

Current Problems of Inland Waterway Transport Legal Regulation in Ukraine

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ABSTRACT

The article analyzes the legislation gaps related to the issue of inland waterway transport in Ukraine. In particular, the authors define and characterize the process of implementation of European legislation in the field of inland waterway transport and investigate the influence of European standards on the development and updating of the legal regulation of inland waterway navigation. The authors make proposals for improvement of the legislative base of Ukraine on the development of inland waterways.

Keywords: *infrastructure, shipping, river ways, waterways, fairway*

1. INTRODUCTION

The development of the modern Ukrainian state embraces the ongoing changes in the political and socio-economic life of society. These changes also apply to new approaches to transportation of cargo and people. The world transport system has recently seen the rise of competition between different modes of transport; the contribution of maritime, aviation and road transport to the world freight turnover has increased, while the share of railways and inland waterways has dropped. Therefore, many countries have changed the entire transport policy with its main imperative to create economic preconditions for the return of cargo flows to inland waterways and in general the integration of inland waterways into logistics supply chains.

The modern state's economy heavily depends on the transport logistics and more developed countries appear to have a more extensive transport system. One of the modes of transport is water transport that in turn comprises maritime and river transport. However, in contrast to maritime, river transport in Ukraine is poorly developed. This is due not only to the lack of a sufficient number of ships and infrastructure on the rivers, but also to the problems in the legislative regulation of navigation in inland waterways of Ukraine.

According to official data, road transport accounts for more than 60% of cargo-and-passenger transportation in Ukraine while water transport takes up no more than 2% [1].

As the area of Ukraine is 603 628 square kilometers, transport is an important domain that affects all spheres of public life.

Despite the low statistics, navigation plays an important role in ensuring the livelihood of those regions of Ukraine where the density of rail and highways is low or absent and the inland waterway network is well developed.

Ukraine has large coastal maritime spaces and a significant number of navigable rivers, which urges the state to pay

great attention to public administration of their regime and a more effective mechanism for their protection.

At the same time, the activities of the privies in the field of water transport must be regulated by law, as the use of water vehicles can cause significant damage to the lives and health of citizens, the environment and the aquatic world (animals and plants), as well as entail administrative and criminal liability of all parties of these relationships. In addition, legal regulation of the safety of navigation, inland waterway transport and small vessels is still in a rudimentary state.

1.1. Related Work

The questions of legal regulation in the field of inland waterway transport in Ukraine have been addressed by Ukrainian researchers. The most profound works on the issue belong to O. Andriiko, O. Baklan., V. Garashchuk, S. Denysiuk, M. Dolgopolov, V. Kovalenko, V. Kolpakov, O. Martynenko, O. Muzyichuk, etc.

In general, the scientists focus their attention on the issues of control and supervision in public administration: the organizational and legal principles of state control, administrative supervision in law enforcement agencies, and so on. Some researchers have also raised the problem of road safety, while the problems of the shipping industry, specifically legal regulation of navigation in inland waterways of Ukraine, have remained out of the reach of Ukrainian scientists.

1.2. Our Contribution

The article presents a comprehensive review of the Ukrainian legislation aimed at pointing out the problems occurring in the area of inland waterway transport. There is a row of regulatory documents and norms that we consider to be outdated and subject to withdrawal or updating according to the European norms. We also

emphasize the need to introduce a new law on inland waterway transport and suggest some steps to improving it. In particular, suggestions in the sphere of terminology, punishment for violations and state policies in the corresponding area are made.

1.3. Paper Structure

The logic of the research is revealed through the following structure. Section 2 presents the general context of the functioning of inland waterway transport in Ukraine. It introduces the issues of terminology used in the Ukrainian and European legislation, key problems and perspectives of the river navigation, and steps necessary for aligning Ukrainian legislation to the European norms. Section 3 contains main conclusions on the issue and authors' proposals for improving the Ukrainian regulatory base in the area of inland waterway transport.

2. BACKGROUND

2.1. Terminology

The development and establishment of waterways, the revival of glorious shipping traditions and the urgent need to protect the rights of modern Ukraine as a coastal state of particular importance puts on the agenda the problem of developing a holistic concept of jurisdiction and protection of Ukraine's interests in both the waters that wash its territory and the inland waterways.

In our opinion, Ukraine does not use the inland waterways at full capacity and there are two main reasons for it. The first reason is the absence of legislation that would meet the realities of today. The second one consists in the deterioration of river vessels, the mismatch of river depths for safe navigation, the inconsistency of river infrastructure with international requirements, the lack of financing.

Article 21 of the Law of Ukraine "On Transport" refers to maritime and river transport as public and does not use the term "water transport" [2]. The Regulations on the Ministry of Infrastructure of Ukraine [3] and the State Service for Maritime and River Transport of Ukraine [4] also describe the concept of "maritime, river transport".

Regarding the international statements on this issue, we should note that the UN Convention on the Law of the Sea lacks the concept of "water transport", as well as the concept of "maritime, river transport".

An important case of use of terminology is present in the "Association Agreement between the European Union and Its Member States, of the One Part, and Ukraine, of the Other Part". In particular, Article 135 of this Agreement deals with international maritime transport, with the exception of inland sea transport; Article 136 comprises the term "inland waterway transport" [5].

The concepts of "maritime transport" and "inland waterway transport" is also used in Incoterms rules [6] developed by the International Chamber of Commerce which regulate not only the relationship between sellers and buyers within a sales contract, but also affect the customs value of the goods when they are delivered to their destination.

All the mentioned above shows that there is a significant problem for Ukraine in the use of terminology: the legal acts use mainly the term "river transport" instead of "inland water transport". This in turn leads to a "narrowing" of the concept and a reduction of its scope, since inland waterways are not only rivers but also lakes, water storage facilities, canals, other reservoirs suitable for navigation, as well as inland seawater and territorial sea.

In addition, the terminology used in Ukrainian legislation does not often correspond to European definitions, and discrepancies create additional obstacles, especially in the course of international transportation. For example, until recently, Ukrainian legislation did not contain a legislative definition of the term "river port"; and at present, the definition of the term is present only in the decree of the Ministry of Infrastructure of Ukraine.

2.2. Problems and Perspectives of Inland Waterway Transport in Ukraine

Legal regulation of inland navigation is seen as a legal space within which its members operate. Today, despite the numerous regulations governing inland navigation, the legislative framework on this issue is fragmentary, many issues remain out of the legislators' view, and there is no legislative impetus for the development of the industry.

At present, there is an outdated legal framework in Ukraine regulating the annual traffic and the operation of port infrastructure. The only modern law governing the issue of river ports is the Law of Ukraine "On Transport". The "Inland Water Transport Charter of the USSR" of 1955 has also been used in this area so far, which makes inland waterway transportation less attractive.

The modern water transport infrastructure of Ukraine was formed during 1930-1990's. Its development was the part of the plan of industrialization and it was established to conform to geopolitical interests of the state but did not take into account the economic interests of the end consumer and satisfaction of demand [7]. The dramatic change in the structure of demand for transport services has led to serious economic imbalances and increased transport costs.

Despite this, inland waterway transport has a number of advantages. First, Ukrainian inland waterway transport is a rather extensive system and has an objective cost effectiveness. Among other advantages of inland waterway transport, we should mention high energy efficiency, environmental friendliness, the ability to transport large and long loads over long distances, low infrastructure and port costs, as well as the possibility of loading and unloading cargo on the unpaved shore, etc.

A strategic problem of expanding the water transportation requires the development of a modern and efficient water transport infrastructure, which is to intensify the movement of ships and reduce costs for water transport [8].

At present, Ukraine's intra-branch infrastructure of river transport is in a poor state and requires significant investment. A significant part of Ukrainian river waterways does not meet the requirements of safety of navigation at guaranteed depths; only slightly more than half of the waterways (57%) have guaranteed depths [9]. For further navigation in inland waterways, Ukraine needs dredging. Moreover, floodgates are in a catastrophic condition as they are reaching an operating time of 70 years. For example, the systematic inadequate financing for the maintenance of the Dnipro River floodgates has led to a situation on the brink of a technological disaster.

The river fleet also suffers heavy problems. According to the State Statistics Service, there are only 628 units of small-tonnage merchant river vessels suitable for inland waterway transport left, which is about 21% of the number used in 1990. State Statistics Service data show that depreciation of fixed assets of inland waterway transport in Ukraine is 76.2%. This situation is caused by chronic (over 25 years) under-financing of state-owned companies and insufficient investment from private investors. The number of technically outdated vessels is 82.3% [9].

Thus, river transport in Ukraine currently has more problems than positive developments. The delayed reform process in the field causes the following problems:

- reduction of capital investments in the industry, due to the high level of depreciation of fixed assets;
- insufficient funds needed for maintenance and modernization of waterways;
- inefficient use of available inland waterway capacity;
- lack of an industry development strategy.

The analysis shows that the state support and measures aimed at attracting appropriate investments, inland waterways can be a good alternative to existing transport schemes, which will promote competition in the transport market, increase the level of transport of shippers and diversify risks during the transportation.

In order to promote the development of river navigation it is necessary to change the infrastructure of inland waterways, upgrade the existing fleet, perform dredging works, and repair the ports. This requires huge investments in the industry by both the state and national and international investors. The question of financing on the part of the state budget of Ukraine is quite painful, since public investment is very small and it cannot meet the needs of an industry that has not received adequate funding for almost three decades. The possible way out of the current situation for Ukraine is to finance the reconstruction of river infrastructure at the expense of the State Road Fund of Ukraine established by the Law of Ukraine in November 2016. Considerable private investment in inland waterways is also needed, as, for example, to build one river terminal costs about 150-200 million euro; but large investors do not seem to be ready to invest in the development of Ukraine's river transport

primarily because of the lack of a basic law in this area, and therefore clear rules of play.

Investment in the development of port infrastructure is to be directed at accelerating the passage of cargo through terminals, reducing the cost of transshipment. Large investments in the long run will allow the creation of an E-40 water corridor that connects the Black and the Baltic Seas.

The adoption of a law governing the transportation of inland waters of Ukraine would give impetus for the effective development of this industry. Nevertheless, it is only a stronghold because, in addition, freight needs river infrastructure to be set up. Developing the necessary legislation will also give impetus to national and foreign investment in the development of river transport. This, in turn, will be an incentive for the construction of modern river vessels, the restoration of navigable waterways, the restoration of the satisfactory condition of the floodgates, the performing of dredging.

Another important issue is the inland navigation of ships under foreign flags. While in Ukraine river transport is declining, it is rapidly developing in neighboring European countries. Therefore, the opening of border crossing points in the Ukrainian river ports would allow increasing the commodity turnover between the countries, as well as the international transportation of passengers by river transport.

However, there is some improvement. In accordance with the decree of the Cabinet of Ministers of Ukraine of 05.10.2016 an international checkpoint across the state border of Ukraine was opened in the river port of Kyiv.

However, it is important to consider the factors that have a rather negative impact on freight transit across Ukraine. The most essential of these are related to the inconsistency of the quality of the border control system with the amount and cost of taxes and fees collected, as well as the low level of information services, the excessive cost of services provided in the customs territory, unfavorable conditions in the process of registration of transit traffic, and in particular the absence of clear legislative regulation.

Transit cargo is usually transported across Ukraine by foreign shipping companies, which increases the tonnage handling fees at national ports, but decreases freight revenues from national shipowners.

It is worth noting that the adoption of the Decree of the Cabinet of Ministers of Ukraine "On Some Issues of Entry of Foreign Non-Military Ships to the River Ports of Ukraine" resulted in some democratization of the legal regime of entry of foreign vessels to the river ports of Ukraine. It looks quite convincing; passenger, sporting, sailing vessels and yachts have the right to enter the river ports of Ukraine, open to foreign non-military vessels, regardless of the flag they carry.

For comparison, according to the order of the Ministry of Transport of Ukraine of 25.11.1998 that was valid up to 2012, a vessel under the flag of a country that did not have inland navigation agreements with Ukraine had to obtain a One-Time Permit to enter the Ukrainian river port.

The former extremely burdensome permitting procedure is now valid only for the foreign non-military vessels, except

for passenger, sporting, sailing and yachts, under the flag of a country that does not have a respective treaty with Ukraine. Undoubtedly, the permit procedure for cabotage operations remains in force.

Booking cabotage for vessels flying the national flag is a common practice in Europe and around the world.

In this context, the definition of the cabotage operations becomes relevant. Initially, the concept of cabotage meant sailing “from cape to cape”, i.e. coastal navigation without access to the high seas. Eventually this concept became legal: it refers to transport of goods or passengers without crossing the state border. The term “small cabotage” applies to shipping within one sea or two adjacent seas, and large cabotage is shipping in several seas (different basins). Thus, when sailing in large cabotage, ship can possibly cross the state borders.

There are some nuances in the definition of cabotage in different countries. As distinct from international transportation, a vessel carrying cabotage operations may enter the ports of only one state. Cabotage transportation at the same time can be the part of international transportation. For example, a ship departs from the port of Hamburg, Germany, with cargo that is partially unloaded in the port of Odesa, and then – Mykolaiv. The part between Odesa and Mykolaiv is a cabotage transportation. Certainly, cabotage transport in Ukraine is only allowed to ships under the Ukrainian flag (Article 131 of the Merchant Shipping Code of Ukraine).

However, if there is an appropriate permit issued by the State Maritime and River Transport Service of Ukraine, cabotage may be carried out by the vessels under the flag of another state. For example, Article 6 of the Agreement between the Government of Ukraine and the Government of the Federal Republic of Germany on Inland Navigation of 14.07.1992, provides that the carriage of passengers and/or cargo between the ports of one Contracting Party (cabotage) is reserved for ships of that Contracting Party. Exceptions require the special permission of the competent authority.

There are also general rules consolidated in the Decree of the Cabinet of Ministers of Ukraine “On Some Issues of Entry of Foreign Non-Military Ships to the River Ports of Ukraine” №155 of 29.02.2012. The procedure for issuance of one-time permits for entry to the river ports of Ukraine is established by the order of the Ministry of Infrastructure of Ukraine № 665 of 09.11.2012 concerning one-time temporary permits for vessels under the flags of states that do not have international treaties with Ukraine on inland waterways. To obtain such permit, the administration of the flag state, the shipowner or his representative must apply to the State Maritime and River Transport Service of Ukraine no later than six days before the ship arrives at the river port. In turn, the transparent cabotage transportation is an incentive for the development of domestic inland waterway shipping.

The prominent researchers in the field S. Boniar [10], O. Kotlubai [9], V. Topalov [11] emphasized the need to stimulate the development of navigation in our country. In fact, the amount of river transport in Ukraine is declining

rapidly, due to the lack of funding for replenishment and maintenance of the fleet.

In our opinion, a structured system of bodies that coordinate the activities of water transport today is not a holistic formation, which leads to inconsistencies in management and causes difficulties in law enforcement activities. For example, there is a conflict situation regarding the appointment of port masters. According to the information on the website “Ports of Ukraine” as of February 18, 2019, two captains were officially employed in the seaports. One is from the Ukrainian Sea Ports Authority (USPA) and the other from the State Maritime and River Transport Service of Ukraine (Maritime Administration). The conflict arose from the desire of the Maritime Administration and the Ministry of Infrastructure to exert particular influence on the appointment and dismissal of port captains.

The Maritime Chamber of Ukraine argued that there should be a clearer separation of security and supervision functions at the legislative level. The supervision function is to embrace separate functions of captains of ports, in particular, certification, issue of passports of seamen, etc. [12]

To resolve this problem it is necessary to establish an effective body responsible for the development and operation of the strategic inland waterway infrastructure, including shipping gateways, navigation aids, river information systems, and fairway maintenance. What the newly created body needs to perform the above functions is a stable and sufficient financing scheme. It should be noted that the economic effect of using inland waterway transport at full capacity can offset the state’s expenses for maintenance and reconstruction of the river infrastructure. In addition, the Association Agreement between the European Union and Its Member States, of the One Part, and Ukraine, of the Other Part, provides for introduction of new principles for shaping and coordinating public transport policy, creating conditions to ensure quality control of the performance of the functions of the relevant executive authorities.

The shipping transport infrastructure plays a prominent role in the economic development of Ukraine, which is connected to a new turn in the development of trade and economic relations between Ukraine and the EU countries and changes in the volume of foreign trade and transit transportation. The other factors include the state of the world economic situation, changes in prices for the main types of export-import products and the need to improve the living standards of the population of Ukraine.

Nowadays when Ukraine is deepening its integration into the world economy domestic transport is of great importance. It contributes to economic development, foreign economic relations and enhancing the competitiveness of the country. Recently, there has been a rather rapid growth of interstate freight flows, where transport is a major infrastructure component of foreign trade in both goods and services.

Therefore, transportations carried out by various modes of transport contribute to the development of the entire transport system and bring profit to the participants of the

transportation process. Consequently, a well-developed and modern transport infrastructure that brings together interdependent suppliers of resources, producers of products and in particular consumers, contributes to the growth of the economy, the main indicator of which is the increase in gross domestic product.

2.3. Steps to Adaptation of the European Norms and Standards

The analysis of the Rules of Navigation in Inland Waterways of Ukraine and their correspondence to the European Inland Waterways Rules shows that there are significant differences between the current rules of Ukraine and the European norms. The difference concerns the use of terminology, signaling navigational signs, manifested in the available form of signs, colors of buoys, characteristics of lights, etc.

Besides the use of inland waterways in the EU is much higher than in Ukraine, accounting for 6% in 2018.

The Regulations on Navigation Provision of Inland Shipping (Approved by the Decree of the Ministry of Transport and Communications of Ukraine No. 498 of June 14, 2007) based on the interstate standard GOST 26600-98 (Signs of navigation inland navigation waterways. General specifications) [13] does not correspond to the European standards as well.

In this context, Ukraine should focus on the experience of the European Union countries in improving the level and quality of the use of inland waterways, since the creation of a strong international inland transport system will create additional jobs in Ukraine and provide the impetus for the development of the economy as a whole. In addition, we should also mention that European countries see the inland waterway transport as the way of both cost-efficient and safe for environment transport [14]

At present, the realization of maritime and river potential is of particular importance for ensuring the stable development of Ukraine as an independent European state. Since maritime shipping accounts for about 90% of world trade, the issue of implementation of international and European standards for shipping becomes very urgent for the effective and more sustainable involvement of Ukraine in international maritime and river transport.

One of the first steps in this direction was the approval by the Cabinet of Ministers of Ukraine at the end of 2017 of the Resolution No. 747-p on the Strategy of implementation of the provisions, directives and regulations of the European Union in the field of international maritime and inland waterway transport ("road map").

The main objective of the Strategy is to adapt national legislation to the legislation of the European Union, which will facilitate liberalization and mutual access to the markets of Ukraine and the European Union.

According to Article 138 of the EU-Ukraine Association Agreement, our country aligns its legislation, including administrative, technical and other norms in the field of

international maritime transport, with the relevant norms adopted by the European Union, in so far as to which such a legislative approximation would promote the goals of liberalization, mutual access to the markets of Ukraine and the European Union, and the movement of passengers and goods by sea and inland waterway [15, p.23].

Article 249 of the Treaty establishing the European Community (as amended by the Treaty of Nice) provides that the European Parliament acting jointly with the Council, the Council and the Commission shall make regulations and issue directives, take decisions, make recommendations or deliver opinions in accordance with the conditions laid down in the Treaty. The EU Regulation is a general act; it is binding in all its constituent parts and is directly applicable to all Member States. The EU Directive is binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods. Regulations and Directives enter into force on the date or, in the absence thereof, on the twentieth day following their publication.

Directives are often referred to as the "main instrument of harmonization" of EU Member States' legislation. Ukraine also expects a similar effect from the process of adaptation of Ukrainian legislation to EU regulations and directives in the field of maritime and inland waterway transport.

In this regard, according to the Strategy, Ukraine has undertaken to implement the following acts of European law:

- Council Directive 87/540 / EEC of 9 November 1987 on access to the occupation of carrier of goods by waterway and mutual recognition of diplomas, certificates and other official qualifications for carrying out such activities. At present, the legislation of Ukraine does not take into account the mutual recognition of diplomas, certificates and other documents on educational activity. This requires amendments to the Decree of the Ministry of Infrastructure of Ukraine №490 of 07.10.2014 "On approval of the Regulation on the Issuance of a Merchant Ship Certificate Permitted to Navigating Inland Waterways" regarding the establishment of a certificate of completion of the relevant course.

- Directive 2006/87 / EC of the European Parliament and of the Council of 12 December 2006 laying down technical requirements for inland waterway vessels. The objective of the implementation of this Directive is to establish uniform technical requirements for the introduction of a harmonized system of issuance and validation of technical certificates (inland waterway certificates) for inland waterway vessels.

- Directive 2005/44 / EC of the European Parliament and of the Council of 7 September 2005 on harmonized river information services on inland waterways in the Community. The Directive is aimed to harmonize information and communication technologies on inland waterways, which helps to significantly improve the safety and efficiency of inland waterway transport.

In addition, the provisions of the Strategy provide for the implementation of Council Directive 96/75/EC on the systems of chartering and pricing in national and

international inland waterway transport in the Community, including under the Association Agreement, confirm the need to use the terminology of EU legislation.

It is worth noting that delaying the introduction of relevant amendments to the national legislation, affects the

3. CONCLUSION

We consider it reasonable to include all the commitments made by Ukraine regarding the implementation of the European Union directives into the new Law “On Inland Waterway Transport”. This concerns the pricing and contracting in the area of international and national inland waterways; the establishment of uniform rules in the field of international maritime and inland waterway transport; improving the level of inland navigation; establishing uniform technical requirements for the introduction of a harmonized system of issuance and certification of technical certificates (ship certificates) for inland waterway vessels.

However, the current edition of the Rules of Navigation in Inland Waterways of Ukraine has been in force for 15 years, without any significant changes. In view of the aforementioned and the practice of applying the Rules, there is an urgent need for a comprehensive revision rather than a partial amendment.

Improving the competitiveness of inland waterway transport is possible if a number of infrastructure, organizational and legislative problems are resolved.

Ukraine urgently needs to seek compromises with all players in the inland waterway market (because in the course of voting for the draft law “On Inland Waterway Transport” in 2018, there were only 10 votes short for its adoption).

The draft law “On Inland Waterway Transport” provides for some positive developments:

- financing mechanism (presence or absence of canal duties as a source of financing the operating costs; determination of the road fund of Ukraine as a source of budget allocation, presence or absence of annual dues);
- requirement to receive funds from the state budget for compensation to the shipowners of the cost of the built vessel and spent on the river fuel;
- admission of foreign vessels in cabotage operations;
- availability of automated accounting of river transport;
- deregulation [16].

However, according to experts delay in the adoption of the law “On Inland Waterway Transport” in Ukraine has reached 28 years.

We believe that the new law must take into account the terminology. The relevant Committee of Verkhovna Rada of Ukraine should submit certain amendments to the existing legislative acts, which will help to avoid discrepancy in terminology in the future.

We propose to use the term “inland waterway transport” instead of “river transport” which is nowadays found in many legal acts. This will extend the definition and include not only rivers, but also lakes, artificial reservoirs, etc. In addition, replacement of the definition of “river

international authority of Ukraine as a player on the world stage and strikes the image of our country.

transport” in the Regulation on the Ministry of Infrastructure of Ukraine will allow the Ministry to develop the industry more effectively and bring the legislation of Ukraine closer to the European norms.

We should also address the issue of punishment for violations of the rules of inland navigation. The main types of administrative responsibility for such violations are warning, fine, deprivation of the right to control the ship, public works, and administrative arrest. The study of the practice of the authorities shows that the most common is the imposition of fines on the subjects of torts.

In our view, today there is a need to toughen administrative liability for offenses in the field of river transport by raising fines, because today they do not fully correspond to the degree of the offense.

The Maritime Administration insists that this will contribute to a clearer adherence to the requirements of the legislation in the field of safety of navigation on maritime and inland waterway transport and encourage individuals and legal entities to abstain from offenses, as well as to implement measures to control (supervision) in the field and exert influence on violators [17].

Therefore, strengthening the interaction between the public and private sectors, public authorities and local self-government bodies, introducing decentralization, especially through coordinated public policy initiatives, can provide a solid basis for the sustainable development of the Ukrainian transport sector and the creation of a free and competitive market for transport services. This will inevitably affect growth of the main indicators of the Ukrainian economy, so the state should pay attention to the problems of the industry, which have not been addressed for almost three decades.

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