state and the private sector and other forms of investments. In other words, it is possible to use the second (alternative) concession model, which

²² Law of Ukraine "On Concession" <https://zakon.rada.gov.ua/laws/show/155-IX#Text>

²³ Law of Ukraine "On Concession" <https://zakon.rada.gov.ua/laws/show/155-IX#Text>

provides for non-competitive transformation of a lease agreement into a concession one.

In the Odesa, Mykolayiv and Chernomorsk ports some of the investment projects have been completed, while the others in the middle of implementation. As a result, **the objects of the state port infrastructure and private investments are very closely intertwined** in many port terminals. In this situation, port terminals can continue operating under existing legal instruments (mainly leases, less often through investment agreements etc.) or be transformed into a concession. It is applicable if the port operator intends to continue making large-scale investments in the development of its terminal by implementing new or continuing previously started investment projects.

It should be noted that the law on concession provides for a special procedure to enable the transition from lease to concession in order to continue investment in the state property under the lease agreement. In itself, the idea of implementing such a transition is great and progressive. **However, the legislation on this procedure contains a number of obstacles to its practical implementation.** As a result, there is currently no example of the transferring port terminals into concessions, despite the fact that almost two years have passed since the new concession law came into force and port operators are willing to continue investing in the infrastructure under the terms of concession.

Therefore, in order to launch the mechanism of transition to concession agreements, which will allow further investment in the development of the terminals, it is necessary to amend the concession legislation to improve the procedure of such transition. Primary concerns include about the existing time limits, the objects of the concession, as well as certain nuances of the transition itself.

Firstly, the current version of the concession legislature only allows the transition from lease agreements to concession ones. But there are other contractual forms of investment in the development of some of the terminals. One of the examples are investment agreements adopted together with the Ministry of Infrastructure and the Cabinet of Ministers of Ukraine. Therefore, to ensure equal conditions for the development of various port terminals, conditions for the transformation of investment agreements into concessions should be

created, similar to the procedure with the lease agreements.

Secondly, **the law on concessions contains a strict time limits for the concession agreement**, which remains as a result of the transition from the lease of state and municipal property. Thus, the term of the concession may not exceed the one remaining until the expiration of the lease agreement, when the concession agreement is signed. This restriction makes it de facto impossible to transform most port lease agreements into concessions. After all, the average term of a successful concession project, in terms of its payback and other parameters, starts with 10 to 15 years. Most existing lease agreements for port infrastructure expire much earlier. Therefore, for the development of concession relations, it is advisable to remove the time limits from the concession agreement.

And thirdly, **the current legislation on the transformation of leases agreements into concession ones does not explicitly allow to include new facilities that are not leased to the investor, but will be created by them as part of the concession project into the concession agreement.**

The law also does not provide for the inclusion of the infrastructure facilities of the port that are adjacent to the leased terminals and altogether are used to provide a full cycle of services. These include berths, docks, rail- and motor roads, utilities, etc. Most of them are currently not under the lease. At the same time, it is unrealistic to implement a successful concession project in the port industry without including the abovementioned facilities into the concession agreement. In order to eliminate this legislative shortcoming, it is necessary to expand and specify the provisions of the concession legislation in terms of determining the objects of port infrastructure that may be part of the concession agreement.

LEASE OR CONCESSION?

As of September 2021, there no written proposals from entities operating under lease agreements stating their desire to switch to concession under the review of the Ministry of Infrastructure.



This is probably because lessees want to wait until the end the launch stage of two pilot projects to make sure that the concession will be implemented as well as to analyze all the pros and cons of the new model.

It is possible that as soon as the concessionaires of the Kherson and “Olvia” ports will begin operating under this new system, given the opportunity for rapid development, the business, which currently operates under lease agreements, will become engaged. After all, **the concession, comparative to the lease, gives more freedom to the private operator to manage and develop the state property**, including the construction of new terminals. Concession is designed to make the port infrastructure investment mechanism more accessible, faster and safer for the investors. When choosing a form of partnership between the state and the private sector, everything depends on the property in question and investment plans formed around it.

The choice in favor of a concession or lease depends on every individual investment case.

It should be noted that the transition from lease to concession should also occur by bypassing a new tender, otherwise none of the port operators will be interested in such a transition. As of Novem-

ber 2021, the Verkhovna Rada of Ukraine is considering bill #4572 to promote investment in privatization and lease of state and municipal property. It will also amend a number of existing regulations. It has already passed the first reading and, if adopted, will resolve the many issues of attracting necessary investment.

Thus, choosing a form of investment requires individual approach in each case. It is within state's interests to attract investments, create new jobs, receive timely payments for the use of its facilities as well as taxes.

CONCLUSION

Overall, the concession model, although it is currently a top priority, is not the only option for the development of a port or a terminal. The concession, for all its benefits, should not be seen as a universal solution and the only possible tool for attracting investment in seaports. Alternatively, other forms of investment, such as privatization, can be used successfully. When choosing, you must first take into account the individual characteristics of a particular port.

Terminals, which have already received the main bulk of investment, should be privatized. And the ones, where the investment is only planned or the ones where the company will continue previous investment projects, should be transferred through concession.

The state's job is to create legislative and administrative conditions for the successful application of all possible forms of partnership between the state and the private sector in Ukrainian ports. Only by doing this and considering each specific investment project, the most optimal legal mechanism can be chosen, which will achieve a balance of interests of the state and businesses.



