M&A Practice in Agricultural Business

ALEXANDROV & PARTNERS

№1 Law Company for Agricultural Business!

Dmytro Alexandrov

- Practicing attorney with over 17 years of experience.
- Dmytro was recommended by The Best Lawyers International Rating Agency as one of the best lawyers in construction and land law two years in a row – in 2014 and 2015.
- According to the results of the "Choice of the Client. Top-100 Best Lawyers of Ukraine" survey, Mr. Alexandrov was included into the list of 100 best lawyers of Ukraine (2015).
- Dmytro Alexandrov ranked the second among the best partners of law firms according to the rating survey conducted by the Yurydychna Praktyka Newspaper (2013).
- According to the results of Ukrainian professional survey of the quality of legal services "Choice of the Client", Mr. Alexandrov was included into the list of 100 best lawyers of Ukraine and was recognized by representatives of the business as one of the best lawyers of Ukraine in land and agricultural law. (2012).
- According to the results of Ukrainian professional survey of the quality of legal services "Choice of the Client", Mr. Alexandrov was included into the list of 100 best lawyers of Ukraine and was recognized as one of the best lawyers of Ukraine in real estate, construction and

SEVERAL PROJECTS FROM OUR PRACTICE:

For agrarian holding TRIGON AGRI in Ukraine we:

- *carried out 24 due diligences of agricultural enterprises*
- *obtained 19 approvals from the Antimonopoly Committee of Ukraine for concentrations*
- *advised on agreements for the acquisition of elevators*

We acted for a famous developer in a dispute with one of Ukrainian major banks. In the course of the conflict there was a possibility, inter alia, of hostile takeover of the facility worth approximately USD 30 million. As the result of the confrontation which lasted over a year and included more than 15 court proceedings, the parties entered into agreement on settlement of a dispute and became partners in the management of a joint business.

Our company supported complex M&A transaction related to acquisition of assets of two sugar mills by the Client. In total, the Client invested more than USD 14 million.

We advised an investor who joined a project on construction of SKY MALL, one of the largest shopping malls in Kyiv with total area of more than 90 000 sq.m.

Photo Gallery











# of Alexandrov & Partners

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DEAR READER,

In this textbook we shared the experience that we gained during the period of more than 12 years of practice and the legal advice that we provided to our Clients in the course of complicated and complex M&A transactions.

We aimed to:

- provide you with useful information about certain stages of M&A transactions;
- draw your attention to issues that may be avoided if you know about them;
- recommend methods of optimization of risks in projects and at their separate stages;
- reveal mechanisms of legal protection;
- offer completed legal documents that were prepared and improved while working on hundreds of projects.

We sincerely hope that you will find answers to your questions on the pages of our textbook.

We wish you a successful and prosperous business!

Thank you for your attention.

Sincerely yours,
Alexandrov & Partners International Law Company

ALEXANDROV
& PARTNERS

DUE DILIGENCE IN M&A AGREEMENTS PERTAINING TO AGRARIAN SPHERE

Detailed preliminary study of the subject matter of an agreement plays an important role in the consummation of M&A projects pertaining to agrarian sphere. Moreover, the specific character of commercial agriculture has a material effect on the ways of investigation of a company within the frames of the due diligence.

The experience of comprehensive follow-up of M&A agreements when agricultural companies in various regions of Ukraine were the subject matter of such agreements allows us to distinguish both the specific feature which is pertinent to agricultural business only, and identify conditional standards of agreement follow-up at various stages, and define regular patterns in terms of their consummation.

The area of land cultivated by a target company plays the decisive role in taking decision on the expediency of entering into an agreement in whole thus having direct influence over the determination of final price as the key indicator with monetary value determined by the parties.

Major blocks of commercial farming land are registered as the ownership of private persons, habitants of surrounding populated localities. Such situation evolved historically as the result of land allotment due to disintegration of the system of collective farms. Overwhelming majority of such land plots have been already registered for lease purposes by local agricultural business structures.

The essential factors to be thoroughly analysed and taken into account when entering into the agreement should include proper confirmation of the title to land, technical condition, grounds of acquisition and perfection of rights to fixed assets of the company (immovable property designated for business purposes, transportation vehicles, special-purpose machinery), stock reserve, production in progress, property fund and land share fund when such «heritage» of the local collective farm is recorded in the name of the company, material agreements of the company, real condition of receivables and payables, labour relations at the company.

It should be separately emphasized on the necessity of legal due diligence of the seller's rights to business, thorough examination of business structures of the parties in terms of antitrust regulation. The lack of approval for concentration in cases set forth in the law may overscore all efforts aimed at the agreement preparation and consummation; moreover, it will result in significant sanctions against its parties (that matter is developed in more detail in a separate article).

Any M&A agreement, including in the agrarian sector, has a sophisticated structure, it requires preliminary planning and coordination of its stages, as well as complex approach to its consummation. An operating enterprise is the target under such agreement, in which enterprise, as is proved by our

experience of following up similar projects, it is very hard to identify and sell exclusively the leasehold pertaining to the agricultural land or other core assets.

Actually, new blocks of leased lands and other assets of the company (production in progress, stock reserve, buildings and constructions, special-purpose machinery, equipment and agricultural implements), established contractual relations with counterparties, open obligations, rights of claim, pending disputes are transferred under the control of a new owner together with the acquired company.

Also, at the stage of preliminary study, it is very important to reveal the real condition of its performance indicators, identify any existing and predictable risks.

Notwithstanding the fact who initiated the M&A agreement - the seller or the purchaser - the operational objectives and motivation of the parties, for obvious reasons, are diametrically opposite.

Economic benefit as the eventual outcome of the agreement consummation drives the seller to carry out a pre-sale preparation in the course of which the measures are taken to settle any outstanding problems pertaining to the company activities, however, at most all comes down to cosmetic post-documenting of missing records with respect to essential indicators, concealment of existing defects. In certain cases, there occur apparently unfair actions on the part of seller, which actions are aimed at the creation of concealed liabilities (payables), encumbrance of core assets of the company in favour of business structures affiliated with the seller.

The purchaser, at the preliminary stage of the agreement, driven by quite obvious motives tries to get a picture of real financial standing of the company to the maximum extent possible; moreover, it makes no haste in abandoning the reasonable arguments in favour of decreasing the entity price.

The first meeting of representatives of the seller and the purchaser, as a rule, ends up by signing a memorandum aimed at fixing intentions of the parties to consummate the M&A agreement in future. Key indicators of the company stated by the seller and conventionally accepted by the purchaser, as well as the preliminary mechanism of the entity price determination, operational measures of the parties aimed at the agreement conclusion are reflected in such document. Such provisional arrangement is formalized in practice in the form of a memorandum of understanding, less frequently - in the form of a preliminary agreement. This fact is explained by the unwillingness of the parties to restrict themselves by certain obligations at the preliminary stage.

In the final part of the article, there is example Memorandum of Understanding (Annex No. 1) and Preliminary Agreement (Annex No. 2) developed according to the results of successful completion of projects of M&A agreements follow-up in the agrarian sphere.

As a rule, in the memorandum of understanding, the seller declares that the company owns necessary resources and means to carry out business whereas it may have insignificant legal defects (separate litigation with an unscrupulous counterparty, small amount of current liabilities, lack of certain primary documents which are being renewed at the moment, etc.), however, in whole the company is presented to the purchaser as a quite attractive investment object.

The importance of the due diligence of the target is explained to the full extent by the necessity to confirm or disprove the indicators of financial and economic activities of the object of agreement as declared by the seller, reveal any concealed defects and risks. The obtained opinions and findings of the investigation may drastically change any arrangements previously achieved by the parties, the structure of the future agreement, and, in individual cases, even cast doubt on the expediency of its consummation in whole.

At the preliminary stage of investigation, it is necessary to take into account the fact that the company may not suspend its business activities and freeze the indicators declared by the seller. Hence, it is our belief that the due diligence report has to reflect the history of changes in key indicators thus confirming their expediency subject to general economic needs of the company operations.

Team of experts engaged in comprehensive study of the company operations in any case has to process a significant number of documentation and information provided by representatives of the seller and verify the results against alternative sources.

For this purpose, upon the execution by the representatives of a memorandum of understanding, a request is sent to the seller for the provision of information and documents for examination on the basis of indicators declared by the seller. Taking into account specific nature of the particular target, in the course of processing of information provided, there arise, as a rule, additional requests regarding urgent questions.

Our experience of successfully completed M&A projects in the agrarian sphere confirms the expediency of implementation, within the frames of the due diligence, of the following procedure in terms of actions and measures:

External due diligence (collection and verification of information about the company from external sources):

1. Obtaining of information from the state enforcement service bodies (at the place of the company's registered office and its assets) to verify whether there are any pending enforcement proceedings involving the company.

2. Information search to verify whether there exist any court decisions/ litigations involving the company or its participants, according to the information from the register of court decisions. Verification of the information obtained in local courts at the place of the registered office of the company.

3. Verification of information on existence of any encumbrances/ bans on alienation of assets of the company, pledges of corporate rights/ interest in

the authorized capital of the company, according to the information from state registers. Obtaining of excerpts with respect to the objects of immovable and movable property, obtaining of a summary of information from the local bureau of technical inventory (for the period when it performed registration functions).

4. Obtaining of information confirming the company's title to land plots from district land resources bodies/ village councils/ district administrations (area, category/ type of lands, location, grounds for the accrual of rights, and the term thereof).

5. Obtaining from the tax service bodies of information on the existence of any debts of the company to the budget with respect to taxes, charges and other mandatory payments (certificate of the status of payments to the budgets or a reconciliation report on mutual settlements).

6. Business information about the seller (search for business entities related to the seller by relations of control, verification of contractual relations of such entities with the company, analysis of contractual relations involving the seller and the company)

Internal due diligence (verification of the information about the company in accordance with the findings resulting from the examination of the documents provided, explanations obtained from officers, inspection and inventory taking of the assets)

1. Verification of the seller's rights to the business (this includes the analysis of incorporation documents, examination of the chronology of resolutions passed by the highest governing body of the company, legal due diligence of the grounds for transition of participants of the company, determination of risks involved with the disposal of corporate rights (or similar rights, according to the substance thereof), verification of the fact whether the procedures for reorganization (if any) were performed properly.

2. Legal due diligence of the rights to use land (verification of agreements, state certificates; analysis of the company's plan with respect to production in progress to define the areas of actually cultivated lands; analysis of the information provided by land resources bodies). The information on the status of settlements regarding lease payments is verified separately, any possible grounds for termination of the lease agreements, legal defects in the executed agreements are determined.

3. Verification of the ownership rights/ rights to use agricultural and special-purpose machinery, transportation vehicles. First of all, the registration documents and primary documents are to be examined, which documents create the grounds for accrual of respective rights for the company. In addition, technical certificates, primary documents (agreements, certificates, and consignment bills) are examined. The status of settlements is determined. In addition to the stated above, the information regarding buyout/ lease of property shares is requested (resolutions on allotment of certain assets of the company in kind from the share fund are examined). The information obtained has to be compared with the accounting records (relevant information).

4. Analysis of the ownership rights/ rights to use immovable property (title, registration, and technical documentation is requested) In addition, the building documents and permits, licenses, approvals with respect to construction in progress/ refurbishment are examined. The information is compared with the accounting records.

5. Examination of receivables and payables of the company on the basis of available primary documents. Key counterparties are examined in term of availability of any legal defects, according to the information of tax authorities and public registers. Commercial and economic feasibility study of entering into relevant agreements is made, the due dates and prospects of debt collection, and the grounds for its accrual are determined.

6. Analysis of the company's debt to financial institutions (banks), entering into and performance of loan agreements, availability of collaterals to secure the performance of obligations (including a mortgage/ pledge/ suretyship). Tax liabilities of the company (according to the accounting records), eligibility for a tax credit, for reimbursement of amounts of paid tax from the budget have to be examined.

7. Comparison of the indicators pertaining to the production in progress, volumes of harvested crop, and stock reserve of the company (according to the accounting records). Accurate information is subsequently determined by inventory taking.

8. The inventory taking and examination of technical condition of the immovable property, transportation facilities, special-purpose machinery, equipment of the company, biological assets, stock reserve, examination of the condition of production in progress, with the engagement of agriculturers (to be carried out simultaneously with other due diligence phases).

9. Holding of a meeting with the labour collective/ owners of land shares, landlords (studying of public opinions, establishment of facts which invoke dissatisfaction, discussion of property matters).

A combined format of the due diligence and remote processing of the collected information is the most convenient, within the frames of which format on-site stages are carried out (negotiations with individual employees of the company, taking copies of required documents, inspection and inventory taking of the assets, holding of a labour collective meeting, negotiations with representatives of local authorities, etc.).

The information obtained and processed within the frames of the due diligence are systematized in topic-related sections of the opinion as set out below.

Verification of the Seller's Rights to Business

As our experience proves, the verification of legal capacity of the seller to enter into and perform an agreement, availability of all rights to the target to the extent required is a matter of high priority in terms of possible entering into a M&A agreement in the future.

Special attention should be paid to studying the history of accrual of the seller's property rights to the business. Sometimes, personal circumstances of the seller or its specific requirements to the conclusion of a future agreement come to the fore.

In the context of above, it would be expedient to refer to the event which occurred during the follow-up of one of the M&A projects by experts of the company.

Within the frameworks of the project, at its preliminary stage, a private agricultural company in one of the district centres in Kharkiv Region was studied. In the course of work, specific details of acquisition by the seller of the rights to business were revealed. The seller's father acted as the founder of the company. Under his supervision, the company achieved high performance and economic indicators. The area of leased agricultural lands cultivated by the company exceeded seven thousand hectares. The end-to-end cycle of agricultural production was ensured by its own special-purpose machinery and equipment, necessary business buildings and structures, human resources.

Approximately one year prior to the project start, the seller's father died as the result of armed attack on his house. As investigation officers found, robbery was the aim of offenders since there were rumours spread in the village that large amount of cash from business was kept in the house.

After the said dreadful events, the seller started to manage the company's affairs. The rights to the company were registered in his name in accordance with the procedure of succession.

At the stage of agreement consummation, the seller flatly prohibited to disclose information on financial relations and payments between the parties to any persons without exception, including to the state registrar.

The agreement was entered into at the office of a private notary far away from the populated locality where the company was registered. The proposal to include the provision pertaining to the agreement price and financial relations between the parties in a separate document, with the notarial certification thereof, was rejected by the seller due to «legal» considerations, as well as options to register alternative grounds for the disposal of rights in favour of the purchaser.

Hence, the state registrar was to be provided with such document pursuant to which actual payments between the parties were to be made whereas certain provisions of that document had to be hided for the state registrar who made entry on the change of participants of the company.

As the result of long-continued negotiations aimed at the settlement of that situation, the notary who certified the sale and purchase agreement prepared an excerpt therefrom, in which excerpt he concealed all sections pertaining to the payments between the parties. The registration actions were successfully taken pursuant to a notarial excerpt from the sale and purchase agreement with respect to rights to the private agricultural company.

When working out this complex of matters, there should be assessed factors which may affect the subsequent consummation of the M&A agreement.

The completeness of the seller's corporate rights to the company, existing management structure, availability of proper authority to effect the transaction, non-availability of encumbrances of the seller's title to business, corporate disputes, good title to business must be verified.

Such verification will allow mitigating risks of unpleasant surprises during the agreement consummation since the purchaser, as the result of its completion, should have full ability to validly take the company under its control, make changes in the staffing establishment and implement business decisions.

Any property disputes involving the seller may become the ground for attachment of an interest in the company, imposition of a ban on its alienation, whereas under the enforcement procedures in connection with decisions on the seller's obligations, the company assets and funds may become the object of enforcement.

Incidentally, the specifics of business organization of the company considered as the target may significantly affect the structure of a future agreement. The like event occurred in the course of project implementation in Kirovohrad Region.

Within the frameworks of the project aimed at acquisition of an agrarian firm in the form of a family-operated farm in one of the district centres in Kirovohrad Region, experts of the Company were engaged for carrying out the due diligence and subsequent agreement follow-up.

The seller determined the acquisition of rights to blocks of lands cultivated by the agricultural firm as the milestone of the project.

On the basis of preliminary examination of the seller's rights to the business, it was found that legally it was impossible to purchase the corporate rights of the business entity in the form as existed. The law determined the only possible way of alienation of a family-operated farm that is in the form of an integral property complex. The said form of business is directly related to the person of its founder (a citizen of Ukraine, members of his/her family) who should possess required skills and experience in agriculture to acquire title to land for running a farming enterprise. In the register, there were found individual cases of alienation of «corporate rights» of a family-operated farm to a purchaser legal entity. However, such option seemed to be very hazardous in view of probable refusal of the state registrar to carry out the registration, sufficiency of grounds for challenging the concluded agreement, cancellation of the state registration of changes in the composition of participants of the legal entity, invalidation of the constituent documents on the grounds of non-compliance thereof with the requirements of the applicable laws.

The acquisition of the integral property complex in that case could not create legal consequences for the purchaser in the form of transfer of rights to use land plots under the agreements entered into and registered by the family-operated farm.

On the basis of the due diligences results, the parties were advised to include in the project, as an individual element, the reorganization of the target by changing its business organization and strict determination of the right of succession. After the procedure of reorganization of the agricultural firm into a limited liability company was completed and assets and liabilities were examined once more, the parties entered into a sale and purchase agreement with respect to 100% interest in the authorized capital of the limited liability company on agreed terms and conditions.

Our experience proves that the examination of documentation under the present section of the due diligence is the guarantee of possible consummation of transaction by the seller. On the other hand, the said information helps to properly structure the agreement with a view of mitigating risks of its subsequent challenging.

Property Rights to Land

In the course of company's documentation examination, the examiners have to find out the area of land intended for commercial agriculture which is actually used by the company; which portion of all lands is duly registered in the name of the company; which portion of the land may be deemed conditionally confirmed (with a detailed list of reasons).

In preliminary arrangements, the seller usually states the area of cultivated lands. That information may be verified by comparison of the company's fields plan, information regarding details of the production in progress, certificate of the local tax authority (areas of agricultural lands owned by the company) with the most recent date of information about the areas as confirmed by land lease agreements.

We recommend that at this stage you pay attention to the compliance by the seller with the succession of crops and correctness of agro-engineering measures on the company's lands. Any violations pertaining to this matter may have very negative consequences in the form of land exhaustion and its unsuitability for use in accordance with the purchaser's plans in the near future, or it may require additional restoration measures.

In the course of project follow-up, which project was aimed at the acquisition of a group of companies in Mykolayiv Region, the experts paid attention to high indicators of production volumes and crop yield in the commodity heading «sunflower seeds» in accordance with the operating results of that group of companies for several preceding years.

During the due diligence of the companies, it was found out that in the course of recent years, main blocks of agricultural land of the companies were laid down with sunflower seeds in violation of the succession of crops. The seller explained that decision by its obligations under a concluded foreign economic agreement to supply the said crop in great volume.

At the same time, the seller emphasized high crop yield on its agricultural lands in the recent years and favourable climatic parameters.

According to opinions of independent agriculturers engaged by the purchaser, such violations of the succession of crops in cultivation of crops by the seller essentially exhausted large blocks of land. Hence, the prospects of using the said lands for cultivation of cereal crops in accordance with the plans of the seller after the agreement consummation were essentially restricted. The fields required comprehensive measures with the view of restoration of lands.

The said circumstances significantly affected the final price of the M&A agreement since they restrained the purchaser in implementation of its plans of cultivation of crops thus having trigged additional expenses for taking restoration measures.

The information provided by the seller regarding the actual use of agricultural lands may be considered conditional since, in practice, the instances of the so-called «self-acquisitions of land» upon implicit consent of local officials are widespread, as well as the use of land for production cycle completion after the expiration of land lease agreements, and improper use thereof.

During the verification of a company's good title to land, there should be requested all agreements of the company (including appendices and schedules thereto), in which agreements the right to use land is the subject matter thereof.

The major package of documentation confirming the use of land comprises lease agreements with individuals. They, as a rule, are template agreements and it is required to verify the compliance thereof with the applicable requirements of the laws on land lease as of the date of execution thereof. For the purpose of analysis, general lists of the land owners, accounting data regarding the land rent payments, information about agreements under re-registration is also requested.

In this package, special attention should be paid to the status of settlements with the landlords, and it is required to find out the reasons of indebtedness, if any. Non-payment of land rent is the ground for early termination of a land lease agreement upon the initiative of the landlord, and a significant block of lands may, thus, legally fall within the risk envelope. The agreements may provide for other legal avenues for early termination which should be assessed in each individual case.

Without exception, each agricultural company which leases land from individuals has a certain number of land plots the rights to which, for some reasons, cannot be confirmed by documents as of the date of due diligence. Thus, some part of the land lease agreements may be signed but not submitted for registration or may be under consideration by registration service bodies, state certificates with respect to some agreements may be re-registered in accordance with the procedure of succession, and in some cases, the land owner may just have moved to other region for a long time. All those circumstances should be assessed as a whole and verified by comparison with the information obtained from alternative sources. According to the results of study, the property rights to land, generally, are divided into three categories: «confirmed», «conditionally confirmed», and «not confirmed».

We recommend that the aforementioned agreements be referred to the so-called risk group since there is an objective probability of losing the rights to use land under such agreements. Moreover, in some instances, the company's production in progress on such lands may also become at risk of loss.

In the course of a project follow-up, which project was aimed at the examination of contractual work regarding relations with the landlords of commercial farming land at one of companies in Kharkiv Region, there was revealed a significant number of expired land lease agreements with individuals.

The management of the company explained that they were actively working to renegotiate land lease agreements. With the accumulation of certain number of renegotiated agreements, including attachments thereto, they were submitted for registration in accordance with the established procedure. In the course of negotiations with the employees of the company, it was found that there was a

competitive agrarian company working in the region, which company conducted an active campaign to obtain new blocks of land from local land owners, including for account of current landlords of the company.

In the context of those circumstances, some blocks of land which were cultivated by the company under re-negotiated but not registered agreements were transferred to the competitive agrarian firm for lease and submitted for registration.

Judicial instances, with respect to the matter of validity of the agreements, quite justifiably proceeded from the fact that the time of accrual of the right to lease the land is related to the state registration, and precedence in conclusion of an agreement had no crucial importance. Instead, long-continued litigations allowed the company to gain time required to complete the production process on disputed land plots and gather in the crops and take them away.

Land lease agreements with respect to state-owned and municipally-owned property which are submitted for analysis by the seller should also comply with the applicable requirements of land laws. It is required to examine the conditions of performance of each of such agreements, and whether there are any legal defects therein and, finally, grounds for possible termination or challenging thereof.

Separately, it is required to pay attention to the lease of land having the status of unclaimed land shares. Such status is assigned to lands which were intended for allotment at the collective agricultural enterprises, however, for some reasons, some persons failed to participate in the meeting of land share holders and initiate the execution of a certificate of land share. Such lands, upon resolution of relevant village, town, city council or district state administration, may be transferred for lease (as a rule, it is a short-term lease) to be used for their designated purpose. However, as far as individuals execute state certificates with respect to relevant land shares, the block of land falling under such status is being reduced.

In the course of examination of a company's right to land, miscellaneous variances of joint activity, agreements containing conditions precedent which provide for alienation of agricultural land also fall under the risk group.

According to the results of processing of the whole package of land documentation, a consolidation table is drawn up, which table reflects the information about confirmed areas of land, types of ownership, terms of lease agreements, lease payments. The explanatory note to this section usually specifies the risks and recommendations concerning the overcoming thereof, reasons why the rights to separate land plots cannot be considered to be confirmed.

Immovable property, transportation facilities, and special-purpose machinery

The verification of the company's rights to this group of assets is very complicated because of a number of reasons. Unconditionally, the initial

information provided for analysis contains detailed lists of property owned by the company.

In practice, the seller often neglects the necessity to register rights to separate facilities due to various reasons. It may be both the reluctance to incur additional expenses and existence of legal defects with respect to separate items. Some agreements on the purchase of immovable property, transportation vehicles and special purpose machinery for business purposes have apparently formal nature, in consequence of which fact they cannot be legally registered in the name of the company in a proper manner.

On the other hand, even when primary documents are available at the company and it has observed the registration procedures with respect to separate items, the relevant assets would not necessarily at all be available, without mentioning their technically sound condition.

In the event when the company which is the subject of examination was established on the basis of property owned by previous collective agricultural enterprise, it is required to process in detail whole documentation relating to the establishment and inventory taking of the property mutual fund, lists of land share holders, resolutions of general meetings of the holders of property certificates, agreements on disposal of certificates.

In practice, the property fund of the former collective agricultural enterprise was mostly transferred into custody to the successor company until a decision on allotment in kind and transfer into ownership of land share holders of separate property items is made. All property of the collective agricultural enterprises was transferred to the share fund, starting from permanent business structures and buildings to small horticultural sundry. At the same time, the technical condition and service performance of such property is quite low, off-market. The immovable property often requires capital repair. As for the transportation facilities and machinery, a number of them also needs a repair, and some items are not subject to refurbishment and are of interest as scrap metal only or just may be unavailable.

Our experience of examination of agrarian sphere facilities allows us to state that the matter of inventory taking and the inspection thereof by experts on technical matters comes to the forefront in the course of studying a company. After having obtained the information about service performance and technical condition of the machinery, transportation facilities and business structures, you may start the examination of the company's rights to such facilities.

In the course of legal due diligence of the company's rights to the said assets, the primary documents pertaining to the acquisition of the assets, availability of any disputes with respect to the specified items, manner of undergoing registration procedures are examined.

When verifying the rights to immovable property, the examination of availability of the company's right to land is mandatory, which land underlies such facilities.

All revealed legal defects are fixed in an explanatory note to be included in the section comprising recommendations for the removal of such defects or possible legal consequences thereof for the company.

That portion of the property suited for operation which is registered in the name of the company should be mandatory allotted in kind at the meeting of property share holders, transferred pursuant to transfer and acceptance certificates, and duly registered under relevant categories of the property. In practice, transactions with the share fund are mostly registered as a mere formality in consequence of which the documentation pertaining to the share fund often needs thorough refinement, as well as a pertinent meeting of the property share holders is needed.

When developing plans for dealing with the company's assets and share fund, you should not forget that the holders of property certificates are local residents from neighbouring population centres who may be staff members of the company or engaged for seasonal work, as well as they may act as landlords of land designated for agricultural use. The matters pertaining to allotment of property from the share fund are very sensitive and may spark off certain social discontent.

The report on the property status of the company within the frameworks of due diligence is limited to the detailing of property items having clean title which are fit for operation as intended. Also, it is very important to reflect those items which for any reasons did not appear in the list of confirmed property of the company as compared to the information provided by the seller, as well as those ones which require legal refinement.

Receivables and Payables

This stage of preliminary analysis is aimed at the work with the primary documentation of the company in accordance with predetermined criteria. Obviously, the seller will insist on increasing the agreement price by the amount of receivables of the company whereas it is aware that a part of it is doubtful or uncollectable. Payables, depending on the terms of settlement thereof, may bring certain risks to the company in the form of penalties, third-party claims to the company assets, other negative consequences.

The whole package of documentation of the company relating to the debt indicators is initially processed with the aim of determining material contracts which may have decisive influence on the indebtedness structure of the company. The criteria include limitation periods, debt amount and its form.

The main objective of the due diligence is to reveal real and reasonable amounts of receivables and payables in the record-keeping of the company, as well as the risks related to non-repayment of the debt and claims of counterparties.

On the basis of completed analysis, the debt of the company is structured in accordance with its reasonableness. Also, recommendations concerning

the optimization of such indicators of the company are developed. It is important to engage the seller and current management of the company to the work with indebtedness since it will enable not only to establish the first contact with counterparties but will allow to develop a scheme of debts optimization acceptable to both parties of the future agreement.

Our experience proves that by the use of mechanisms of assignment of claims, change of one debtor for another, pledges and suretyships it is possible, in most cases, to materially change the picture of obligations at the company by having get rid of doubtful receivables and unreasonably increased payables.

Leftover Stock, Warehouse Inventory, Biological Assets

Warehouse inventory of the company should be mandatory examined in accordance with the stock bookkeeping information (receipts and expenditures), actual balance with respect to each item and the information of primary documentation regarding the company. It is impossible to fix the said items for specific date since the amounts change constantly in view of the current demands and obligations of the company (use of petroleum, oil and lubricants, fertilizers, seed grain for agrarian events, lease payments in kind, sale of agricultural products under previously concluded contracts, etc.).

It is very important to have actual picture of the drain on reserves of the company, planning of future costs and proceeds as provided by the seller and confirmed in the course of due diligence. This will allow mitigating the risks of lack of availability of resources required for taking future actions related to transfer of company under new management, and will also complement the picture in terms of understanding.

When examining biological assets of the company, it is required to pay relevant attention to the dynamics of changes in number/ livestock in relevant groups and carry out resumptive reconciliation of the actual availability with the accounting data of the company.

The revealed indicators and discrepancies are described in the opinion to be subsequently taken into account in determining the property status of the company and deviations of indicators previously declared by the seller.

Further Yield

The production in progress (further yield) holds a special place in the asset profile of the company. The complicacy of its assessment, on the one hand, is explained by the necessity of forecasting crop yield indices and, on the other hand, by inability to check the compliance by the employees of the company with production run of farm crops to the full extent. Consequently, the forecasting indicator of the further yield depends on both the human factor and influence of other circumstances beyond control of the parties.

According to our experience, it is expedient to consider two alternatives: either not to take into account the further yield in the agreement price (if it is expedient considering the phase of the production run, the right to gather in the further yields may be vested in the seller), or explore in detail the structure of the production in progress and compliance with production run with the engagement of specialists in agrarian sphere (in such case we recommend that likely risks of reduction in yields be considered in determining the price for such asset).

When including the further yield into the M&A agreement, it would be expedient to apply the mechanism of stage-by-stage payment segregating into a separate instalment the amount equivalent to speculative material damages which may be caused by circumstances under control of the seller.

When agreeing on the pricing mechanism with respect to further yield, there may be taken into account actual yield indices in the region for the preceding period.

The amount is paid to the purchaser at the cropping phase or when, subject to the specific character of farm crops growing, there is a possibility to determine actual yield indices.

In practice, it is very difficult to achieve the balance of interests with respect to further yield because of excessive number of factors which may be affecting the actual growing of agricultural products and, eventually, might trigger claims on the part of each of the parties to the agreement. The simplest way is to strike a compromise regarding the indicators pertaining to the value and yielding capacity. In the event of decreased yield index with respect to some items of crop, the difference amount is subject to withholding from the last instalment.

As the result, each of the parties has to assess for itself the economic consequences and potential risks of transfer, within the frameworks of M&A agreement, of further yield and determine, taking into account the above, acceptable terms and conditions in the master agreement.

Record Keeping at the Company

According to the results of study of the company in various ways, great number of processed documents, both primary documents and accounting records, you may imagine beforehand the general picture of financial and commercial activities of the company.

Within the frameworks of examining the correctness of transaction accounting at the company, the correctness and completeness of separate indicators with respect to the company are examined and adjusted in the bookkeeping and tax accounting.

Each discrepancy in information from primary documents and bookkeeping should be worked out in detail since such discrepancies may be the result of thefts or attempts to conceal from the purchaser separate transactions with the company assets or to artificially increase the payables

of the company owed to entities related to the seller, and manifestation of other unethical practices on the part of the seller.

Within the frameworks of this trend, the evaluation of tax schemes is carried out in terms of the validity of its implementation and possible legal consequences thereof for the company in future. The findings of tax inspections of the company for the nearest (actual) period are taken into account. This, among other things, will allow revealing any risks related to possible claims of fiscal controlling authorities against the activities of the company.

Labour Relations

According to the general rule, labour resources at the company are formed from local residents of the neighbouring population centres. This refers to the staff recruitment and engagement of additional labour resources under the seasonal work principle, and entering into civil-law agreements with individual experts in accordance with current needs of the company.

Attention should be paid to a number of peculiarities of interaction with labour collective of the company in the course of due diligence, structuring and consummation of the subsequent M&A agreement.

Firstly, the news itself about possible sale of the company, as a rule, is accepted in the collective extremely negatively. Usually, that circumstance is related in the collective with dissatisfactory business situation at the company, its unprofitability and low economic effectiveness. Otherwise, why to sell profitable business? In addition to that, a change of the owner and management of the company, as a rule, they link to future mass personnel reductions. In any case, the pre-sale study of the company by outside experts and the probability of subsequent entering into a M&A agreement is perceived rather antagonistically in the collective.

At the same time, the members of the labour collective themselves are also the holders of property certificates confirming their rights to land shares, as well as the landlords with respect to the lands designated for commercial agricultural production received thereby as the result of allotment of blocks of land owned by former collective agricultural enterprises.

Taking into account these circumstances, the work related to the headcount optimization at the company should be carried out at most considerately and gradually. In order to reduce a rush of disaffection, it is important for the new owner, at the initial phase, to establish a contact with an action group by making certain steps to meet their expectations. For instance, to declare a slight increase of the rate of land rent for future periods, partially repay wage arrears, arrears in land rent, propose more favourable terms for buying up property certificates from the labour collective.

If there are competitive entities in the region which are interested in re-allotment of blocks of land, the lack of dialogue with the labour collective may develop into mass termination of lease agreements on the initiative

of the land owners, with subsequent renegotiation thereof with the competitors, property disputes with respect to allotment of individual items from the share fund, and other negative consequences.

Moreover, the study of internal documentation of the company with respect to development of labour relations is a requisite element since it, subject to the decision made by new owner, makes possible to organize production processes and implement certain decisions on personnel related matters (approval of needed candidacies at key positions in the company).

Risk Management. Recommendations

According to the results of due diligence with respect to the object of agreement, the potential purchaser is provided with information on the financial and operating performance of the company, statement of assets and liabilities, reliable accounting information of the company, information about the documents confirming legal compliance regarding its operations.

Understanding the base values pertaining to the company's operations as stated by the seller, the purchaser may have general idea and determine the expediency of subsequent negotiations aimed at the conclusion of agreement.

Each section of the due diligence contains the information on any risks revealed, their level, and possibilities of optimization thereof. We recommend that the risk management frameworks are reflected in succeeding agreements of the parties with respect to the structure of the agreement. This is a kind of preparation to the agreement by its parties and the company itself.

In itself, the risk management means discovering and forecasting possible negative consequences for the parties to the agreement and the company itself as related to particular business transactions, confirmation of such transactions by documents (or lack of confirmation), as well as development of efficient legal mechanisms to decrease the level of negative consequences or remove problem elements from the agreement.

The due diligence results which are reasoned and confirmed by documents play the key role in negotiations of the parties on final terms and conditions of the agreement since mutual concessions and amendments to preliminary arrangements allow to work out a practicable and economically feasible pricing mechanism of the future agreement.

Since the due diligence report is quite extensional, the purchaser is additionally provided with an abridged table containing key indicators revealed in the course of examination, risks and methods of their mitigation, other recommendations with respect to the transaction.

Expert Opinion

The pre-sale due diligence in agrarian sphere is objectively needed since it allows to reach some balance of interests of the parties at the completion phase of the project - during the execution and consummation of the agreement itself.

The success of any agreement, to a considerable extent, depends upon the level of competence of its parties in terms of its consummation, cognizance of peculiarities and condition of the subject of the agreement. It is our belief that significant importance of due diligence with respect to the target lies in provision of the parties with actual, verified, documented information about the target and its peculiarities, which fact, eventually, is a sort of guarantee of successful completion of the project.

Dmytro Slobodian

Annex No. 1

MEMORANDUM OF UNDERSTANDING

___ _____ 20__ Kirovohrad

_____ (passport: series __ No. _____, issued by _____ «__» _____ (date), residing at: _____ _____), hereinafter referred to as **the Seller**, of the one part,

and

_____ LLC (identification code: _____; address: _____), hereinafter referred to as **the Purchaser**, as represented by _____ _____, acting on the basis of the Power of Attorney, of the other part,

hereby express their intent to conclude agreement for the sale and purchase of a 100% participatory interest (corporate rights) in the authorized capital of TARGET Agricultural Business LLC, USREOI code:_____, located at: Kirovohrad Region, the city of _____, _____ St., building ___, which is a legal successor of all rights and obligations of TARGET FE, USREO code:_____, under the following terms and conditions:

1. By this Memorandum of Understanding (**the Memorandum**) the Parties determine in advance the terms and conditions and the procedure for the purchase of 100% of the corporate rights in TARGET Agricultural Business LLC:

According to the arrangements of the Parties, prior to implementation of reorganization procedure the basic agreed value of 100% of the corporate rights in TARGET Agricultural Business LLC, taking into account the actual date of financial business activity established at _____, according to the official exchange rate of Euro of the actual date.

Based on the results of Due Diligence about the property status, the Parties establish the price of 100% of the corporate rights in TARGET Agricultural Business LLC at UAH _____.

The Parties agreed to determine UAH_____ as a Discount that is not paid to the Seller and is an insured amount for compensation of all possible losses (shortages) related to the harvesting, partial cattle plague, deviations when weighting over again of the commodity stocks and supplies at the warehouses of TARGET Agricultural Business LLC and other losses, because part of the assets (grain, fuel, petrol, forage) is tolerant (it changes form and weight), and due to the circumstance that during the period when the corporate rights are being transferred there

is a necessity to bear general business expenses for the construction in progress and biological assets, to sell part of agricultural products in order to timely pay the taxes, wages, to purchase required equipment, spare parts, agricultural machinery, to maintain the accounts payable at the level not exceeding four hundred thousand Hryvnias (UAH 400,000), etc.

When implementing the agreement the Parties shall list the assets (buildings, structures, machinery, equipment, cattle, pigs, construction in progress, grain, fuel and lube materials, and other property of TARGET Agricultural Business LLC to be transferred to the Purchaser.

2. The Parties acknowledge and agree that all payments for the concluded by the Parties agreement for the sale and purchase of 100% of the participatory interest (corporate rights) in TARGET Agricultural Business LLC (hereinafter, the Principal Agreement) shall be made in the national currency of Ukraine (Hryvnia). The income tax shall be paid by the Seller. All expenses related to the purchase of the corporate rights shall be paid by the Purchaser.

3. The Parties agree that representatives of the Purchaser may conduct a repeated «Due Diligence» (legal, financial and technical audit) of TARGET Agricultural Business LLC, including the inspection of agricultural machinery and construction in progress, within 5 working days of signing hereof. The Seller shall assume the unconditional obligation to ensure access of the Purchaser's representatives to the required data, documents, and assets for the inspecting of data and figures of TARGET Agricultural Business LLC provided in the Memorandum.

4. The Parties agree that any procedure aimed at the acquiring by the Purchaser of the corporate rights TARGET Agricultural Business LLC shall be legally possible and comply with the laws of Ukraine. For these purposes, the Parties shall exert every effort, including the holding by the Seller of necessary founders' meetings, taking of decisions, drafting of minutes and other actions aimed at the performance of the agreement in compliance with the current laws of Ukraine.

5. The final provisions regarding the procedure, conditions, rights, obligations and liabilities of the Parties according to the attained agreements shall be established by the Principal Agreement, which the Parties contemplate to sign within 2 working days of the fulfilment of clauses 3 and 4 of this Memorandum. The date of signing of the Principal Agreement shall be _____.

6. The Seller hereby represents and warrants that he has all legal rights to the corporate rights free and clear from any encumbrances held by third

parties. The Seller hereby warrants that the property of TARGET Agricultural Business LLC:

a) is its private property and is registered in a duly manner;

b) is free from any debts, liabilities and claims of any third parties;

c) is free from any encumbrances and circumstances that impact or may impact the ownership rights, and not leased, pledges, alienated and donated into favour of third parties in any other form and under any rights stipulated by current laws of Ukraine.

7. The Seller declares its readiness to bear sole property liability set forth by this Memorandum and laws of Ukraine, in case of provision of designedly incorrect or incomplete information about the status of assets (balance) of TARGET Agricultural Business LLC to the Purchaser.

8. At the moment the Memorandum is concluded, the Parties fixed these main tangible and other assets, which should be kept on the balance sheet of TARGET Agricultural Business LLC.

– Lease rights pertaining to the agricultural land of the total area of 0000000 hectares, including:

00000 hectares of stock and reserve lands within the territory of _____ district of Kirovohrad Region, with the lease term until «__» _____;

00000 hectares of land within the territory of _____ district of Kirovohrad Region under the agreements with the individuals (including the duly registered Lease Agreements for the land of 00000 hectares with the term of lease until «__» _____; Lease Agreements for the land of 00000 hectares that have been concluded but not filed for the state registration, with the term of lease until «__» _____);

00000 hectares of land within the territory of _____ district of Kirovohrad Region of uncalled shares under the lease agreement with _____ State Administration, valid by «__» _____.

– Property, buildings, structures, equipment, machinery, of the net book value of UAH 000000 according to the list provided by the Seller.

– Biological assets:

Livestock population in the amount of approx.___ (including ___ of cows), of the total weight of ___ tonnes +/-2 tonnes at the average price of _____.

Pigs_____, of the total weight of ___ tonnes +/-0,3 tonnes.

– Goods-in-process:

Wheat 0000Ha +/-3Ha;

Barley 0000Ha +/-3Ha;

Rye 0000Ha +/-3Ha;

Triticale 0000Ha +/-3Ha;
Oats 0000Ha +/-3Ha;
Peas 0000Ha +/-3Ha;
Grain mixture 0000Ha +/-3Ha;
Vetch and oats 0000Ha +/-3Ha;

Their estimated price at the moment of signing of the Memorandum shall be on the average _____ UAH/tonne, including VAT, at the average gross yield of ____ cwt per hectare.

Sunflower ____Ha +/-3Ha, estimated price ___ UAH/tonne at the average yield of ___ cwt per hectare.

Maize ____ Ha +/-3Ha, estimated price ___ UAH/tonne at the average yield of ___ cwt per hectare.

Rape ___ Ha +/-3Ha, estimated price ___ UAH/tonne at the average yield of ___ cwt per hectare.

Millet ___ Ha +/-3Ha, estimated price ___ UAH/tonne at the average yield of ___ cwt per hectare.

Buckwheat ___ Ha +/-3Ha;

Sainfoin___ Ha +/-3Ha.

The anticipated yield of grain and oil-bearing crops, according to the estimated prices and the average yield, is valued by the Parties at UAH _____ .

9. The Seller purchases one new combine harvester «_____» for a normal conduct of harvesting campaign, and the enterprise has sufficient petrol, employees and resources. The Parties agree that these assets in the form of the construction in progress and/or cash grain in any case will be transferred to the Purchaser after he purchases the corporate rights. For storage and stowage of the novel the Purchaser designates the certified warehouse «_____ Elevator», located at_____, Kirovohrad Region.

The amount and quality of grain crop shall be confirmed by a warehouse receipt issued by «_____Elevator» at TARGET Agricultural Business LLC.

<u>Commodities and materials</u>:
Sugar ___tonnes +/-0,5 tonne;
Wheat of the year 20__ __ class_____ tonnes +/-1 tonne;
Barley ___ tonnes +/-0,5 tonne;
Hay ___ tonnes +/-1 tonne;
Petrol_____ litres +/-100 litres;
Diesel fuel _____ litres +/-100 litres;
Synapse_____ tonnes +/- 1 tonne.

10. If the information, which the Seller provided to the Purchaser in sections 6 and 7 hereof, is incorrect or incomplete, the Purchaser has the right to terminate this Memorandum and refuse to conclude the Principal Agreement.

11. In case of absence/lack of assets of TARGET Agricultural Business LLC, above the amount of the Discount, i.e. more than for UAH _____, the value of the corporate rights of TARGET Agricultural Business LLC shall be reduced by the value of lacking assets, according to the estimated prices specified herein. If the Parties do not fix an estimated price of an asset, they shall apply the current market prices for that asset formed at that moment in that region (Kirovohrad Region), subject to delivery basis EXW (ex warehouse of TARGET Agricultural Business LLC). The accounts payable of TARGET Agricultural Business LLC shall not exceed UAH _____ at the moment of signing of the Principal Agreement. The positive amount by which the accounts payable exceed the limit established by the Parties in the Memorandum shall be taken into account when determining the value of the Principal Agreement.

12. The Seller and the Purchaser agree that the Purchaser is entitled to assign all his rights and obligations arising out of this Memorandum to another legal entity designated by the Purchaser (hereinafter, the New Purchaser). In this case the New Purchaser becomes the party to the Principal Agreement and has the right to sign the latter. As of the signing of this Memorandum, _____LLC is such a company.

13. The Purchaser shall be liable for the actions of a New Purchaser as regards the entering into a final agreement with the Seller.

14. The above terms and conditions shall be confirmed by signatures of the Parties.

15. Map of the fields of TARGET Agricultural Business LLC is an integral part of this Memorandum and is the principal orientation point for the Purchaser for checking dislocation, type, and area of agricultural land of the Seller, location on the map of the construction in progress.

16. The Parties agree that all details of this Memorandum, as well as any other information, which became known to the Parties in the course of implementation of this Memorandum, is a confidential information that cannot be disclosed during the whole period of time from the signing hereof to the transfer of the ownership right to the participatory interest (corporate rights) in TARGET Agricultural Business LLC under the terms and conditions of the Principal Agreement.

17. Funds at the settlement accounts of TARGET Agricultural Business LLC, the amount of which as of the date of signing hereof equals _____ (_____), shall be transferred to the Seller prior to signing of the Principal Agreement.

18. Signatures of the Parties:

For and on behalf of the SELLER:

«_____»

_____

_____

_____ _____(_____)

For and on behalf of the PURCHASER:

«_____»

_____

_____

_____ _____(_____)

Annex No. 2

PRELIMINARY AGREEMENT

«__» _____20__ _____

Seller:_____, holding 100% of participatory interest in the charter capital of PAC «Company», having its registered address at __ _____. Passport series ___ No._____, issued by _____ UMVSU in _____ _____, identification number _____, the «**Party 1**»,

Purchaser: Limited Liability Company «_____», EDRPOU Code _____, having its registered office and place of business at _____, the «**Party 2**», as represented by _____ , acting on the basis of the Power of Attorney, on the other hand,

herewith express their intent to enter into a sale and purchase agreement (the «**Principal Agreement**») of 100% of participatory interest (corporate rights) in the charter capital of PAC «Company», EDRPOU Code _____, having its registered office at _____ , Ukraine, as follows:

1. The Parties shall herewith preliminarily define the following terms and procedures:

- Determination of the initial contractual value of 100% of corporate rights to PAC «Company»;
- Purchase of 100% of corporate rights to PAC «Company»;
- Payment for corporate rights to PAC «Company» by instalments;
- Determination of the terms and conditions that impact the change of the price of 100% of corporate rights to PAC «Company» towards increase or decrease as compared to the initial contractual value;
- Determination of the security mechanisms, guarantees that payments shall be made in favour of Party 1 for the corporate rights to PAC «Company»;
- Purchase of agricultural equipment which is not the property of PAC «Company», but is privately owned by Party 1.

2. The subject matter of the Principal Agreement: purchase of 100% of corporate rights to PAC «Company» and other property privately owned by Party 1, the «**Assets**».

3. The Parties agreed that at date of transfer of title to corporate rights to PAC «Company», PAC «Company» may not be a founder of any other

companies or connected by control relationship with any third parties, act as a surety under any financial or any other third party obligations. Party 1 hereby warrants that the corporate rights to PAC «Company» are not subject to any pledge, any other types of encumbrance, third party rights.

4. The Parties agreed that the initial contractual value of 100% of corporate rights to PAC «Company» shall be the equivalent of USD 0000000000.

The amount in hryvnias to be paid by the Purchaser for the corporate rights in pursuance of discharging the obligations under the Principal Agreement shall be paid by multiplying the monetary equivalent of the agreement price (outstanding portion thereof) in foreign currency (USD) by the official UAH/USD exchange rate established by the National Bank of Ukraine on the date of the actual payment of the agreement price. Such price shall be determined by the Parties in advance provided that at the date when the title to corporate rights to the company is transferred there shall be no accounts payable or overdue tax liabilities. The price shall be formed on the basis of company's assets and liabilities declared by Party 1 as well as rights to other assets of PAC «Company», in particular the following:

- Production in progress;
- Biological assets;
- Fixed assets (buildings, constructions and agricultural equipment);
- Land plot lease agreements.

5. The final value of 100% of corporate rights may be changed if the initial list of assets shall not correspond to reality and/or if its quantity, status, quality decreased/deteriorated and/or if at the date of transfer of corporate rights to PAC «Company» there shall be accounts payable towards third parties or overdue tax liabilities. In this case the cost of the corporate rights shall be decreased pro rata to the amount of the existing accounts payable, overdue tax liabilities and/or the amount of the nominal value of the decreased/deteriorated assets of PAC «Company».

6. The Parties agreed that for the purposes of securing the payments for corporate rights to PAC «Company», Party 2 shall warranty to Party 1 the following:

- pledge of corporate rights to PAC «Company»;
- suretyship granted by LLC «Company_3», EDRPOU Code _____, having its registered office at _____.

7. The title to corporate rights shall transfer from Party 1 to Party 2 from the date when the State Registrar amends the details about the founder in the Unified State Registry.

8. Party 2 and Party 1 or an entity specified by Party 1 shall enter into a separate agreement for the sale and purchase of grain seeder «____», production serial number _____, manufactured in 2010, fully equipped and in good working order at the price of UAH _____.

9. The Parties agreed that all payments to be paid under the agreement shall me made in Ukrainian hryvnias by way of wire transfer to the bank account(s) of Party 1 in the following order:

- the first instalment, an equivalent of USD 00000000, shall be paid not later than __ _____ for 100% of corporate rights to PAC «Company»;
- the second instalment, an equivalent of USD 00000000, shall be paid not later than __ _____;
- the third instalment, an equivalent of USD 00000000, shall be paid not later than __ _____.

10. Within the period of 20 days from the date of this Agreement, the representatives of Party 2 shall carry out due diligence, financial and technical audit of the balance sheet and assets of PAC «Company» and on the basis of the findings thereof the Parties shall enter into the Principal Agreement with the final value within 7 business days. The Parties shall use their best endeavours to enter into the Principal Agreement as soon as possible after the audit.

11. Party 1 warrants that it has all the legitimate rights to the corporate rights to PAC «Company», and such rights are not encumbered by any third party rights and that they have not been pledged. Party 1 warrants that the Assets of PAC «Company» are not pledged or encumbered by any third party rights. Party 1 also warrants that the land with the area of at least _____ hectares is used by PAC «Company» on a fully legal basis.

Including:

- 0000 hectares of agricultural land are used by the farms up until 2055 and are being leased from the founders of farms as integral property complexes;
- 0000 hectares of agricultural land are owned by PAC «Company» which fact is evidenced by the State Certificates of Title;
- 0000 hectares of agricultural land are actually used by PAC «Company» and registration of title thereto is pending;
- 0000 hectares of agricultural land are leased under agreements with individuals for the period until 2055, which have passed registration;
- 0000 hectares of agricultural land are leased under agreements with individuals for the period until 2055, whose registration is pending (final stage);

• 0000 hectares of agricultural land are leased under agreements with individuals for the period until 2020, whose registration is pending;

• 0000 hectares of land are under buildings and structures of PAC «Company» the registration of title to which is pending;

• 0000 hectares of agricultural land (uncalled land shares), leased until 2048 under lease agreements and resolution of _____ District State Administration;

• 0000 hectares of agricultural land of the state reserve fund leased for the period until 2048 under an agreement with _____ District State Administration;

• 0000 hectares of agricultural land (social sphere) actually used by PAC «Company» on the basis of Resolution of _____ District State Administration; the agreement has not been concluded yet.

12. The lease payment, tax and other obligations for the use of land plots leased by PAC «Company» shall be paid in full for 20__ and for the whole previous year.

13. The Parties agreed that the cost of corporate rights to PAC «Company» may be decreased if the leasehold declared by Party 1 to the land (land plots) or their legal status shall not be evidenced by documents. In this case the cost of corporate rights shall be decreased by the amount of UAH 0000.00 for each absent/undocumented hectare of land. In relation to 0000 hectares of land leased under agreements with individuals for the period of up to 2020, the cost of corporate rights to PAC «Company» shall be decreased by UAH 0000.00 for each absent/undocumented hectare of land. In respect of the use of the social land with the area of 0000 hectares, the parties shall deem the Resolution of _____ District State Administration (without agreement) to be sufficient evidence.

14. At the date when the title to the corporate rights to PAC «Company» is transferred to Party 2, the production in progress shall be at lease as follows:

• winter wheat of at least 0000 hectares;

• winter coriander of at least 0000 hectares..

15. Biological assets (headcount):

Farm No. 1	Breeding sows	00
	Boars	00
	Fattening pigs	00
	Piglings, group 2–4	00
	Piglings, group 0–2	00
	Total:	**00**

Farm No. 2	Cows	00
	Breeding bull	00
	Bull-calfs 20__	00
	Bull-calfs 20__	00
	Heifers 20__	00
	Heifers 20__	00
	Heifers 20__	00
	Total:	**00**
Farm No. 3	Breeding sows	00
	Boars	00
	Fattening pigs	00
	Piglings, group 2–4	00
	Piglings, group 0-2	00
	Total:	**00**

The Parties acknowledge that the information in clause «Biological Assets» may be changed insignificantly for the efficient development of the «cattle breeding» business within the company.

16. Fixed assets kept on the balance sheet of PAC «Company» and are to be transferred to Party 2:

Name of Assets	Nominal Estimated Value (UAH)	Quantity (Units), Remarks
Transport (d.n. 000000000)	0000.00	1
Transport (d.n. 000000000)	0000.00	1
Transport (d.n. 000000000)	0000.00	1
Transport (d.n. 000000000)	0000.00	1
Special-purpose machinery (No. 00000000000000)	0000.00	1
Special-purpose machinery (No. 00000000000000)	0000.00	1
Special-purpose machinery (No. 00000000000000)	0000.00	1
Special-purpose machinery (No. 00000000000000)	0000.00	1
Building Letter A (address:_____)	0000.00	1
Building Letter B (address:_____)	0000.00	1
Building Letter C (address:_____)	0000.00	1
Building Letter D (address:_____)	0000.00	1
Total:	**0000.00**	

The rights of PAC «Company» to the said property shall be confirmed by the respective documents of title, technical passports/passports of technical inventory in cases established by the laws, and by source documents in other cases. If as the result of the audit the Parties reveal property that forms part of the land share fund, the Parties shall agree the legal regime of transferring the rights to such property in favour of Party 2. Transport, agricultural equipment and special-purpose machinery manufactured in «_____» shall be fully equipped and be in good working order with due account of wear and tear. Transport, agricultural equipment and special-purpose machinery older than five years may have technical deficiencies that do not require any total overhaul.

17. The Parties agreed that Party 2 shall have the right to unilaterally transfer all the rights and obligations hereunder to another legal entity appointed by Party2 (the «New Purchaser»). In this case the New Purchaser shall become a party to the Principal Agreement. If the Principal Agreement shall be treated as concentration, Party 2 shall undertake to obtain a permit for concentration from the Antimonopoly Committee of Ukraine prior to entering into the said agreement. In this case the execution date of the Principal Agreement shall be additionally agreed by the Parties.

18. Party 2 shall be liable for the actions of the New Purchaser related to the conclusion of the Principal Agreement with Party 1.

19. The Parties agreed that this Agreement shall be effective until the Parties sign the Principal Agreement and perform of all terms and conditions hereof. The Principal Agreement shall be signed within 7 business days from the date of completion of PAC «Company» audit. The Parties shall use their best endeavours to enter into the Principal Agreement as soon as possible after the audit.

20. On the day of transfer of title to corporate rights to PAC «Company» from Party 1 to Party 2, the Director General of the company – _____ shall resign from his office as Director General of PAC «Company» by writing a letter of resignation and handing such letter over to Party 2.

21. The Parties shall execute the Principal Agreement in a notarised form. All costs related to notarisation of the Principal Agreement as well as security agreements (if required) shall be equally born by the Parties.

22. Party 1 hereby warrants that it will reimburse Party 2 for any costs related to the audit in the amount of UAH _____, if Party 1 refuses to conclude the Principal Agreement after the completion of the audit or in the course thereof.

23. Beginning with __ _____ 20__, but not sooner than the date of the Principal Agreement, Party 1 shall ensure access for Party 2 representatives to the territory and cultivated fields of PAC «Company».

24. The Parties agreed that all details of this Agreement as well as any other information that became known to them in the course of performing this Agreement shall be confidential and may not be disclosed during the whole term – from the date of this Agreement and transfer of title to the corporate rights up until the Parties discharge all of the obligations towards each other.

25. Signatures of the Parties:

For and on behalf of PARTY 1:

«_____»

_____

_____

_____ _____(_____)

For and on behalf of PARTY 2:

«_____»

_____

_____

_____ _____(_____)

HIDDEN DEFECTS IN THE FACILITY AND THEIR INFLUENCE ON THE M&A TRANSACTION

At the stage of preliminary agreeing of the M&A project between the parties it is already possible to describe in general the future features of the master agreement. Usually, their details are worked out on the basis of a thorough study of the agricultural enterprise during the due diligence.

However, a certain group of circumstances may be left out of control of the parties to the agreement and at the same time may have a significant impact on the final result of the project. Certain circumstances may be intentionally concealed by the seller in order to get more favourable conditions for alienation of the facility.

Such aspects of audit of an agricultural enterprise as proper registration of rights to land, legality of acquisition of assets (real estate, transport, machinery, equipment, inventory, warehouse stock), legal confirmation of accounts payable and receivable envisage review of a huge quantity of source and accounting documents, analysis of terms and conditions of agreements, timely carrying out and documentation of business operations at the enterprise, comparison of the revealed indices with accounting information, review of documents to see whether they have any defects related to their execution and compliance with registration procedures.

Greater portion of the documents related to the target is provided by the seller for the purposes of due diligence and, as a rule, most of the facts therein coincide with the information declared in the memorandum of understanding (preliminary agreement).

In order to confirm its rights to the business, the seller provides constituent and registration documents evidencing seller's right to the participatory interest in the charter capital. As a rule, the said information coincides with the information in the Unified State Register of Legal Entities and Individual Entrepreneurs publicly accessible in the Internet.

However, such inspection is aimed at revealing obvious violations and defects, but it doesn›t allow obtaining of complete information about the enterprise and its owner taking into account certain categories of legal risks.

It is very important to ensure thorough audit of the obtained information about the enterprise and the seller from alternative sources. Such audit is aimed at studying of information about the enterprise based on its key performance indices and main assets as well as about owner of the company and its participation in legal relations, which create certain risks for implementation of the project or may provoke the same in the future.

The lawyers engaged in the M&A project have an important function to reveal legal defects and ancillary risks, and determine legal implications for participants of the project and mechanisms of their management.

Rights to Alienate a Business

In the M&A project, the seller is a person or a group of persons who in aggregate own a sufficient share in the agribusiness that allows them to make key managerial decisions in the company, implement the necessary personnel decisions at their own discretion, indirectly (via governing bodies) ensure carrying out of financial and business activity of the company.

Inspection whether the share in the target company is owned by the seller is carried out on the basis of official information from the Unified State Register of Legal Entities and Individual Entrepreneurs managed by the State Registration Service of Ukraine.

If the seller is a legal entity, it is mandatory to inspect the scope of the powers it has to enter into the master agreement. The resolution about the signing and performance of the agreement must be adopted by the highest governing body of the selling legal entity in strict compliance with the charter and applicable laws. Along with this, if there is a chain of corporate subordination in the business structure of the seller, it is advisable to trace its beneficial owner. In certain cases it is advisable for the seller to adopt resolutions on performance of the agreement at all levels of corporate subordination.

If the seller is an individual who is married, it is advisable at the preliminary stage of the project to obtain a notarised spousal consent to implement the agreement.

Rights to the business (corporate rights connected with the participatory interest in the charter capital or shares) must be free of any encumbrances of third party rights.

Encumbrance is a right to obligor's movable property or restriction of obligor's right to movable property that arises under a law, agreement, judgement or other acts of individuals and legal entities with whom the Law connects the arising of the rights and obligations with respect to movable property (Law of Ukraine «On Securing of Creditors› Claims and Registration of Encumbrances»).

The Law of Ukraine «On Pledge» sets forth that both the property and the proprietary rights may be used as the collateral.

The court practice related to the pledge of corporate rights and participatory interest in charter capital of a company is ambiguous in terms of determination whether such right may be used as collateral. At the same time, in practice agreements for the pledge of corporate rights and/or participatory interest in the charter capital of a company are being freely entered into and registered with the State Register of Encumbrances over Movable Property. The existence of a registered pledge is a direct obstacle for the registration of any changes in membership of company's participants by the bodies of registration service within the M&A project.

In determining the priority of rights to the encumbered property, the lawmakers proceed from the anteriority of registration of the encumbrance.

At the same time, if at the date of signing of the alienation agreement there existed an encumbrance that was not entered into the register, the purchaser under the paid agreement is considered to be a bona fide purchaser pursuant to Article 388 of the Civil Code of Ukraine.

The Law of Ukraine «On Securing of Creditors› Claims and Registration of Encumbrances» sets forth that if the encumbrance is not registered, such encumbrance is effective in relations between the obligor and the chargee; however, it is not effective in relations with third parties, unless otherwise provided for by the law.

If the seller has an unpaid tax debt, information about tax lien may be entered into the respective state registers. Encumbrance of rights to business may also occur on the basis of judgements in the form of attachments or prohibition of alienation of certain assets.

Therefore, it is very important not only to check during the due diligence whether there aren›t any registered encumbrances with respect to the seller's rights to the business, but also to ensure constant monitoring of registers in terms of any encumbrances up until the performance of the master agreement.

Collection and Analysis of Information on Litigations and Enforcement Proceedings

Litigations that involve the seller, related persons or the company itself may have a significant influence on the implementation of the agreement in general. It is rather difficult to forecast the trial of different categories of cases in Ukrainian courts especially in terms their duration and legal implications for the parties to the dispute.

The legal nature of material disputes may be different, however, their legal implications and impact on the M&A transaction may fully justify the thorough collection and analysis of the relevant information related to this category within the project.

Corporate disputes which challenge the fact or grounds on the basis of which the seller acquired rights to the business, or which challenge corporate resolutions adopted for the purposes of implementation of an agreement, may create significant risks or deprive the purchaser of the rights to the purchased agricultural enterprise under the M&A project in the future.

In such disputes the claimant may be either the former owner of the business or one of the participants of the target company, if the seller or any other interested person obtained rights to the business with violation of pre-emptive rights of other participants. In any case, prior to settlement of the dispute on the merits and in order to secure the same, the court often prohibits the seller to alienate the business (corporate rights or participatory interest). It also prohibits the state registrars to carry out any registration actions aimed at state registration of certain changes with respect to the

target company. Pre-award reliefs are granted in the form of rulings and are sent to parties in question for performance.

The existence of such pre-award reliefs is a direct obstacle for implementation of the M&A project. Moreover, the prohibition to carry out any actions by the state registrars is not entered into the state registers. The ruling of the court is sent to the registration service at the place where the company's file is kept, therefore, this may become an unpleasant surprise at the stage of registration of the master agreement.

In such cases it is better to postpone the performance of the master agreement until the completion of legal proceedings within the corporate conflict.

Administrative courts may settle disputes related to cancellation of entries about the legal entity in the Unified State Register of Legal Entities and Individual Entrepreneurs, disputes related to recognition of state registrars› actions as invalid, and other disputes. These types of judgements may also create significant obstacles or completely block the project.

Enforcement of such judgements may serve as the ground for introduction of significant changes about the legal entity into the Unified State Register, cancellation of the recent registration entries (including those dealing with the fact that the seller became a participant).

Any dispute dealing with property claims against the seller may also affect the M&A transaction. The Law of Ukraine «On Business Entities» envisages in specific cases the possibility of enforcing part of the property owned by certain types of business entities, including limited liability companies, pro rata to participant's participatory interest to his personal debts.

Seller's creditors are entitled to demand that the company uses part of its property to pay for the debt pro rata obligor's participatory interest in company's charter capital or separates the respective portion of property in order to enforce the same pursuant to the established procedure.

Enforcement of the whole participatory interest of the participant in the charter capital of the company terminates his participation in the company.

As a rule, the company itself is not specified in this category of judgements. The court doesn›t ascertain the property status of the obligor and whether he has sufficient quantity of other property which may be enforced. Instead, at the stage of enforcement proceedings the state enforcement officer may, with his resolution, attach obligor's property and if it is not sufficient – attach corporate property owned by the obligor. Based on the results of clarification of obligor's property status within the enforcement of the judgement, it is possible to lay a claim seeking separation of part of property in order to enforce the same in favour of the company.

The rights to the business may also be mentioned in cases dealing with division of jointly owned property. During the trial of this category of cases by the courts, the courts quite often apply pre-award reliefs in the form of attachment of property or prohibition of its alienation.

The above are just separate examples of litigations that may directly affect the implementation of the M&A project.

Therefore, during the inspection of seller's rights to the business it is worth checking the Unified State Register of Judgements using the relevant search criteria. At the same time, one should not limit his search just to the location of the target company and its owners, because there may be disputes pending throughout the whole territory of Ukraine. The company or its participant in such cases may appear, for example, as a joint obligor (surety), which in its turn negates the requirement to try the case at the location of the respondent.

Taking into account the fact that not all judgements are timely entered into the Unified State Register, it is advisable to ask the sellers to issue powers of attorney authorising collection of information from judicial bodies in different jurisdictions and authorities that enforce the judgements.

Within the scope of obtained powers, we recommend that you visit local courts, enforcement service authorities and, if possible, personally talk to the employees from clerk offices and receptions, and regular employees from the respective authorities. If you reveal any pending proceedings, we advise that you review the files of the case and make copies of process documents for further study.

Additionally, we recommend sending requests for information to check whether there is any litigation involving certain range of related parties and pending enforcement proceedings.

Information collected during the review should be thoroughly analysed with identification of legal risks for implementation of the M&A project. As a rule, the abovementioned information is reflected in due diligence report in the «Seller's Rights to Business» section.

Obtaining and Analysis of Registration Data Related to Company's Assets

Undoubtedly, the property status of the target company is thoroughly audited during the due diligence. Lawyers study source documents related to the acquisition of rights to movable and immovable property of the company, proprietary rights, documents of title and technical documentation with respect to each significant asset. The lawyers check for compliance with the established registration procedures to which the law links the acquisition of title and other proprietary rights in certain cases. In any case, based on the results of the review of company's documents related to property status it may appear that some documents are missing, some documents had been lost or are being re-issued.

The checking of company's assets in state registers is aimed at obtaining of up-to-date information about registration of the following groups of assets as well as find out whether there are any registered encumbrances of third party rights:

– real estate (buildings and structures of any designated purpose whereby the target company is specified as the owner or if the seller specified that such real estate forms part of the assets of the company);

– vehicles and specialised agricultural machinery (indicated in the registration documents and/or declared by the seller in the structure of company's assets); and

– rights to lease commercial agricultural land (according to information from land resources authorities and registration service).

The fact that the company has registration documents to a certain facility doesn›t necessarily mean that such asset is 100% legally owned by the company. In our practice we had instances of registration of special-purpose machinery in favour of the agricultural enterprise on the basis of documents that didn›t even envisage accrual of any rights of use or disposal by such enterprise.

Thus, in the course of due diligence the lawyers audited original copies of registration certificates evidencing registration of special-purpose machinery in the name of the enterprise. Taking into account particular characteristics of the facilities (year of manufacture and technical state), the relevant facilities were additionally checked against the list of property of the mutual fund from which the owner of the enterprise bought out certain portion of property certificates. The results of the audit showed that the property belongs to the mutual fund. However, no resolutions were made with respect to appropriation of certain property items from the mutual fund in favour of the holders of the certificates in accordance with the established procedure. Also, no judgements were rendered with respect to recognition of rights to such assets in favour of the company. After negotiations with employees from State Technical Supervision Authority it appeared that the registration had been carried out on the basis of mutual fund custody agreement (without any rights of use and disposal).

In order to obtain the most recent information whether the company performed any necessary registration procedures and registered the transport and special-purpose machinery, it is necessary to send requests to territorial bodies of State Traffic Inspectorate and Technical Inspection Bureau.

The existence of any registered encumbrances over movable property of the company should be checked in the State Register of Encumbrances over Movable Property. At the request of the authorised person, the excerpt from the register may be formed by the notary or Information Centre of the Ministry of Justice of Ukraine State Owned Enterprise.

At the present time, Ukraine has introduced and activated a unified system of registration of proprietary rights to real estate and their encumbrances. State Register of Proprietary Rights to Real Estate is a unified state information system containing information about the rights to real estate, their encumbrances as well as objects and subjects of such rights. State registrars of territorial bodies of the state registration service and notaries as special subjects with specific

powers are authorised to keep the register, update the entries with the most recent information and form excerpts.

Until the beginning of 2013, proprietary rights to real estate items were registered by local bureaus of technical inventory and rights to land plots by territorial bodies of land resources, mortgages and encumbrances over proprietary rights to real estate were registered by notaries and certificates of title to buildings and structures were issued by local self-government bodies.

The transfer of current records related to each facility, including proprietary rights, derivative proprietary rights and encumbrances, is carried out gradually, as and when it is necessary to enter new data to the register about an object.

In view of the change of the approach to the state registration of proprietary rights, redistribution of governmental competence and lack of clear information interaction between state registration authorities there are often cases of «double registration» of proprietary rights, in particular rights of use of agricultural land plots under lease agreements.

Therefore, in order to obtain complete and up-to-date information about the registered proprietary rights of the company to the relevant assets and find out whether there are any registered encumbrances, we advise checking information in the State Register of Proprietary Rights to Real Estate as well as send inquiries to the competent registration authorities that performed the relevant functions until the end of 2012 to see whether they made any registrations.

Checking of Relations with Counterparties and Getting Acquainted with Tax Authorities

Local tax service may act as a source of valuable information about the target in the context of a specific project. In order to visit such authority, it is necessary to obtain a power of attorney with the requisite scope of powers and talk with the inspector and head of the local tax authority. It is worth asking them for up-to-date information from the tax payer registration card of the target company about the status of payment of taxes and duties. It is also advisable to inquire whether there are any other «tax defects» in company's business activity (appropriation of estates, existence of transactions with unreliable companies).

In addition, we recommend sending requests about the results of tax audits of the company, about most recent decisions adopted by the tax authority in relation to the company, and about the results of their appeal. Information about business operations of the company with other companies with signs of fictitious or other legal defects should be thoroughly checked with involvement of company's senior management.

The effects of such transactions can be extremely negative for the company (adoption of resolution to increase tax implications, application of

penalties, and institution of administrative or criminal action against certain officials.

Contracts with dubious counterparties should be checked whether they have any signs of «merchantability» (track the movement of commodities on the basis of executed source documents of the company – records in warehouse books, transport documents containing detailed information about the routes, vehicles, drivers, powers of attorney for the obtaining of inventory items).

The obtained findings should be compared with the information from bookkeeping and tax accounts related to company's performance. In respect of operations with dubious counterparties, it is worth checking more thoroughly source accounting documents and if the revealed risks are confirmed, the previous senior management of the company should be obligated to compare the mutual settlements under the signed agreements and sign supplemental agreements on termination of the respective contracts.

In the event of any doubts regarding the legality of certain business operations or company's counterparties, we advise, prior to signing of the master agreement, as the case may be, to obligate the seller to ensure termination of agreements, document and complete dubious business operations, and adjust financial relations of participants of the project with due account of possible claims on the part of tax authorities.

Expert Opinion

It is important to understand that the revealed defects may have extremely negative consequences for participants of the project.

The existence of any defects in the rights of the seller to the business may block the implementation of the master agreement at the stage of its registration or create rather significant grounds for its appeal in the court of law.

Violations in documentation and registration of company's rights to assets do not exclude future disputes dealing with third party rights thereto, which, it its turn, may provoke significant financial losses for the company.

Relations between the company and the counterparties in respect to which there are doubts as to their reliability should also be settled prior to the signing and performance of the master agreement. Such contracts should not be left without any attention. After gaining of the actual control over the company and appointment of the new senior management, the controlling bodies may raise questions with respect to dubious operations.

Prior to the signing of the master agreement and execution of the necessary internal documentation of the company designated for the replacement of the owner and transfer of control, the purchaser must have not only reliable and most recent information about the revealed defects and risks but also actual legal mechanisms of managing the same.

Andriy Makarenko
Dmytro Slobodian

TRANSACTION STRATEGY AND AGREEMENT ON THE STRUCTURE OF THE TRANSACTION: REFLECTION OF PROBLEMATIC ISSUES AND THEIR RESOLUTION, SHARING RISKS BY THE PARTIES

A deal is not simply a package of documents which must be formally signed by the parties, but a complex of organisational and legal issues that, if correctly resolved strategically and tactically, will ensure achievement of the goal by the parties to the transaction (as a rule, an ultimate goal is the transfer of rights) with maximum of guarantees for the parties thereto. In other words, a transaction is a complex deed composed of several stages.

Every transaction can be compared to battle actions, even when the parties enter into it by their mutual consent rather than for the reasons of necessity. Why? Each of the parties searches for the most advantageous terms and conditions that can be perceived by counterparty as a disadvantageous position which may result in irritation that may lead to a conflict of interests and disruption of the transaction.

Agreements regulating relations in the agroindustrial complex, first and foremost those related to investing into the development of agricultural sector of Ukraine serve as a vivid example of such approach. Because the national agricultural sector suffered less from the financial crisis than other sectors of the economy, this sector seems to be very promising for the future global investments.

The future investor has to assess all aspects of a specific agribusiness, including those features that restrain or slow down the investments, *inter alia*, natural risks, lengthy operating cycle, inability to fully control the growing of the goods due to large areas, regional peculiarities of the goods, etc. All of these factors create a need for the conclusion of agreement on the structure of the transaction.

We will take an example from the practice of regulation of agrarian relations. Company 1 received a loan for the construction of an elevator (grain storage) and the loan was secured with mortgage of the property. A dispute arose between the parties during the term of the loan: the bank unilaterally changed terms and conditions of the agreement and Company 1, treating bank's actions as illegal, stopped repaying the principal amount of the loan and interest thereon. Under the terms and conditions of the loan agreement, the bank has the right to demand early repayment of the principal amount, to collect interest and penalties and enforce the mortgage without recourse to court, and that's exactly what the bank does. The court of first instance awarded payment of all the debts and, besides that, the bank sold the mortgaged real estate and corporate rights of the debtor at the auction.

At first glance, the situation is hopeless for the debtor. Alexandrov & Partners International Law Company acted for the hopeless debtor. We organised a strategic counteraction against the bank and built a legal theory in the case for recovery of debt. We lost in the court of appeal instance, but we

won in the court of cassation instance and the case was returned for retrial. It was our victory, because such judgement allowed us to win time. Over 15 court proceedings were initiated against the bank in different periods of time and in different cities, inter alia, one of the judgements terminated the loan agreement.

As a result of such settlement of the case the parties conducted negotiations and entered into an agreement on settlement of the dispute, became partners in financing construction of the property, and the company received another loan for completion of the construction.

The settlement of the dispute between the parties of the described conflict was also accompanied by the lawyers of the Alexandrov & Partners International Law Company and ended up in a complex transaction on the transfer of the property into the joint management by the parties. But the dispute would hardly have been settled, if the transaction had not had a clear strategy. Strategy and tactics are implemented in the key document of complicated transactions that is an agreement on the structure of the transaction.

The execution of a transaction can be described with the help of the following algorithm: determination of the purpose, negotiations between the parties, choice of method and decision about what law is applicable to the transaction, due diligence of the property, conclusion of an agreement on the structure of the transaction, preparation and approval of documents, signing of documents, actions after the execution of the transaction (registration of title, change of company's participants, etc.).

The next important stage after determining the purpose of an M&A transaction is the choice of the place of effecting the transaction, that is, which law is applicable to the transaction. For example, acquisition of real estate located in Ukraine can be made by one of the following ways:

1) conclusion of agreement for the sale and purchase of the real estate;
2) enforcement of real estate as collateral;
3) conclusion of a barter agreement;
4) acquisition of corporate rights of the company who is the owner of the real estate item;
5) acquisition of shares in the company – participant of LLC who is the owner of the property, etc.

The last option presupposes execution of the transaction abroad, if a purchaser of shares is also a non-resident.

While choosing the law applicable to the transaction, it is necessary to carry out legal analysis of every possible option of conduct from the point of view of antimonopoly and tax risks, financial expenses, further use of non-resident companies, possibilities for setting procedures for conducting joint business, etc.

Thus, for example, the tax implications of concluding a sale and purchase agreement in Ukraine can exceed by many times the expenses on

the transaction under which the shares of a non-resident company – an LLC participant are acquired, moreover, a non-resident company may also be used in the future not only as a holding but also as a trade company (from this point of view it is convenient to acquire companies registered in EU countries that have a number of VAT payer or possibility to obtain such number).

If as the result of execution of the transaction several persons become business partners, it is necessary to consider a possibility of their entering into a joint activity agreement. Here we speak about shareholders agreements. Thus, the possibility of entering into shareholders agreements is envisaged by Ukrainian law, however their functionality is doubtful, and the slightest deviation of its provisions from the legally established order results in invalidity of the corresponding clause. Foreign jurisdictions offer very wide possibilities for governing the relations between the business partners, which undoubtedly influences the parties' choice of the jurisdiction to govern the transaction.

An agreement on the structure of the transaction is the key point with which the negotiations between the parties are completed, the consent is reached, and purposeful, coordinated and timely actions, ensuring successful completion of the transaction, are commenced.

The goal of the conclusion of the agreement on the structure of the transaction:

1) The key purpose is to fix information.

   The vehicle of progress in any transaction is timeliness and completeness of information exchanged by the parties. Quality of information determines the quality of work on the project, because information that is timely, complete, fixed and brought to parties' notice makes the participants of the project and contactors better organised and eliminates every possibility of taking inappropriate actions, resulting in delaying of the transaction.

   An agreement on the structure of the transaction is one of the first documents in a project with which fixation of information commences. In complicated projects information must be fixed constantly, for example:

   - any request must be made in writing, which ensures compliance with the request;
   - electronic letters must be sent with a copy to all participants of the project, which ensures their being informed of the status of the transaction at any point of time;
   - the minutes of the meeting must be prepared and signed by the parties after every meeting; such minutes record all the items discussed by the parties and eliminate the possibility of misunderstanding between the parties.

     In the process of implementation of the project the need for fixation of information increases constantly.

2) Determination of the nature of all risks in the project, providing for the ways to remove the risks, and where they cannot be removed entirely – ways of risk management.
3) Making provisions for the ways and procedures determined by the parties for execution of the transaction, obligations of the parties.
4) Settlement of financial questions of the transaction;
5) Structuring and management of the possible problems;
6) Determination of the persons responsible for the performance of a specific job (first of all, for the making of decisions and coordination of contractor's work).

Planning only reflects the sequence of actions to be taken and makes an integral part of structuring.

As a rule, well-prepared agreement on the structure of the transaction must answer the following questions of the investor and the seller:

- determination of the total price of the transaction, procedure for and terms of payment of the price of the acquired business or assets by investor, financing of the transaction;
- choice of resident structure of the transaction subject to the peculiarities of taxation in separate jurisdictions;
- necessity of reorganisation of the business before it is acquired by an investor and measures on implementation of such reorganisation;
- choice of the way of implementation of the transaction, that is: purchase of corporate rights, securities or assets as a complex of property or an integrated property complex, depending on the peculiarities of the object of the transaction;
- necessity of obtaining permissions, licenses and approvals from Ukrainian governmental authorities or other countries, for example, obtaining of permission from the Antimonopoly committee of Ukraine for concentration, registration of foreign investment with the National Bank of Ukraine (obtaining of a license for making an investment abroad);
- ways of minimisation and settlement of risks confronting the parties in the process of implementation of the transaction, which risks may consist of the following: pending lawsuits, rights, claims or encumbrances of third parties, as well as contradictions between the seller and the investor concerning certain parts of the transaction;
- guarantees of the partners during implementation of the transaction and a mechanism for settlement of controversies;
- description of the parties' actions necessary for completion of the transaction, terms for taking the actions and responsible persons;
- matters related to management of the business, its functioning in the future and distribution of profit;
- regime of confidentiality of information about the transaction.

Exceptional importance of the components of the transaction described above is explained by the following. Notwithstanding the potential benefit achieved by the investor from the purchase of a business and by the seller from the sale, execution of an M&A transaction assumes risks for both parties in any case. Quite often all problems and debts pass to buyer together with the assets of the company. In this connection it is very important to choose for the purchase of a business a method which is most acceptable for a certain person and to correctly organise the process of execution of the transaction.

The most widespread methods of purchasing a business are as follows: acquisition of corporate rights to a company or purchase of a company as an integrated property complex.

Both methods have positive and negative points and the parties to the transaction may bear additional risks. The following is our thorough consideration of each of the aforesaid ways.

Acquisition of corporate rights of a company is one of the most widespread kinds of transaction used for the purchase of a business. Such transactions are widely used by Ukrainian companies in connection with a number of advantages that they provide. In particular, in the event of acquisition of corporate rights of a company, the buyer becomes the owner of the company and its assets, gets access to the management of business and forms the executive body of the company.

One of the main advantages of executing such kind of transaction is that at the purchase of corporate rights the seller and the buyer do not pay value added tax, because in accordance with the Tax Code of Ukraine, the purchase (sale) of corporate rights is not subject to taxation. Operations on the purchase (sale) of corporate rights do not influence tax obligations of both the buyer and the seller of corporate rights who are payers of value added tax. An additional point is that during the purchase of corporate rights of a company it is important to take into account its tax obligations, in particular, it is reasonable to save and use in business activity the available tax credit on the value added tax.

In the event of purchase of corporate rights of a company, the new owners receive not only assets but also licenses necessary for the carrying out of business; it also does not consume much time to change the name of the owner of the rights and register the rights to the property. This factor is especially important in case the acquired company owns licenses for provision of certain types of activity or has leasehold of land plots from state owned and municipally owned lands or is the owner of project and permission documentation for construction. Acquiring corporate rights can also be advantageous in the event of purchase of a business related to extensive use of intellectual property, because conducting such business is possible in combination with exercising right of intellectual property and, thus, such rights, in another case, must be transferred separately.

In the context of execution of M&A transaction by way of purchase of corporate rights, we should emphasise the method whereby the seller transfers corporate rights to the investor through a non-resident (one or a few). Such option may be employed, first of all, for the purposes of structuring taxation of the results of the transaction and business activity in the future and also for the purposes of compliance with the regime of confidentiality of information about the owners of the business or for the purpose of reorganisation of the business management and «cleansing» of assets.

Another possible way of effecting a transaction is to acquire a company as an integrated property complex. Such possibility is guaranteed by laws of Ukraine. In particular, according to the Commercial Code of Ukraine, an integrated property complex of a company is treated as real estate and can serve as an object of sale and purchase and other agreements.

Such way of purchase of business is most logical from the financial point of view, though labour-consuming, because the documents required for registration of the transaction must be carefully prepared. At the purchase of a company as a property complex, it is recommended that the parties to the transaction draw up a certificate of assets inventory, a balance sheet and a list of all debts and obligations of the company.

It is necessary to note that the parties' choice of foreign jurisdiction for the M&A transaction (most often – the Netherlands or Republic of Cyprus) brings not only positive things such as confidentiality of information, possibility of structuring taxation and use of international arbitration courts for resolving disputes, but also a number of additional inconveniences. These include increase of the expenses for legal services and maintenance of business, problems with recognition and enforcement of judgements of foreign courts in Ukraine, considerable time necessary for establishment of companies abroad and diminishing the efficiency in adoption of decisions by the top management of such companies.

However, all disadvantages listed above can be prevented by the parties in the process of preparation of the agreement on the structure of the transaction. In particular, by means of development of an effective mechanism of co-ordination of activity and distribution of powers of the top management of company in Ukraine and the company located in a foreign jurisdiction, it is possible to achieve the acceptable level of co-operation and efficiency in making decisions.

As the result of conclusion of the agreement on the structure of the transaction, each of the parties clearly understands who does what, when and in what way he does that, the process continues as a perfectly arranged and functioning mechanism. As a result of competent structuring and fixing of the structuring principles in the agreement on the structure of the transaction, the process of effecting the transaction is accelerated significantly, and unforeseen situations are prevented.

The principles of the agreement on the structure of the transaction include clarity, brevity and simplicity. The agreement on the structure of the transaction is a methodical guide for the parties.

Every transaction is unique and, therefore, the agreement on the structure is a unique document for every specific transaction, it is not possible to use a template here, but it is necessary to point out the following key points of the agreement:

1. Recitals

The recitals lay down the substance and essential terms of the transaction, consent of the parties thereto, in certain cases – conditions which must be complied with for the implementation of the transaction.

Agreement on the structure of the transaction, September 2013 Project on the settlement of dispute between the parties which arose from the transfer by the local council of non-residential premises in Kyiv Region in different periods of time and to different legal entities. Recitals.

«The Parties agree that this Agreement may be made solely under the condition that the following requirements shall be met prior to its signing:

1. Acceptance of inheritance by the successors of Party 1 and determination of their shares in the inherited property.

2. Changes of participants of Party 2 in connection with the transfer of the participatory interest of Party 1 to its successors, redistribution of participatory interests of participants in the charter capital of Party 2, making of corresponding changes to the Charter of Party 2, approval of the new wording of the Charter of Party 2 and appointment of legitimate director of Party 2.

3. The minutes of the General Participants Meeting of Party 2 properly record the change of participants, redistribution of participatory interests held by participants in the charter capital of Party 2, making respective changes in the Charter of Party 2, approval of the new wording of the Charter of Party 2 and appointment of director.

4. The procedure for convocation and holding of the General Participants Meeting of Party 2 and adoption of resolutions of the General Participants Meeting complies with the requirements of the Civil Code of Ukraine, Law of Ukraine «On Business Entities» and Charter of Party 2.

5. State registration of changes of the participants, the director of Party 2 in appropriate bodies of state power.

6. Authorisation of the new director by the resolution of the General Participants Meeting of Party 2 to sign the Agreement».

These recitals reflect conditions required for implementation of the transaction.

Agreement on the structure of the transaction, January 2014. Project on acquisition by a Ukrainian investor of a part of integrated property complex (IPC), separate industrial items, further division of IPC,

registration of title to separate properties, acquisition of a plot of land. Recitals.

1. «Party 1 is the owner of an integrated property complex of production facilities (hereinafter referred to as «IPC»), located at _____, under the Sale and Purchase Agreement dated_____.

2. IPC consists of:

- administrative premises with area of ___ sq. m (letter «A»);
- warehouse with area of ___ sq. m (letter «Б»);
- workshop for cutting glass, warehouse for the ready products, garage with mechanical workshops with area of ___ sq. m (letter «Г»).

3. Party 1 hereby intends:

- to sell to Party 2 part of IPC, in particular, the properties marked with letters «A» and «Г»;
- to take all necessary actions to ensure carrying out independent business activity by Party 2 in the purchased premises:
  - to sell 2 gantry cranes together with crane platform (ground for processing of cargo);
  - to sell the concrete fence which encloses the land plot underlying the premises marked with letters «A» and «Г»;
  - to sell part of railway bed;
  - to ensure uninterrupted supply of electricity to the premises purchased by Party 2 with power capacity of 70 kW;
- to carry out all actions necessary for the transfer of the title to the land plot with the area of 1.14 hectares to Party 2 in the earliest dates with minimum expenses,

the complex of measures envisaged in this clause is hereinafter referred to as the «Transaction».

These recitals reflect the substance of the transaction.

2. Terms

In any agreement, the terms must be clearly and comprehensively defined. Ambiguity of definitions may be adversely used by the unfair party.

3. Designation of Project Coordinator (Person Responsible for Making Decision) by Each of the Parties

In any transaction, for the resolution of current questions to be effective, each party must appoint a person responsible for making of decisions and coordination of contractors. It is especially important for the transactions the parties to which are large companies with multilevel management system (for example, banks, insurance companies, etc.). Most frequently, «implementation of transaction» is done by the contractors who are not authorised to independently adopt decisions and in the event of routine situations they must comply with all the requirements of the bureaucratic system with respect to obtaining approvals. The managers of the lower level,

as a rule, do not take responsibility to make decisions and as a result a minor problem migrates from one department to another.

Therefore, the person responsible for making decisions, both strategic and tactical, must be appointed by each of the parties. The agreement on the structure of the transaction must specify the contact details of such person, and if there are several responsible persons – the list of questions which each of them is competent to address.

> *Agreement on the structure of the transaction, June 2014. Project on the settlement of a dispute between the debtor and a bank by way of taking into joint management by the parties of the mortgaged property – large real estate item. General provisions.*

«The Coordinator of the Project on legal matters on behalf of the Bank is _____, contact telephone number _____, e-mail _____, on behalf of the Debtor – D.K. Alexandrov, contact telephone number _____, e-mail _____».

4. Procedure for Interaction and Circulation of Documents between the Parties

It is a question of significance in large transactions and rational resolution of the question eliminates any possibility of «hanging» of documents.

> *Agreement on the structure of the transaction, June 2014. Project on the settlement of a dispute between the debtor and a bank by way of taking in joint management by the parties of the mortgaged property – large real estate item. General provisions.*

«The parties approve the following order of electronic circulation of documents between them - each email related to the Project addressed to any of the authorised persons of the Parties designated as such in this agreement and Schedules hereto, must not be left unattended by the addressee or another authorised person for more than 24 hours.

On each of the documents, listed in Schedule 2, there must be indicated the date and time when it was sent for approval by each of the Parties, and in the case of approval of the text of the document there must be put a mark «Approved» and signatures of coordinators of the Project from each of the Parties on each page of the approved document».

5. Order of Preparation of Documents

In the transactions requiring preparation of considerable quantity of documents, it is necessary for the parties to draft and approve the list of documents that must be prepared and agreed by the parties and of the persons/parties responsible for preparation of the documents, as well as the deadlines for preparation thereof.

In large transactions it is recommended to present the indicated sections in separate documents and schedules to the agreements on the structure of the transaction.

Agreement on the structure of the transaction, June 2014. Project on the settlement of a dispute between the debtor and a bank by way of taking in joint management by the parties of the mortgaged property – large real estate item. General provisions.

«Schedule 1 to the Agreement on the Structure of the Transaction

List of Documents Required for Implementation of the Project

1. Technical scope of work under the shareholders agreement, including basic data of participants of Company_1 and the list of officials of Companies_1 and 2 (to be prepared by Party_2*);
2. Shareholders agreement of the Parties and Option Agreements (to be prepared by Party_2);
3. Constituent documents of Company_1 (to be prepared by Party_1) and Company_2 (to be prepared by Party_2) – drafts Charters. Party_1 also prepares the draft provision of the Charter of Company_2 concerning the competence of the Board of Directors of Company_2;
4. Preparation of documents of Company_1 and Company_2 for performance of the terms of shareholders agreement, in particular: resolutions of the General Shareholders Meeting, orders about appointment of officials of Companies_1 and 2, employment agreements with officials of Companies_1 and 2 (to be prepared by Party_ 2). Employment contract with the Chief Financial Officer of Company_2 to be prepared by Party_1;
5. Agreement(s) for construction of the Property and schedule of financing construction (to be prepared by Party_2);
6. Agreement for the use of permitting and project documentation in the process of construction of the Property and its commissioning (to be prepared by Party_2);

……..

* – the phrase «to be prepared by Party_1» means that Party_1 prepares the draft document and agrees it with Party_2 and vice versa».

6. Sequence of Actions/Signing Documents Related to the Project

This section of the agreement actually envisages a plan for the project. However, having just a plan is not enough for the proper organisation of the parties. The plan must always envisage the terms of and persons responsible for implementation of every stage. The plan organises the parties, sets the terms and names the responsible persons – it activates achievement of aims.

Agreement on the structure of the transaction, January 2014. Project on acquisition by a Ukrainian investor of a part of integrated property complex, separate industrial facilities, further division of IPC, registration of title to separate properties, acquisition of a land plot. The order of signing of documents.

«The Parties hereby agree to the following order of signing of documents for implementation of the Transaction:

On the date of signing of agreement for the sale and purchase of part of IPC (agreement is subject to notarisation), the Parties shall also enter into the following agreements:

a) Agreement for the sale and purchase of gantry cranes (simple written form).
b) Agreement for the sale and purchase of part of railway bed (simple written form).
c) Agreement on joint use of technological network of the main consumer (simple written form).
d) Agreement on sublease of a land plot (simple written form).

.....

On the date of signing of agreement for the sale and purchase of part of IPC, Party 1 hands over the following documents to Party 2:

a) Resolution of the owner on the sale of a part of IPC.

.....

After the signing of agreement for the sale and purchase of part of railway bed:

a) Agreement with Pivdenno-Zakhidna Zaliznytsia STBU (South-West Railway) on allowing of railcars in and out of the part of the railway bed owned by the Parties».

If the project is complicated, and there are many contractors and stages, it is recommended to make the plan of the transaction in a separate document, a schedule to the agreement on the structure of the transaction.

Agreement on the structure of the transaction, June 2014. Project on the settlement of a dispute between the debtor and a bank by way of taking in joint management by the parties of the mortgaged property – large real estate item. Schedule 1 to the Agreement on the structure of the transaction.

Plan of Work on Implementation of the Project

- The draft documents that must be prepared by Party_2 shall be provided to Party_1 for approval until 1 June 2014 inclusive (unless otherwise indicated in the table). Deadline for signing of the documents by the representatives of the Parties is specified in the table.
- Responsible person of Party_2 is Person 1, contact telephone number: _____.

№	Stages	Description of Work	Deadline	Contractor	
				Party 1	Party 2
1	***Preparation of documents, necessary for Company_1 to obtain control over Company_2, and the documents necessary for compliance with the terms and conditions of the shareholders agreement***	Preparation, approval and signing of agreement for the sale and purchase of participatory interest in the charter capital of Company_2 by Company_1, and resolutions of the general participants (shareholders) meetings of Companies_1 and 2	Preparation, approval – 4 June 2014 Signing – 8 June 2014 (1 business day after registration of Cyprus company)		Person 1, Person 2
2		Preparation, signing of necessary documents of Company_1 and Company_2 for compliance with the terms and conditions of the shareholders agreement, in particular: resolutions of the general participants (shareholders) meetings, powers of attorney for the representatives of Company _1, orders on appointment of officials of Companies, employment contracts with officials of Companies_1 and 2	Preparation, approval – 4 June 2014 Signing – 8 June 2014 (1 business day after registration of Cyprus company)		Person 1, Person 2, Person 3
3		Approval of the list of audit (appraisal) companies which can appraise the value of the Property (shares of Company_2) according to the terms and conditions of the shareholders agreement.	2 June 2014		Client adopts the resolution

7. Obligations of the Parties

Without clear understanding of who does what, the terms of implementation of the transaction may be delayed, especially if there are several lawyers and representatives acting on behalf of each of the parties.

Agreement on the structure of the transaction, March 2013. Project on acquisition by a Ukrainian investor of the assets of a plant in Germany. Obligations of the Parties.

«1. OBLIGATIONS of ALEXANDROV and PARTNERS ILC:

1) Obtaining of a license(s) from the National bank of Ukraine for making of investments abroad on the date defined by the Parties in the agreement dated 22 February 2013 from the date of obtaining all necessary documents envisaged by paragraph 9 Article 2 Clause II of this agreement, to be submitted to the National bank of Ukraine.
2) Preparation of the following draft documents:
    a) minutes of the general participants meeting of Company 1 with the decision to become a shareholder of Company 2 and to increase its charter capital;
    b) power of attorney to act on behalf of Company 1 in relations with the National Bank of Ukraine and the Department on Combating Organised Crime of the Ministry of Internal Affairs of Ukraine;
    c) power of attorney to act on the behalf of Company 1 in relations with the bodies of the Ministry of Justice of Ukraine.
3) Apostilled copies of the following documents and their further transfer to Mr. X :
    a) minutes of the general participants meeting of Company 1 with the decision to become a shareholder of Company 2 and to increase its charter capital;
    b) power of attorney authorising the German lawyers to act on the behalf of Company 1 in Germany;
    c) Charter of Company 1;
    d) certificate of state registration of Company 1;
4) 4) Bringing all the documents to be prepared by Company 1 and Mr. X. under this Agreement in compliance with laws of Ukraine.

8. Procedure for Making Payments, Financing of Costs

The procedure for making payments and financing of costs are the key points of every transaction which the parties must agree in advance. The procedure for making payments may also become an additional guarantee of interests of the parties, for example, when the parties agree to the distribution of payment depending on the fulfilment of obligations.

Also, the payment for the transaction may be made in other than monetary form – barter, assignment of right, transfer of securities, etc.

9. Reflection of Problematic Issues of the Transaction, Methods of Their Resolution, Sharing of Risks by the Parties

During the structuring of the transaction the lawyers' task is not to create a perfect legal construction, but to model a transaction in which interests of the parties will be protected to the maximum extent possible, and to foresee any bottlenecks and methods of overcoming them.

An agreement on the structure of the transaction is concluded after due diligence of the object of the transaction, and the parties, therefore, can envisage influence of legal defects of the object on the whole transaction,

to foresee the problematic issues of the transaction and methods of their resolution.

Objects of M&A transactions always have legal defects, but their presence is not always a negative factor, for example, the fact that the seller does not have documents for loading cranes, which are one of the objects of the transaction, can result in the substantial decrease of their price, as such machinery must be registered with the appropriate state authorities.

During implementation of the transaction there may be revealed problematic issues and risks. Frequently, such risks are related to the disputes with third parties, claiming their rights to certain part of the assets or other rights. In the agreement on the structure of the transaction, the parties must elaborate and fix a clear algorithm of actions which will allow them to settle all their disputes until the date of completion of the transaction. As a rule, lawsuits are settled either by way of conclusion of settlement agreements or by way of obtaining judgements controlled by the parties and on the terms agreed beforehand. It is also necessary to conduct the whole process of appeal of such judgements by way of successive submissions and further revocation of appellate and cassation complaints in order to minimise the possibility of revision of such judgements in the future.

Agreement on the structure of the transaction, September 2013 Project on the settlement of dispute between the parties which arose from the transfer by the local council of non-residential premises in Kyiv Region in different periods of time and to different legal entities.

«If Party 1 is deprived of/restricted in its title to the property on the ground of illegality of acquisition thereof, including under a judgement at the claim filed by Party 2, any third party, participants of Party 2, bank institutions, BTI and/or if there are any pending court proceedings in Ukrainian courts which can deprive/restrict Party 1 of/in its title to the property on the ground of illegality of its acquisition, Party 2 assumes an absolute obligation to return to Party 1 monetary funds received from Party 1 in accordance with this Agreement within 3 (three) business days from the date on which Party 1 filed the respective demand to Party 2».

Agreement on the structure of the transaction, January 2014. Project on acquisition by a Ukrainian investor of a part of integrated property complex, separate industrial facilities, further division of IPC, registration of title to separate properties, acquisition of a land plot.

«For the purpose of guaranteeing the rights of Party 2 to use the land plot with the area of 1.14 hectares before becoming the owner thereof, the Parties shall enter into a simple written form of land plot sublease agreement underlying the IPC purchased by Party 2. At the same time, Party 1 is obliged to ensure obtaining of consent from the

village council authorising sublease of the land plot and to assist in state registration of the sublease agreement».

While drafting the warranties of the parties, it is also advisable to envisage liability (for example, in the form of fines) for breach of warranties or their invalidity and the right of the non-breaching party to recovery of losses.

Expert Opinion

Taking into account the abovementioned peculiarities of the legal construction of the agreement on the structure of the transaction and thorough analysis of the situations that we face in practice, we can make the following conclusions.

In general, the agreement on the structure of the transaction is a document the conclusion of which confirms readiness of the parties to effect the transaction and determines the general plan of the transaction taking into account particular tasks and terms of their performance.

We may state that the agreement on the structure of the transaction is a unique document that significantly simplifies the process of conclusion of the future transaction, performance of its provisions and protection of its parties› interests.

An agreement on the structure of the transaction does not preclude adjustment of the action plan in the process of implementation of the project, but the general direction of movement to the purpose remains unchanged. There are no «perfect» legal constructions, but the foresight, timeliness and persistence of parties and their legal advisors are always necessary during implementation of the planned actions.

Dmytro Alexandrov

Schedule 1

AGREEMENT ON THE STRUCTURE OF THE TRANSACTION

__ March 2013

_____ **Limited Liability Company** represented by _____, hereinafter referred to as **«LLC»,** and

Attorney X, with the office located at: _____, and

_____ **Limited Liability Company** represented by _____ hereinafter referred to as **«Company»,** and

ALEXANDROV and PARTNERS International Law Firm, represented by **Dmytro K. Alexandrov,** hereinafter referred to as **«ALEXANDROV and PARTNERS ILC»,**

hereinafter together referred to as the «**Parties**», and each individually as a «**Party**»,

have entered into this Agreement on the Structure of the Transaction (hereinafter referred to as «Agreement») as follows:

RECITALS

LLC intends to purchase the property of company B registered in the commercial register under number _____ with the local court _____, having its registered office at _____, in relation to which bankruptcy proceedings were instituted in accordance with the ruling dated_____ rendered by the Nurnberg local court specializing in bankruptcy.

Under the advice of Doctor _____, Attorney, Partner of LLC, which was given by him to Attorney X upon request, and according to the information provided by Attorney G, the purchase of assets of company _____ _____ shall be carried out by «acquisition of one or two limited liability companies in accordance with German laws (GmbH), providing their financial support in the amount necessary for the purchase of the assets of company B as set forth in the framework agreement. If the purchase of German LLCs shall be made through an offshore company, LLC shall purchase the participatory interests/shares in German LLC before the latter acquires the assets of company B».

SECTION I. STRUCTURE OF THE TRANSACTION

The Parties hereby agree and state that the transaction related to the indirect acquisition of the property of company B by LLC_____ (hereinafter referred to as «**Transaction**») shall have the following structure:

1. Acquisition of company V by company C acting through its Director, Attorney X, and controlled by LLC.
2. Registration of company C as the sole shareholder of company V in the respective German registration authorities.
3. LLC shall become a participant of company V and shall increase its authorized capital up to the size necessary for acquisition of the property of company B and for the carrying out of business activity of company V during the term determined by LLC.

   The fact that LLC shall become a participant of company V, that its authorized capital shall be increased and that the participatory interests shall be reallocated among the participants (between company C and LLC) shall be recorded in the respective minutes/ resolution of the General Participants Meeting of company V, which shall be signed by company C in the capacity of the registered participant and the LLC in the capacity of the future participant invited to the General Participants Meeting.
4. Introduction of the necessary changes to the information about company V with the respective German registration authorities: registration of increase of the number of participants, increase of the authorized capital and reallocation of participatory interests among the participants.
5. Obtaining from NBU of the license for export of the necessary capital from Ukraine by LLC with the purpose of increasing authorized capital of company V, the participant of which LLC will have already become.
6. Acquisition of property of company B by company V on the basis of agreements concluded with Mr. _____, receiver of company B property.
7. Registration of company V title to the purchased property of company B.

SECTION II. OBLIGATIONS OF THE PARTIES

The Parties hereby state and agree that for the purpose of effecting the Transaction each of them shall assume the following obligations:

1. LLC shall:

1) Approve the amount of money to be contributed by LLC into the authorized capital of company V (subject to the cost at which property of company B shall be purchased; expenses necessary for business activity of company V and company B, accordingly, during the term set by LLC; expenses related to the payment of notary's and lawyers' fees, payment of stamp duties and taxes that shall arise during the purchase of company B property).

2) Assess recommendations given by Attorney X and tax advisor Mr. _____, concerning tax implications and risks of effecting the transaction in accordance with the German laws, as well as those concerning registration of company V title to the purchased property of company B.
3) Approve lawyers who will act on behalf of LLC in Germany in taking all required registration actions.
4) Ensure formalisation of the following documents required for execution of the Transaction:

   documents necessary for German lawyers to take all the required registration actions:

   a) minutes of the General Participants Meeting of LLC containing a resolution to become a participant of company V and to increase its authorized capital (certified by notary);

   b) power of attorney authorizing German lawyers to act on behalf of LLC in Germany (certified by notary);

   documents necessary for ALEXANDROV and PARTNERS ILC to obtain NBU license for making an investment abroad:

   a) minutes of the General Participants Meeting of LLC containing a resolution to become a participant of company V and to increase its authorized capital;

   b) power of attorney authorizing ALEXANDROV and PARTNERS ILC to act on behalf of LLC in relations with the NBU and Department on Combating Organised Crime of the Ministry of Internal Affairs of Ukraine;

   c) power of attorney authorizing ALEXANDROV and PARTNERS ILC to act on behalf of LLC in the bodies of the Ministry of Justice of Ukraine.
5) Provide ALEXANDROV and PARTNERS ILC with the following documents necessary for preparation of the package of documents to be passed to Mr. X for the carrying out of all necessary registration actions in Germany:

   a) original copy of the charter of LLC;

   b) original copy of the state registration certificate of LLC;

   c) original copy of notarised minutes of the General Participants Meeting of LLC containing a resolution to become a participant of company V and to increase its authorized capital;

   d) original copy of notarised power of attorney authorizing German lawyers to act on behalf of LLC in Germany.
6) Provide complete financing of Transaction in a timely manner.

2. MR. X shall ensure:

1) Purchase of company V by company C by 28 February 2013.
2) Signing of the agreement on maintenance of the plant and capacities of company B between company V and the receiver of company B property during the period from 1 March 2013 until 31 March 2013 at the expense of company V or any another of its affiliated structure (to be executed by 28 February 2013).
3) Registration of company C as the sole participant of company V with the appropriate German registration authorities (to be executed within 3 business days upon the purchase of company V).
4) Execution of the minutes/resolution of the General Participants Meeting of the LLC containing a resolution to become a participant of company V, increase its authorized capital and reallocate participatory interests among the participants (company C and LLC) (to be executed within 1 business day upon the receipt of the duly issued power of attorney from LLC).
5) Execution of the minutes/resolution of the General Participants Meeting of company C authorizing its director to sign the minutes of company V on admission of the new participant and increase of the authorized capital of company V as well as to sign the agreement between the participants of company V.
6) Execution of the agreement between company C and LLC on admission of the latter to the membership of company V participants, increase of the authorized capital of the German company by the amount of contribution of LLC and reallocation of participatory interests (the agreement must be also signed by company V to evidence that it has read the same).
7) Entry of the necessary changes into the records of company V kept by the respective German registration authorities: registration of the increase of the number of participants of company V, increase of its authorized capital and reallocation of participatory interests, all of which must also be recorded in the charter of company V (to be executed within 7 business days of the date of signing indicated in paragraph 4 of Clause 2 of Section II hereof).
8) Provision of the text of the power of attorney under which the German lawyers will have the right to make all necessary registration actions in Germany. The text of the power of attorney must be made in English (to be executed within 3 business days of the date of this Agreement).
9) Provision of ALEXANDROV and PARTNERS ILC with the certified and apostilled copies of the following documents (in 2 copies each) (to be executed within 5 business days of the date of this Agreement):

1) the excerpt from the Register of Companies related to company V containing information about the participants of the company (LLC and company C) as well as the amount of the authorized capital;

2) the charter of company V containing the information about the participants of company (LLC and company C) as well as the amount of the authorized capital;

3) the minutes/resolution of participants of company V on the admission of LLC to the membership of participants, increase of the amount of the authorized capital by the amount of the contribution of LLC, reallocation of participatory interests;

4) the minutes/resolution of the General Participants Meeting of company C authorizing its directors to sign the minutes of company V on admission of the new participant and increase of the authorized capital of company V, as well as to sign the agreement between the participants of company V;

5) agreement between company C and LLC on admission of the latter to the membership of company V participants, increase of the authorized capital of the German company by the amount of contribution of LLC and reallocation of participatory interests (the agreement must be also signed by company V to evidence that it has read the same);

6) bank statement evidencing opening and existing of the bank account of company V to which the funds shall be transferred by LLC as its contribution into the authorized capital;

7) constituent documents of company C (the charter, certificate of state registration, excerpt from the register of companies/trade register/court register);

8) framework agreement between LLC and Mr. _____;

9) agreements under which the property of company B shall be purchased by company V;

10) bank statement evidencing the existence of the bank account of the insolvency administrator of company B.

3. ALEXANDROV and PARTNERS ILC shall:

1) Obtain license(s) from the National Bank of Ukraine for making investments abroad within the period defined by the Parties in the agreement dated 22 February 2013, upon receipt of all necessary documents envisaged by paragraph 9 of Clause 2 of Section II of this Agreement, for their further filing with the National Bank of Ukraine.

2) Prepare the following draft documents:

a) minutes of the General Participants Meeting of LLC containing a resolution to become a participant of company V and to increase its authorized capital;

b) power of attorney authorizing to act on the behalf of LLC in relations with the NBU and Department on Combating Organised Crime of the Ministry of Internal Affairs of Ukraine;

c) power of attorney authorizing to act on the behalf of LLC in the bodies of Ministry of Justice of Ukraine.

3) Apostillise copies of the following documents and hand them over to Mr. X:

a) minutes of the General Participants Meeting of LLC containing a resolution to become a participant of company V and to increase its authorized capital;

b) power of attorney authorizing German lawyers to act on behalf of LLC in Germany;

c) charter of LLC;

d) state registration certificate of LLC;

4) Bring all documents to be made by LLC and Mr. X. under this Agreement in compliance with law of Ukraine.

SECTION III. MISCELLANEOUS

1) The Parties hereby agree that all obligations stipulated by this Agreement shall be performed by the Parties as soon as practically possible.

2) According to the information provided by Mr. X in the letter dated 23 February 2013, the Parties assume, and Mr. X confirms that execution of the Transaction does not entail any negative tax implications for the LLC or company V under Germany laws.

3) LLC has opted and instructed ALEXANDROV and PARTNERS ILC to cease further query of information necessary for establishing of identities of persons connected by relations of control with participants of the Transaction as well as facts of exceeding by the financial indices of the participants of the Transaction (groups of companies connected by relations of control with a company C, and group of companies connected by relations of control with LLC in the meaning of the antimonopoly laws of Ukraine) of the indices set by the antimonopoly laws of Ukraine for the year of 2012. In accordance with data provided by Mr. X, the financial indices of the group of companies connected by relations of control with company C do not exceed 1 million euro in the year of 2012.

4) The texts of all documents to be prepared by LLC and Mr. X. under this Agreement must be previously approved by ALEXANDROV and PARTNERS ILC.
5) The designated purpose of funds transferred by LLC as contribution into the authorized capital of the German company for acquisition by the latter of company B property must be envisaged in the following documents: the minutes/resolution of the General Participants Meeting of company V on the admission of LLC to the membership of company V, increase of the amount of its authorized capital, reallocation of participatory interests among the participants, the minutes/resolution of the General Participants Meeting of company C authorizing its director to sign the minutes of company V about admission of the new participant and increase the authorized capital as well as to sign the agreement between the participants of company V and agreement between company C and LLC on admission of the latter to the membership of participants of company V, increase the authorized capital of the German company by the amount of contribution of LLC, and to reallocate participatory interests.
6) LLC shall be authorized to act on behalf of Party 1 and Company V in Germany.
7) Mr. X and LLC bear responsibility for the development of financial and tax structure of the Transaction as well as for execution and implementation of the Transaction as a whole.
8) ALEXANDROV and PARTNERS ILC provided LLC with legal opinion dated 29 January 2013 concerning tax implications related to execution of the Transaction in Ukraine as well as legal opinion dated 29 January 2013 concerning risks provided for by the antimonopoly laws of Ukraine in connection with execution of the Transaction. Should LLC have any questions related to the said legal opinions, ALEXANDROV and PARTNERS ILC shall be happy to answer them.
9) Mr. X shall be responsible for preparation, registration and submission to ALEXANDROV and PARTNERS ILC of the documents described in paragraph 9 of Clause 2 of Section II hereof.
10) ALEXANDROV and PARTNERS ILC shall be responsible for preparation, registration and submission to Mr. X of the documents envisaged in paragraph 3 of Clause 3 of Section II hereof.
11) Any and all amendments and modification to this Agreement shall be made by the Parties in writing and signed by the duly authorized representatives of the Parties.

SIGNATURES OF THE PARTIES

Schedule 2

AGREEMENT

ON THE STRUCTURE OF THE TRANSACTION

Kyiv, 8 January 2014

D Privately Owned Enterprise, identification code _____, having its registered office at _____ (hereinafter referred to as «**Enterprise D**»), as represented by _____, Director, acting on the basis of the Charter, **on the one hand**, and

_____, passport _____, registered at _____ (hereinafter referred to as «**Party 2**»), **on the other hand,**

(hereinafter together referred to as the «**Parties**», and each individually as a «**Party**»),

have entered into this Agreement on the Structure of the Transaction (hereinafter referred to as «**Agreement**») as follows:

RECITALS

1. Enterprise D is the owner of integrated property complex of the production facilities (hereinafter referred to as «IPC»), located at _____, under the Sale and Purchase Agreement dated_____.
2. IPC consists of:
   - administrative premises with the area of ___ sq. m. (letter «А»);
   - warehouse with area of ___ sq. m (letter «Б»);
   - workshop for cutting glass, warehouse for the ready products, garage with mechanical workshops with area of ___ sq. m (letter «Г»).
3. IPC is located on a land plot with the area of __ hectares leased by Enterprise D for the term of 50 years under the Land Plot Lease Agreement dated _____.
4. Enterprise D hereby intends:
   - to sell to Party 2 part of IPC, in particular, the properties marked with letters «А» and «Г»;
   - to take all necessary actions to ensure carrying out independent business activity by Party 2 in the purchased premises:
     - to sell 2 gantry cranes together with crane platform (ground for processing of cargo);
     - to sell the concrete fence which encloses the land plot underlying the premises marked with letters «А» and «Г»;
     - to sell part of railway bed;

- to ensure uninterrupted supply of electricity to the premises purchased by Party 2 with power capacity of 70 kW;

– to carry out all actions necessary for the transfer of the title to the land plot with the area of ___ hectares to Party 2 in the earliest dates with minimum expenses,

the complex of measures envisaged in this clause is hereinafter referred to as the «**Transaction**».

5. Enterprise D warrants that on the date of this Agreement it has the title to the premises marked with letters «А» and «Г» which it intends to sell to Party 2 and that they are not sold or mortgaged, there are not subject to any disputes, pledge, tax lien, they are not contributed to authorised capital of other legal entities, all of which is confirmed by the Excerpt from the State Register of Encumbrances over Movable Property No. _____ dated _____, by the Excerpt from the State Register of Restrictions on Alienation of Real Estate No. _____, by the Excerpt from the State Register of Mortgages No. _____ dated _____.
6. Enterprise D is the owner of the warehouse with the area of _____ sq. m. which is also located at _____. The said warehouse is owned by Enterprise D on the basis of Certificate of Title No. ___ dated ____and, on the date of this Agreement is mortgaged in _____.

   Enterprise D hereby warrants that the said warehouse is a separate item of real estate; it does not form part of IPC and is not one of the premises which are alienated by Enterprise D to Party 2.

Clause 1. Subject Matter of the Agreement.

1. This Agreement governs the relations of the Parties related to acquisition by Party 2 of part of IPC, acquisition by Party 2 of the title by purchasing the land plot of with the area of ___ hectares under the premises marked with letters «А» and «Г», providing Party the possibility of carrying out independent business activity on the purchased property.
2. For the purpose of execution of the Transaction the Parties hereby agree to enter into the following agreements and to take the following actions:

   (1) For the purposes of transferring part of IPC, gantry cranes, part of railway bed into the ownership of Party 2:

   a) Agreement for the sale and purchase of non-residential premises located at_____ - the administrative premises with the area of __ sq. m., (letter «А») and the workshop for cutting glass, the warehouse for

the ready products, garage with mechanical workshops with the area of sq. m. (letter «Г»). This agreement is subject to notarisation.

b) Agreement for the sale and purchase of gantry cranes – KKC-12.5-32 loading crane (registration number 95640) and 3PM3M-20-32 double-cantilever crane (registration number 9201).

Upon signing of this Agreement Enterprise D undertakes to hand over to Party 2 the originals of all documentation related to the cranes, including originals of technical passports.

c) Agreement for the sale and purchase of crane platform (ground for processing of cargo).

d) Agreement for the sale and purchase of concrete fence which encloses the land plot under the premises marked with letters «А» and «Г».

e) Agreement for the sale and purchase of railway bed.

f) Agreement on the maintenance of railway line.

(2) For the purposes of providing uninterrupted supply of electricity to the premises acquired by Party 2:

a) Agreement on joint use of the technological networks of the main consumer, according to which the premises acquired by Party 2 shall be provided with electric power with power capacity of 70 kW. The said agreement shall be signed simultaneously with the agreement for the sale and purchase of part of IPC with its further registration with _____ district subdivision of A.E.S. Kyivoblenergo PrJSC.

The Parties hereby agree that in case of necessity and/or upon request of A.E.S. Kyivoblenergo PrJSC (as represented by _____ district subdivision) they shall make all the amendments into the said agreement necessary for its registration with the bodies of A.E.S. Kyivoblenergo PrJSC and shall take all necessary actions for registration of their legal relations with A.E.S. Kyivoblenergo PrJSC, and will assist each other in registration of such legal relations.

(3) For the purposes of ensuring unimpeded functioning of the part of railway bed acquired by Party 2:

a) The Parties undertake to take all actions in their control and execute all documents necessary for the unimpeded functioning of the railway bed. In particular, the Parties undertake to enter into agreement with Pivdenno-Zakhidna Zaliznytsia STBU (South-West Railway) on allowing of railcars

in and out of the part of the railway bed owned by the Parties as well as any another necessary documents.

(4) For the purposes of the purchase by Party 2 of the land plot where part of the acquired base is located:

a) The Parties shall jointly apply to _____ village council to assign separate mailing addresses to real estate items owned by Enterprise D and Party 2.

b) On the date of signing of the agreement for the purchase and sale of part of IPC, Enterprise D shall execute and furnish to Party 2 a declaration of the concession of the land plot with the area of _____ hectares to Party 2 (this declaration shall not be submitted to the city council).

c) Enterprise D is obliged to take all actions, necessary for immediate transfer of the land plot with the area of ___ hectares into the ownership of Party 2 and undertakes to ensure buy out of the land plots with the area of ___ hectares and ___ hectares.

d) For the purposes of buying of the land plot, on 22 September 2010 Enterprise D filed with _____ village council an application for granting permission «for preparation of the decision on the appraisal of land plot». Enterprise D undertakes to ensure that if decision on the sale of land is issued by the village council it shall also approve sale of the separate land plot with the area of ____ hectares to Party 2 and ___ hectares to Enterprise D.

3. The Parties hereby agree to take all efforts to obtain the title to the land plot with the area of ___ hectares by way of purchase by Enterprise D of the respective land plot and the title to the land plot with the area of ___ hectares by way of purchase of the respective land plot by Party 2 on the earliest possible dates.
4. In order to guarantee the rights of Party 2 to use the land plot with the area of __ hectares, the Parties agree to enter into a simple written form agreement on sublease of the land plot underlying part of IPC acquired by Party 2. In this case Enterprise D undertakes to ensure obtaining approval from _____ village council to sublease the land plot and to assist in state registration of the sublease agreement.
5. The Parties hereby agree that for the purpose of determining exact characteristics of the objects of the sale and purchase agreements they shall jointly ensure, prior to signing of such agreements, the visit of the geodesic specialist to the field for establishing the boundaries of the land plots with the area of __ hectares and __ hectares, identification of the premises acquired by Party 2, measure other

objects alienated to Party 2, in particular, the railway bed, the fence and the crane platform.

Clause 2. Price of the Transaction.

1. The Parties hereby agree that the **price of the Transaction** shall be USD _____ in accordance with the official exchange rate established by NBU on the date of this Agreement (USD 1.00/UAH 7.993). Settlements between parties shall be made in hryvnias at the USD/UAH exchange rate established on the date of payment.
2. All payments to be made Party 2 to Enterprise D in the performance of the Transaction must be evidenced by documents and shall be made by bank transfer which shall be evidenced by the bank receipt. The receipt of payment shall be evidenced by a bank statement from the bank account of Enterprise D the copy of which must also be given by Enterprise D to Party 2.
3. The Parties estimate that expenses on re-registration of the land plots – purchase of the land plot with the area of __ hectares by Enterprise D and of the land plot with the area of __ hectares by Party 2 in the amount of USD _____.
4. Expenses envisaged by paragraph 3 of Clause 2 hereof shall be included into the price of the Transaction and shall be covered by Enterprise D, as it may become necessary, solely after receipt of consent from Party 2 for each necessary payment.
5. The Parties shall make every possible effort to ensure that the amount of expenses envisaged by paragraph 3 of Clause 2 does not exceed USD _____. In the event of the excess of the said amount, additional expenses shall be separately agreed by the Parties.
6. In the event the value of land plot determined by the appraisal company upon request of Enterprise D is not acceptable to Party 2 and the latter orders the appraisal of land in which the value of the land shall be lower, Enterprise D shall to pay to Party 2 50% of the difference between the value established by the appraiser of Enterprise D and that established by the appraiser hired by Party 2.

Clause 3. Procedure for Signing of Documents.

1. The Parties hereby agree to the following procedure for signing of documents for implementation of the Transaction:

   On the date of signing of agreement for the sale and purchase of part of IPC (agreement is subject to notarisation), the Parties shall also enter into the following agreements:

   a) Agreement for the sale and purchase of gantry cranes (simple written form).

b) Agreement for the sale and purchase of part of railway bed (simple written form).

c) Agreement on joint use of technological network of the main consumer (simple written form).

d) Agreement on sublease of a land plot (simple written form).

On the date of signing of agreement for the sale and purchase of part of IPC Enterprise D shall hand over the following documents to Party 2:

a) Resolution of the participant on the sale of part of IPC.

b) Resolution of the participant on the sale of other property to Party 2.

c) Copy of resolution of the participant on the buy out of a land plot signed and sealed by the director.

d) Copy of the letter which was submitted to the village council with a request to grant permission for preparation of land surveying documentation, carrying out of expert examination of the land with the area of __ hectares, for the purpose of its sale to the applicant.

e) A special power of attorney authorising to act on behalf Enterprise D in relations with _____ village council and land management organisations, which shall enable the representatives of Party 2 to obtain information related to the buy out of the land.

After the conclusion of agreement for the sale and purchase of part of railway bed:

a) To enter into agreement with Pivdenno-Zakhidna Zaliznytsia STBU (South-West Railway) on allowing of railcars in and out of the part of the railway bed owned by the Parties.

Clause 4. Obligations of the Parties.

1. Party 2 shall:
   1.1. Make all the payments envisaged by this Agreement in full amounts, within the terms and in accordance with the procedure established hereby.
   1.2. Take all the actions in its control necessary for execution of the Transaction and optimisation of expenses during its implementation.
2. Enterprise D shall:
   2.1. Duly sign and execute all documents envisaged by paragraph 1 of Clause 3 (Procedure for Signing of Documents).
   2.2. Provide assistance to Party 2 in the course of assigning of a separate mailing address to the premises acquired by Party 2.

2.3. Take all the actions in its control necessary for execution of the Transaction and optimisation of expenses during its implementation.

2.4. Ensure transfer of the land plot with the area of __ hectares to Party 2 as soon as possible.

2.5. After the signing of this Agreement, furnish 2 original copies of the following documents to Party 2:

- Agreement for the sale and purchase of the integrated property complex dated _____ – copies certified by the signature of Director of Enterprise D and its corporate seal.
- Agreement for the lease of the land plot with the area of __ hectares dated _____ – copies certified by the signature of Director of Enterprise D and its corporate seal.
- BTI technical passport related to the integrated property complex of production facilities – copies certified by the signature of Director of Enterprise D and its corporate seal.
- Technical documentation related to the railway bed – copies certified by the signature of Director of Enterprise D and its corporate seal.
- Agreement on the placing and taking away of railcars dated _____ – copies certified by the signature of Director of Enterprise D and its corporate seal.
- Agreement on supply of electricity No. ___ dated _____ – copies certified by the signature of Director of Enterprise D and its corporate seal.

Clause 5. Risks Related to the Transaction.

1. Pursuant to the sale and purchase agreement dated _____ Enterprise D purchased premises marked with letters «А», «Б» and «Г». There is also a record about the premises under the letter «В» in the technical passport of BTI on IPC.

   As it was notified by Enterprise D, the premises marked with the letter «В», was built without the required permission.

   Thus, Enterprise D assumes all risks and expenses that can be related to the fact of preparing registering documents necessary for the execution of the Transaction.

Clause 6. Miscellaneous.

1. This Agreement is deemed concluded from the date of its signature by the Parties.
2. The Parties shall make every possible effort necessary for the execution of the Transaction as soon as practically possible.

3. This Agreement is made in Ukrainian language in three original copies having equal legal force one copy for Enterprise D and one copy for Party 2.
4. This Agreement shall be in force until settlement of all payments between the Parties envisaged by paragraph 1 of Clause 2 (Price of the Transaction).

Schedule to the Agreement: Outline of the land plot on which the Parties delimited with a red line the land plot with the premises, fence, gantry cranes, crane platform, part of railway bed alienated by Enterprise D to Party 2.

SIGNATURES OF THE PARTIES

SPECIAL RULES OF CONFIRMING AND REGISTERING RIGHTS TO THE LAND WITHIN THE CONTEXT OF M&A TRANSACTIONS

M&A transactions are a special type of transactions which, according to their nature, are aimed, directly or indirectly, at obtaining rights, including rights to land. Such transactions have a number of specific features that are caused by the special statutory regulation of land relations. In the course of drafting of such agreements, special attention should be paid to documents evidencing the rights to the land, the date when such rights originated and conditions under which that happened.

It should be noted that the current version of Article 125 of the Land Code of Ukraine defines the date when the respective right to land originates according to which Article the title to land plot as well as the right to permanent use and the right to lease a land plot originate from the date of state registration of such rights.

It should also be noted that according to Article 126 of the said Code the title and the right to use the land plot are registered pursuant to the Law of Ukraine «On State Registration of Proprietary Rights to Real Estate and Their Encumbrances». This Law is the main regulatory act that regulates the procedure for registration of ownership rights and derivative rights to real estate which includes land.

According to Article 2 of this Law, the state registration of rights to real estate is an official acknowledgement and confirmation by the state of origination, transfer or termination of rights to real estate, or encumbrance of such rights by making the respective entry into the State Register of Rights to Real Estate.

Thus, our state recognises the title of an individual and/or legal entity to the real estate, including land plot, from the date of registration of such right and obtaining of the relevant document.

In practice, taking into account the changes in the laws since the collapse of the Soviet Union and gaining of independence by Ukraine, when the private property actually appeared, the list of documents evidencing rights to land and serve as the ground for state registration is quite extensive. These documents include, inter alia, agreements concluded in accordance with the procedure established by the law, irrespective of their signing date and body that certified them, if such conclusion complied with the applicable laws at the time, state certificates of title or right of permanent use of the land plot notwithstanding whether they contained cadastral number, real estate ownership certificates, judgements, etc. As it can be seen, the list of documents which serve as the basis for state registration of rights to the land plot is rather extensive due to constant introduction of amendments to the laws, which, among other things, relate to documents of title to the land.

The title to the land is guaranteed. This title is acquired and is exercised by individuals, legal entities and the state solely in accordance with the law.

The grounds for origination and termination of titles to land plots as well as other rights to real estate items located on them are legal facts envisaged by the law, which are evidenced by the respective documents.

In the course of implementation of the land reform in Ukraine which commenced in 1992 and continues up to this day, the laws related to land relations had been significantly amended several times, including to the extent related to determination of documents that allow the owners and users to unequivocally confirm the respective rights to the land. Whereas, in respect of certain documents the laws presumed that such documents were valid irrespective of their date of issue and form, and in respect of other documents required replacement with new title documents provided for by the applicable laws such as documents evidencing the right of permanent use.

Thus, according to the Law of Ukraine «On State Registration of Proprietary Rights to Real Estate and Their Encumbrances», which establishes the basic principles of registration of proprietary rights to real estate, the rights to land acquired since 1 January 2013 are evidenced solely by the excerpt from the State Register of Rights to Real Estate or title certificate, however, along with the said documents there also continue to be in effect all other documents evidencing such title obtained from the beginning of time when Ukraine introduced an institute of title to land. Such documents include, inter alia, state certificates of title, state certificates of title to private property and state certificates of title to land plot irrespective of the colour and size of the form and availability of cadastral number, as well as lease, superficies and emphyteusis agreements duly registered at a certain period of time.

Before we proceed to describe in more detail the matters related to confirmation of title to land and registration of the same, we would like to note that since the independence the land law has been constantly amended in Ukraine and it either weakened or reinforced the powers of the state in this process.

One of the weekenings was the adoption of a number of amendments, including into the Land Code. Thus, on 21 March 2013 Resolution of the Cabinet of Ministers of Ukraine No. 502 dated 11 April 2002 ceased to be effective, which previously approved the Procedure for Changing of Designated Purpose of Lands Owned by Individuals or Legal Entities that significantly amended the procedure for the changing of the designated purpose of the land plot for an individual owner of such land plot. First of all, such amendments cancelled double procedure for preparation and approval of the plan. At present, the development of the plan for allocation of privately owned land, the designated purpose of which is being changed, does not require obtaining of approval from any governmental authority. The agreement between the owner of the land plot and the land surveying organisation is the sole ground for development of the plan. Further, the plan

is subject to approval by authorised governmental authorities pursuant to Article 186-1 of the Land Code of Ukraine and introduction by the cadastral registrar of changes related to the designated purpose of the land plot into the land cadastre.

On the one hand and despite of everything, the state simplified the procedure for changing of the designated purpose, however there had to be «rain on the parade». The Law of Ukraine «On State Land Cadastre» and the Law of Ukraine «On Regulation of Urban Planning» were enacted on 1 January 2013. These laws prohibit changing of the designated purpose of the land plot it if doesn›t comply with the detailed plan of the territory and/or zoning plan of the territory, in other words, with the requirements of the general plan of the settlement. It should be noted here, that a considerable part of settlements in Ukraine, especially villages, don›t even have general plans. This became a new obstacle for the land owners. This factor along with other factors should be taken into account while choosing a land plot.

Title

Below we will discuss in more detail certain documents evidencing the right to the land and their special characteristics. We will start with the title. Thus, until 1 May 2009, the document that evidenced the title to the land plot (irrespective of how the owner acquired such right) was just the state certificate. At different periods of time, the state certificates for land plots had different colours and details, however these characteristics do not change their legal status and do not cancel the scope of the rights which were granted by such state certificates at a certain period of time.

Further, on the basis of Law of Ukraine No. 1066-VI dated 5 March 2009 «On Introduction of Amendments to Certain Legislative Acts of Ukraine Related to Documents Evidencing Title to the Land Plot and the Procedure for the Division and Joining of the Land Plots» which was enacted on 1 May 2009, amendments were made to the procedure for the transfer of title to the land plot from the pool of privately owned lands, which established that the following documents evidence title to the land:

- state certificate of title to the land plot;
- civil law agreement on alienation of a land plot concluded in accordance with the procedure established by the laws if a title to the land plot is purchased under such agreement;
- certificate of inheritance.

Thus, the title to the land was evidenced by the state certificate and if the land plot was purchased from the pool of privately owned lands without the changing of its boundaries and designated purpose – by the civil law agreement on alienation of the land plot. Such agreement was enclosed with the state certificate of title registered in the name of the previous owner and on which the notary made a certifying (transfer) record which would specify the new owner and the grounds why he/she was changed. In addition, since

the title occurred from the date of registration, the transfer of title required registration with the bodies authorised to keep the land register (land ledger) and such authorised bodies were the land departments.

The right of permanent use was evidenced by the state certificate of permanent use and the lease right by a duly registered lease agreement. Accordingly, beginning with 1 May 2009 the obtaining of the state certificate of title to the land plot became necessary only if the title was purchased in respect of land plots from the pool of state owned or municipally owned lands as well as in the course of the change of boundaries and/or designated purpose of the land.

In addition, the state certificate evidencing title to such land plot remained to be a document that had to accompany the land plot during the whole period of its existence.

As it appears from the above, the determination of the date when the respective right to the land originated and the availability of the proper documents to evidence the same also have a practical significance both for evidencing the right and for the analysis of risks. Due to such amendments, the date of the agreement and the date when the right to land originates may differ in terms of time, which, in its turn, may lead to different non-standards situations.

Therefore, if at the stage of preparation for signing of agreements one receives documents dated within the period from 1 May 2009 until 1 January 2013 which evidence the title, attention should be paid, among other things, to the registration of the transfer of title in the land register (land ledger, land cadastre), because based on the experience of our company, there were often situations, when an individual purchased a land plot, having registered the sale agreement with the notary, but didn›t register such agreement with the land department that lead to failure of making changes in the land register. Then, when such individual wanted to do anything with that land plot, its title would not be confirmed by the land authorities which lead to inconveniences and postponing of signing of agreements or even disrupted signing thereof.

Later on, in particular beginning with 1 January 2013, amendments to Article 640 of the Civil Code of Ukraine «Date of the Agreement» and the Law of Ukraine «On Land Lease» came into force, according to which provisions related to state registration of agreements were deleted from the Civil Code and Articles 18 and 20 were deleted from the Law, which required state registration of land lease agreements. According to the said amendments, the date of the signing of the agreement, including agreements related to land plots, is considered to be the date of its signing or the date of transfer of the land. And the right to land connected with the signing of such agreement originates from the date of registration of such right with the State Register of Rights to Real Estate.

Let's consider separate options of the transfer of the rights to the land plot during the purchase of the real estate item into ownership depending on the legal status of the seller's land plot.

In a situation when certain assets are being purchased within the framework of the M&A, the purchase of real estate items (buildings and structures) should be considered separately because they deal with legal relations related to the holding and using of the land on which they are located.

In the event of purchase of a real estate item located on the land plot beneficially owned by the seller, the agreement related to such alienation will actually combine two items of sale that will constitute its subject matter (building, structure and land plot). The abovementioned is envisaged by the Civil and Land Codes of Ukraine which provide for the unconditional transfer of title to the land plot in the event of purchase of the real estate item located thereon. In addition, the material terms and conditions of the agreement on alienation of real estate item are the cadastral number and the size of the land plot the title to which is transferred to the transferee.

It should be taken into account that upon the alienation of the real estate item, it is not necessary for the land plot to be transferred in the size held by the owner. The ability of transferring the right to part of the land plot is set forth in Article 120 of the Land Code of Ukraine. However, the provision which provides for the possibility of transferring the right to a portion of the land plot should not be misleading and interpreted from the position of possible unfair actions on the part of the seller aimed at deviation from the transfer of the approved size of the land plot, because we can talk about alienation of a certain portion of the land plot held by the owner only after such portion is allocated into a separate land plot and a separate cadastral number is assigned to it. Thus, an agreement providing for the acquisition of title to a residential building, structure or facility, which is associated with the transfer of title to a portion of the land plot, is executed after such land portion is allocated into a separate land plot and a separate cadastral number is assigned to it (paragraph 2, part 6 of Article 120 of the Land Code of Ukraine). In other words, if the agreement for alienation of a real estate item envisages purchase of just a portion of the land plot, that portion must be allocated into a separate land plot and a separate cadastral number will have to be assigned to it.

However, such joining of two items of sale in one agreement has certain practical difficulties. This is connected with the fact that if a separate type of agreement is concluded, it will be necessary to comply with the mandatory statutory requirements related to the material terms and conditions of agreement with such legal construction. Accordingly, if the agreement for the sale and purchase of the real estate item will provide for the transfer of title to the land plot too, obviously in this case the material terms and conditions

will have to comply with the requirements established for alienation of land plots set forth in Article 132 of the Land Code.

In addition, the agreement for the sale and purchase of the real estate item is a document on the basis of which the rights to the land plot are registered by the state. If the event of alienation of the land plot (from the pool of privately owned lands), the agreement on such alienation is also a document on the basis of which the rights to real estate are registered by the state. Therefore, in the event of the actual sale of the real estate item and the land plot on the basis of one agreement, the respective agreement will be a single document on the basis of which the state will register the rights both to the land plot and to the real estate located thereon, which may cause certain difficulties.

Definitely, such agreement may be concluded with the help of not one but two separate agreements for the sale and purchase of: (i) the real estate item, and (ii) the land plot where such real estate item is located. But in this case the agreement for alienation of the land plot has a derivative nature in relation to the agreement for alienation of the real estate item located on such land plot.

In any case the provisions of the applicable Law provide for the mandatory termination of the title to land of the last owner of the real estate item and transfer of title to the new owner, therefore, it would be reasonable to envisage such transfer in an agreement if material terms and conditions for alienation of the land plot are complied with. The said may be specified both in the text of agreement for alienation of the real estate item and in a separate civil law agreement for alienation of the land plot.

In the event of purchase of the real estate item located on the land plot attached to the seller on the basis of lease rights, in contradiction to the provisions on the transfer of the right of use on the same terms conditions and in the same scope that existed in the previous land user, the replacement of the party to the lease agreement will not be made automatically. In other words, upon the transfer of the title to real estate to the new owner, the land plot lease agreement with the previous owner is deemed terminated and the new owner of the real estate has to obtain the lease right to the land plot in accordance with the procedure established by the law. These provisions are set in the Land Code and the Law of Ukraine «On Land Lease».

The enactment of the abovementioned provisions related to termination of the right of use (lease) and termination of the lease agreement due to the transfer of title to the real estate item to a third party lead to certain practical difficulties of applying the law and numerous litigations related to legal relations involving the lessor, the lessee and the new owner of the respective real estate item.

In order to avoid such misunderstandings in the future, the High Commercial Court of Ukraine explained in its Recommendations No. 04-06/15 dated 2 February 2010 «On the Practice of Applying Land Law by the

Commercial Courts» that the origination of title to the real estate item is not a ground for automatic origination of title or signing (extension, renewal) of the land plot lease agreement which arises from Article 377 of the Civil Code of Ukraine and Article 120 of the Land Code of Ukraine. At the same time, the registration of title to the building and structure does not automatically result in the transfer of title to use land plot underneath it, because the abovementioned rules of civil and land law deal with the transfer of title to land when the title to real estate item is transferred on the basis of alienation agreement. The deeds that provided for the transfer of title to the real estate item serve simultaneously as the ground for the transfer of the right to land, however such right is supposed to be registered in accordance with the procedure established by the law.

Therefore, in this situation the new owner of the real estate item has to register its right of use by entering into a lease agreement and registering the respective rights. In its turn, the lessor, with due observance of paragraph 2 of Article 120 of the Land Code of Ukraine dealing with the scope and terms and conditions of the lease, should not change for the new lessee neither the size of the leased land plot nor any other terms and conditions of leasing out the same. The terms and conditions for leasing of a land plot, which must be complied with for the new lessee, also include the rate of the lease payment. This circumstance must be taken into account in case of the purchase, because going through the established procedure for entering into lease agreement and registration of respective rights, first of all, requires additional costs, and, second of all, may be unreasonably delayed in time, which, among other things, depends upon the respective actions on the part of the lessor. It should also be taken into account that during the period within which the land plot will not be duly registered by the new owner of the real estate item, the latter will have practical difficulties with the taking of legal steps related both to the land plot and to the purchased real estate item.

It is also necessary to consider the situation of alienation of the real estate item located on the land plot which hadn›t been registered in accordance with the established procedure at all. This case deals with state owned or municipally owned land plots which hadn›t been registered by the direct seller (owner) of the real estate.

The effective rules of the laws dealing with the grounds and conditions of origination and transfer of rights to real estate and land plot underlying the same do not allow the occurrence of such situation. However, in practice such situations often occur due to imperfection and constant introduction of amendments to the laws and regulations related to legal regulation of the transfer of title to property and land.

The main drawback in such situation is, per se, the inability to comply with the material terms and conditions of agreement for alienation of the

real estate – the size and cadastral number of the land plot on which the real estate is located.

However, after the review of the rule related to the transfer of rights to the land plot, in the event of purchase of the real estate item it may be concluded that the applicable laws set forth a principle according to which the right to the land (title, lease), on which the real estate is located, transfers to the acquirer of the real estate item solely upon the condition that at the date of alienation the previous owner had such right pursuant to the requirements of the land laws of Ukraine and that right was duly certified. In other words, literal interpretation of paragraph 1 of Article 120 of the Land Code of Ukraine and paragraph 2 of Article 377 of the Civil Code of Ukraine gives grounds to state that the land plot where the real estate item is located should be owned by its seller and only then the owner of the land plot is obligated to obtain a cadastral number for it.

The abovementioned legal position is confirmed by a separate court practice, however it is rather risky and does not eliminate the probability of complications related, for example, to refusal by the notaries to notarise such agreement, therefore, such circumstance should also be taken into account while carrying out preliminary review of the documents.

Also, in theory there may be situations when the alienated real estate item is located on the land plot registered on the basis of the right to permanent use.

According to the Law, the right to permanent use is possible only for state owned and municipally owned land plots. The provisions of Article 92 of the Land Code of Ukraine define a rather narrow group of entities such as: a) state owned and municipally owned companies, institutions and organisations; b) public organisations of the disabled of Ukraine, their companies (associations), institutions, and organisations; c) religious organisations in Ukraine whose charters (by-laws) were registered in accordance with the procedure established by the law solely for the purpose of construction and maintenance of worship and other buildings required for ensuring their activities.

However, during the period of establishment of the land laws, the statutory regulation of the right to permanent use provided for a wider range of entities (collective farms, state farms, other state, cooperative and public enterprises and organisations, religious organisations, later on – farms). In separate cases such legal entities didn›t settle the issue related to the change of title to the land plot when they were changing their form of incorporation and taking into account the Decision of the Constitutional Court of Ukraine dated 22 September 2005 which recognised the requirement of clause 9 of the Transitory Provisions of the 2001 Land Code of Ukraine about the need to re-register the right to permanent use of the land plots as unconstitutional, there may arise a situation when an individual seller of the real estate item is a permanent user of the land from the legal point of view.

In the event when the acquirer of the real estate doesn›t belong to the group of persons who may permanently use the land plot as provided for in Article 92 of the Land Code of Ukraine, we cannot talk about the transfer of the right to use the land plot in the same scope and under the same terms and conditions under which such right was owned by the seller of the real estate item. Therefore, the buyer of the real estate item will be forced to register the land plot underlying the purchased real estate on the general basis.

Land Underlying Integrated Property Complex

In addition to the abovementioned, issues related to the acquisition of the right to land will also originate in the event of purchase of integrated property complex.

According to Article 191 of the Civil Code of Ukraine, the company is considered to be an integrated property complex that includes immovable property (land plots, buildings, structures, etc.) and movable property (machinery, inventory, raw materials, products) as well as binding claims, debts and certain exclusive rights – trademark or any other sign. Thus, according to paragraph 2 of Article 191 of the Civil Code of Ukraine, as an integrated property complex, a company shall comprise all types of property intended for its operation, including land plots, buildings, structures, equipment, inventory, raw materials, products, rights of claim, debts, the right to a trademark or another marking and other rights, unless otherwise established by the agreement and the law.

At the same time, within the meaning of integrated property complex the company is an object of civil transactions and all elements that comprise company's property have to be joined together and subjected to a single purpose of use. According to paragraphs 3 and 4 of Article 191 of the Civil Code of Ukraine, as an integrated property complex the company is treated as real estate.

The rights to the land plot and other real estate items which form part of the integrated property complex of the company are subject to state registration with bodies engaged in state registration of rights to real estate.

The company or its part may act as an object of sale and purchase, pledge, lease and other agreements.

The concept of a company as an integrated property complex in civil relations appeared in 1990's and was related, first of all, to the privatisation processes. Therefore, the legal regulation and its special features are described in the respective laws governing state property. Today, the applicable laws, in particular paragraph 1 of Article 5 of the Law of Ukraine «On Privatisation of State Property», paragraph 1 of Article 4 of the Law of Ukraine «On the Lease of State Owned and Municipally Owned Property», and «Regulation on the Sale of Integrated Property Complexes of State Owned Enterprises which are Classified as Group B, D Privatisation Items» interpret the meaning

of the «unified property complex» and «integrated property complex» to be homogeneous. Thus, an integrated property complex is a business entity with the completed cycle of production of goods (work, services) with a land plot where it is located, autonomous utilities services and power supply system. The aggregate of assets of the integrated property complex has to ensure that such complex carries out separate business activity on a permanent and regular basis. In other words, such company has to function continuously.

Taking into account the abovementioned statutory regulation, the alienation or leasing of the integrated property complex must also envisage alienation or leasing of the land plot where such complex is located. It is impossible to use immovable property, which forms part of the integrated property complex, without the land plot on which it is located, because the land plot is the area which is used directly for the production process without which the business asset loses its designated purpose. Therefore, the alienation of such asset as integrated property complex without the respective land plot is impossible.

However, it should be noted that the provision of paragraph 3 of Article 4 of the Law of Ukraine «On State Registration of Proprietary Rights to Real Estate and Their Encumbrances» as in force on 1 January 2013, makes it possible for the owner of such complex to register his/her right without registration of the right to land, inter alia, «the title to the company as an integrated property complex, house, building, structure (separate portions thereof) may be registered irrespective of whether the title to the land plot on which the same is located is registered».

In relations regarding integrated property complex, the practical meaning has the transfer of title to the purchaser. According to paragraph 3 of Article 191 of the Civil Code of Ukraine the rights to the land plot and other real estate items which form part of the integrated property complex of the company are subject to state registration with bodies engaged in state registration of rights to real estate. This provision is also confirmed by Article 4 of the Law of Ukraine «On State Registration of Proprietary Rights to Real Estate and Their Encumbrances».

The date of transfer of title to the integrated property complex has significant importance. Taking into account the fact that integrated property complex acts as the object of civil law rights, according to paragraph 4 of Article 334 of the Civil Code of Ukraine «the rights to real estate subject to state registration originate from the day of such registration in accordance with the law», and it is a well known fact that the title to real estate is subject to mandatory state registration. This means that the date of transfer of title to integrated property complex will be the date when the details about the new owner are entered into the State Register of Proprietary Rights to Real Estate.

In any case, taking into account the special legal status and practical features of the land use, the main aspect of M&A transactions that include

the right to land is the mandatory audit of such right. Considering the realia and legal system of the market, such audit must be detailed to the maximum degree possible.

Land Parcel (Share) Certificate)

As had been mentioned above, M&A transactions directly or indirectly relate to the obtaining of the right to land. The key element of price formation of a particular agricultural enterprise is the land, it particular, its area, quality and correct registration of title or right to use. According to statistical data, approximately seven million people received land parcel (share) certificates in Ukraine and about 90% of them executed state certificates of title to the land plot. Therefore, today approximately 10% of land that were divided into land shares during the denationalization and privatisation period, are still not duly registered and have not been given the status of private property. But all of this doesn›t mean that such lands are fallow lands and are not being used, most of them are being successfully cultivated by agricultural enterprises on the basis of leasehold of land parcel (share) and are included into the land bank of such enterprises. However, as had been mentioned before, the price of the company is directly affected by the area of the land and correctness of its registration, i.e. registration of right of use.

The land law doesn›t have a clear definition of the concept «land parcel (share)». For the first time the concept «land parcel (share)» was introduced by the Decree of the President of Ukraine «On Urgent Measures Aimed at Acceleration of the Land Reform in the Area of Agricultural Production». In particular, Clause 2 of the abovementioned regulatory legal act stated that the land surveying organisations have to divide the land, which was transferred into collective ownership, into land parcels (shares) without delimitating them (without in-kind allocation), and Clause 3 prescribed a rule that the right to the land parcel (share) may be used as an item of sale and purchase, gift, exchange, inheritance, and pledge.

The division of the land into land shares as an established by the laws procedure for the determination of the size of the collectively owned land parcel (share) into the land to be owned by each member of the collective agricultural enterprise, agricultural cooperative, agricultural joint stock company in conditional cadastral hectares is prescribed by the law in Clauses 8, 9, 14 through 17 of the Transitory Provisions of the Land Code of Ukraine, Article 25 of the Land Code of Ukraine (related to division into land shares of the land owned by the state and municipal agricultural enterprises, agencies and organisations), Law of Ukraine No. 899 dated 5 June 2003 «On Delimitation (In-kind Allocation) of Land Plots to Owners of Land Parcels (Shares)», Resolution of the Cabinet of Ministers of Ukraine No. 122 dated 4 February 2004 «On Arrangement of Work and Methodology of Dividing Land Plots between the Owners of the Land Parcel (Share)».

As opposed to the land plot, the land parcel (share) is a conditional share of the lands that were owned by the collective agricultural enterprises, agricultural cooperatives, and agricultural joint stock companies which size is determined in conditional cadastral hectares. The location and boundaries of such land parcel (share) are not determined.

Therefore, the land parcel (share) is not a land plot and may not be treated as an item of real estate and the proprietary right thereto is not subject to state registration in accordance with the Law of Ukraine «On State Registration of Proprietary Rights to Real Estate and Their Encumbrances».

According to paragraph 1 of Article 2 of the Law of Ukraine «On Delimitation (In-kind Allocation) of Land Plots to Owners of Land Parcels (Shares)», the main document that certifies the right to the land parcel (share) is a certificate of right to the land parcel (share) issued by the district (city) state administration.

Therefore, during the due diligence and review of the documents it is necessary to pay attention to the availability of rights to use the land shares. Thus, the laws do not directly prohibit leasing of the land parcel (share), however more often both the state authorities and the owners themselves wish to properly register the title to the land plot with delimitation of the same and assigning of cadastral number.

On 1 January 2013, amendments to the Land Code of Ukraine related to demarcation of state owned and municipally owned lands became effective. According to the said amendments and paragraph 4 of Article 122 of the Land Code of Ukraine, the powers related to transfer into ownership or use of state owned agricultural land plots for all purposes, were transferred from district administrations to central body of executive power for land resources in particular in the area of land relations, and its territorial bodies. Such central body of executive power for land resources in the area of land relations is the State Agency of Land Resources of Ukraine and its Main Departments in regions. All of these amendments, even from the point of view territorial availability lead to partial complication of the land plot formation procedure and registration of title, which should be also taken into account.

Special Status of Lawyers during the Due Diligence

As had been mentioned above, the title to land, the right to permanent use and the right to lease a land plot shall originate from the date of state registration of such rights. Therefore, the fullness and completeness of the due diligence of the seller's (user's) rights to the land plots directly depends upon the ability to duly verify of state registers, including State Register of Proprietary Rights to Real Estate.

In this area, our country made a step forward by granting, beginning with 1 January 2015, open access to the State Register of Proprietary Rights to Real Estate for all individuals and legal entities who wish to obtain such

information related to a specific item, i.e., by specifying the type of the real estate item and its precise address. However in most cases, in order to carry out full and complete verification, the lawyers need to analyse all registered items of real estate, including restrictions and encumbrances over the property of your counterparty. And that's where the lawyers can be very helpful, who had been granted the right, on equal terms with judicial and law enforcement authorities, of access to state registers of rights to real estate and to obtain the respective official information in the form of certificate in hard or electronic copy.

Therefore, while performing his/her duties, the lawyer uses information from the State Register of Rights related to registered proprietary rights, their encumbrances over the real estate items. If there is no information available about the registered proprietary rights to real estate in the State Register of Rights, the lawyer uses information about the registered proprietary rights available in the State Register of Proprietary Rights to Real Estate, information about any encumbrances over proprietary rights available in the Unified Register of Prohibitions on Alienation of Immovable Property, and information about the mortgages available in the State Register of Mortgages related to such real estate item. Search of information about the registered proprietary rights, their encumbrances over the real estate item with the State Register of Rights shall be carried by the lawyer on the basis of the registration number of real estate item, address of real estate item, location and cadastral number of land plot or identification information of the individual or legal entity.

In other words, the lawyer has access real estate registers on equal terms with judicial and law enforcement authorities and is able to search information by company which makes it possible to carry out the search and legal analysis of rights to land, reveal any existing and future risks faster and more comprehensively.

Special attention should be paid to the location of the land plot and its status. So, if the land plot is located within the boundaries of the city, especially downtown, it should be checked whether it is located in the historical or cultural range as well as archaeological value of such land plot. The review or due diligence which ought to be carried out within specified parameters, status and registration with the respective register in most cases are being ignored by the future buyer which makes it more complicated to carry out future work pursuant to the scheduled development of the land plot and results in additional financial expenses. And sometimes, when this relates to historical ranges of central parts of such cities as Kyiv, Lviv, Kharkiv, Odesa and many other cities, towns and villages included in the List of Historical Settlements of Ukraine, failure to investigate the land plot, its status and rights thereto may lead to suspension of the scheduled project or its cancellation. In order to reveal and inspect such information, it is advisable

to engage relevant professionals who have the experience and capability to obtain information.

Expert Opinion

Taking into account the above, the majority of M&A transactions in agribusiness are directly or indirectly aimed at acquisition of rights to land. The land is a rather specific item of title. At different periods of time, legal regulation of land relations had its own specific features. In practice, taking into account the lapse of time since the collapse of the Soviet Union and establishment of independent Ukraine, when private property actually occurred, the list of documents evidencing the right to land and serve as the basis for state registration is rather long. Thus, in particular, such documents include agreements, signed in accordance with the procedure established by the law, irrespective of their signing date and body that certified them, state certificates of title or permanent use of the land plot whether or not it has a cadastral number, certificates of title to real estate, land parcel (share) certificates, extracts from the State Register of Proprietary Rights, judgement, etc.

As we can see, the list of documents on the basis of which the state registration of rights to the land plot is being carried out is rather long due to constant changes of the land law, which, inter alia, relate to documents of title to land, therefore, prior to effecting any transactions dealing with the rights to land it is necessary to thoroughly study and review documents provided by the seller, and check information from independent sources.

Vitaliy Yankovych

SPECIAL REGISTRATION RULES FOR THE LAND UNDERLYING REAL ESTATE OWNED BY AGRICULTURAL ENTERPRISES

Land is one of the most important resources in the life of the society. It serves as the territorial basis for all types of human activity and as a production factor in many areas of economy, first and for most, in the agricultural sector. An agricultural enterprise treats a land plot from the perspective of a number of aspects: as an object of cultivation for production of goods, i.e. planting and harvesting; as a territory for servicing and/or construction of its production and administrative buildings; and as an asset in the business used during the conclusion of any agreement.

Merger and acquisition transactions (the «M&A») in agribusiness are a special type of transactions which, according to their nature, are aimed, directly or indirectly, at obtaining rights, including rights to land. Therefore, if the investor purchases an agricultural enterprise, the title or the right to use the land is the main item of interest at which the investor is aimed. At the same time, if the investor is interested in purchasing any real estate or integrated property complex, the right to the land plot is one of the assets affecting the ability of entering into such transaction at the date thereof and its value.

In any case, if as the result of the M&A transaction the rights to real estate and land are purchased in one way or another, it is necessary to take into account the special features of such transactions related to the fact that real estate items and land underlying them constitute a specific (special) object of legal regulation.

If the M&A the company (the assets of which include real estate and land) is effected by way of alienation of its corporate rights, then there is no need to additionally alienate or carry out any other legal acts in order to obtain the title or right to use such company's real estate and land where the same is located, because of the real estate and the land do not form a separate item of alienation in such M&A transaction. However, the availability of registered rights to the land plot underlying the items of real estate directly affects the cost of corporate rights. In other words, the effecting of M&A transactions in agribusiness and the value of such transactions directly depend upon the fact whether the rights to the land underlying the real estate are registered and whether they have been properly documented.

Carrying out of due diligence of the target (legal and financial audit of the company) is an important stage that precedes the entering of a M&A transaction, especially in agribusiness. If it is revealed that the rights to land underlying the real estate items had not been completely registered or that such rights do not exist at all, the execution of the transaction may be postponed until such rights are registered or the transaction may be executed conditional upon the registering of such rights, but the purchase price will be significantly reduced.

It is a well-known fact that the registration of rights to land underlying real estate items is a rather time-consuming process for any company and in most cases it requires involvement of the relevant experts (professionals).

In this article an attempt was made to describe as simply as possible the procedure for obtaining rights to land underlying real estate items owned by agricultural enterprises established by the laws and existing in real life by specifying special features and giving examples from our experience.

Most of agricultural enterprises in Ukraine both newly established and those that remained after the transformation of former collective farms and collective agricultural enterprises own real estate items (administrative buildings, production and storage facilities, farm facilities, garages, workshops, etc.). These real estate items are located on land plots attached to the companies without registration of any title thereto. From year to year, such companies obtain from the local department of the State Agency of Land Resources a 6-zem Certificate (a certificate from the state statistics reporting authority on the availability of lands and their allocation broken down by land owners, land users, and lands) and according to the information specified in the Certificate pay land tax. However, in most cases such state of things does not satisfy neither the governmental authorities, local self-government bodies, including state tax inspections, nor the companies that use such land plots.

At a certain moment there arises a need for the company to confirm the title (right) to the land plot. This need may be caused by a number of circumstances. The main include the following: alienation of the company or its separate items of real estate, obtaining of loans which becomes more relevant especially for agricultural enterprises, reconstruction or new construction and other factors which require indication of the cadastral number of the land plot and the title evidencing the basis on which the enterprise is using such land plot.

At this stage, there arises an issue related to documentation and registration of company's right to the land plot and in most cases such issue needs to be addressed immediately and there is no time for the experiments and correction of errors.

It should be noted that the current version of Article 125 of the Land Code of Ukraine defines the date when the respective right to land originates according to which Article the title to land plot as well as the right to permanent use and the right to lease a land plot originate from the date of state registration of such rights. Also, according to Article 126 of the Code the title and the right to use the land plot are registered pursuant to the Law of Ukraine «On State Registration of Proprietary Rights to Real Estate and Their Encumbrances». This Law is the main regulatory act that regulates the procedure for registration of rights to real estate such as land. State registration of rights to real estate is an official acknowledgement and

confirmation by the state of origination, transfer or termination of rights to real estate, or encumbrance of such rights by making the respective entry into the State Registry of Rights to Real Estate.

This would seem to be a regular procedure which would sound very simple according to the village (district) land surveyor: «you need to develop a land allotment plan and execute a lease or sale agreement». It should be noted right away that public authorities and/or local self-government bodies, which competence includes disposal of lands, rather reluctantly consider the issue of alienating land plots to companies mainly considering only the lease option. So in this article we will mainly focus on long-term lease.

Before we discuss the procedure for leasing of a state owned or municipally owned land plot, it is worth getting to know the laws that regulate lease relations. The lease of state owned and municipally owned land is regulated by a number of laws and regulations. The main include the following:

- Land Code of Ukraine;
- Law of Ukraine «On Land Lease»;
- Law of Ukraine «On State Land Cadastre»;
- Law of Ukraine «On Land Evaluation»;
- Law of Ukraine «On State Registration of Proprietary Rights to Real Estate».

According to the said law, the lease of a land plot is the right to possess and use a land plot, which the lessee needs in order to carry out its business or other activities, during a fixed term and on a paid basis under a respective agreement (Article 1 of the Law of Ukraine «On Land Lease»).

Land plots may be leased to Ukrainian individuals and legal entities, foreign nationals and stateless persons, foreign legal entities, international associations and organisations, and foreign states.

The lease of land plots artificially created within shoreline protection belts or allocation belts, on land designated for forestry use and natural reserve fund lands that are located within the shoreline protection belt of water bodies or on land plots of the bed of water bodies is prohibited.

Land plots may be leased for a short term (no more than 5 years) or for a long term (no more than 50 years).

The right to lease municipally owned land plots free from any construction shall be granted on competitive basis, except as provided for in clauses two and three of Article 134 of the Land Code of Ukraine. One of such conditions sets forth that state owned or municipally owned land plots or rights thereto may not be sold on competitive basis (at land auctions) if there are items of real estate (buildings, structures) located on them that are owned by individuals or legal entities.

According to Article 8 of the Law of Ukraine «On Land Lease», the right to lease a state owned or municipally owned land plot may not be

alienated by its lessee to any other person, contributed into a charter capital or pledged.

State owned and municipally owned land plots are provided for use on the basis of resolutions adopted by the respective authority empowered to dispose of such land.

In the below paragraphs will describe in more detail the land plot lease procedure which can be figuratively divided into several stages. «Figuratively» in particular, because this procedure has not been completely described by any regulatory act but had been developed by us as the result of many years of work.

In general, the procedure for allocation and leasing out of the land plot consists of the following stages:

1. Obtaining of a resolution (permit) to develop a land plot allocation plan;
2. Development of the land plot allocation plan;
3. Submission of the land plot allocation plan for approval and expert examination of such plan if required;
4. Forming of the land plot and its registration with the State Land Cadastre;
5. Approval of the land plot allocation plan and obtaining of a resolution (permit) for leasing out of the land plot. Signing of the lease agreement;
6. Registration of the title and land plot lease agreement with the State Registry of Proprietary Rights to Real Estate;

In addition, there are usually additional stages when the company exercises its right to lease the land plot and they include the following:

1. Preparation of technical documentation related to standard monetary valuation of the land plot;
2. Approval of technical documentation related to standard monetary valuation of the land plot and its expert examination;
3. Obtaining of resolution from the competent authority related to determination of the lease payment.

Further we will discuss in more detail each of the abovementioned stages by using an example of leasing a land plot underlying an elevator in Kharkiv Region located outside of a settlement (village). This elevator was built during the Soviet Union times and was purchased by a group of companies engaged in agriculture. During the operation of the elevator after it became a private property, the public authorities, including tax inspection, had repeatedly questioned the confirmation of the rights to the land and payment of the respective taxes. Therefore, the owner of the elevator, a Company, decided to register the right to land by way of leasing it for a long period of time.

1. Obtaining of a Resolution (Permit) to Develop a Land Plot Allocation Plan

Before we proceed to describe the procedure for obtaining of a resolution related to provision of permit for development of a land plot allocation plan, we would like to note that the land surveying plan is being developed for land plots which had not been demarcated in kind on site. If the land plot has been demarcated, then in order to lease it the lessee needs to prepare technical land survey documentation regarding the drafting of document confirming the right to use the land plot.

The procedure for development and approval of the land surveying plan and technical documentation is different. So, prior to applying to the competent authority for a permit (resolution) it is necessary to clarify the title to the land plot and its main parameters.

In practise this can be clarified in the local department of the State Agency of Land Resources or in a land surveying organisation engaged in the development of land surveying plans or just find out the same information in the Internet by visiting the web-site of the public cadastral map at: http://www.map.land.gov.ua/kadastrova-karta and obtain the respective information about the status of the land plot.

Since, in our case the land plot underlying the elevator had not been formed and demarcated, then the procedure for leasing it should be performed through the approval of the land surveying plan.

After the type of land surveying documentation is determined, the next sub-stage is to determine the so called jurisdiction of the body authorised to adopt resolutions on granting of a permit for the development of the land surveying plan.

The procedure for the granting of land plots is regulated by Article 123 of the Land Code of Ukraine.

An entity interested in obtaining a state owned or municipally owned land plot for the use on the basis of the land plot allocation plan submits a request seeking approval to develop such plan from the relevant village, town, city, district or region council, the Cabinet of Ministers of Ukraine, the Council of Ministers of the Autonomous Republic of Crimea, or the local state administration depending on the location of the land plot and its designated purpose.

Article 122 of the Land Code of Ukraine, which differentiates the powers of public authorities and local self-government bodies related to the disposal of state owned and municipally owned lands, sets forth the following:

1. Village, town and city councils shall transfer municipally owned land plots of respective local communities into the ownership or use for all purposes.
2. The Verkhovna Rada of the Autonomous Republic of Crimea, regional and district councils shall transfer the land plots co-owned by local communities into the ownership or use for all purposes.

3. District state administrations shall transfer state owned land plots located in their territory, except as provided for in paragraphs four and eight of this Article, into the ownership or use within the boundaries of villages, towns and cities of district significance for all purposes and outside of the boundaries of settlements for:
   a) water management;
   b) construction of facilities for the provision of services to residents of local communities of the respective district (schools, cultural institutions, hospitals, trading enterprises, etc.), subject to requirements of part seven of this article;
   c) individual suburban house construction.
4. The central body of executive power for land resources in the area of land relations and its territorial divisions (at the present time this is the State Agency of Land Resources and its territorial divisions) shall transfer state owned land plots intended for agricultural use, except as provided for in paragraph eight of this Article, into the ownership or use for all purposes.
5. Regional state administrations shall transfer land plots located in their territory from state owned lands, except as provided for in paragraphs three, four and eight of this Article, into the ownership or use within the boundaries of cities of regional significance and outside of the boundaries of settlements and the land plots that do not belong to a certain district or, if no district state administration has been set up, for all purposes.
6. Kyiv and Sevastopol City State Administrations shall transfer land plots located in their territories from state owned lands, except as provided for in paragraphs four and eight of this Article, into the ownership or use for all purposes.
7. The Council of Ministers of the Autonomous Republic of Crimea shall transfer land plots located in the territory of the Autonomous Republic of Crimea and allocated from state owned lands, except as provided for in paragraphs three, four and eight of this Article, into the ownership or use within the boundaries of villages, towns or cities that do not belong to a certain district, and outside of the boundaries of settlements for all purposes, and shall approve the transfer of such lands into the ownership or use by district state administrations in their territory for the construction of facilities for the provision of services to residents of the local community of a respective district (schools, cultural institutions, hospitals, trading enterprises, etc.).
8. The Cabinet of Ministers of Ukraine shall transfer state owned land plots into the ownership or use in the cases set out in Article 149 of the Land Code (Procedure for Expropriating Land Plots) and the land plots in the bed of the territorial sea.

9. The state privatisation bodies shall sell the land plots on which facilities to be privatised are located.

Taking into account the abovementioned powers, in our case the body authorised to dispose of the industrial lands outside of the settlements is the Kharkiv Region State Administration which issues the respective Resolutions in the name of its Head.

Therefore, in order to obtain the permit for development of the land plot allocation plan and lease of such land plot in order to operate and maintain the elevator located outside of the settlement in Kharkiv Region, it is necessary to apply to the Kharkiv Region State Administration.

The application shall specify the approximate size of the land plot, its designated purpose and further use.

The following documents should be attached to the application:

- graphic materials displaying the desired location and size of the land plot (copy from the general plan);
- the required document which is not specified in the Land Code – 6-zem Certificate of the district department of the State Agency of Land Resources from the state statistics reporting authority on the availability of lands and their allocation broken down by land owners, land users, and lands;
- copies of constituent documents of the companies certified by the signature of the director and corporate seal;
- copies of documents of title to real estate items (buildings, structures) located on the land plot, certified by the signature of the director and corporate seal.

Within its competence, the regional state administration reviews the application and usually within the period of one month, as set forth by the laws, grants a permit or refuses to grant a permit if there are grounds to do so. The reason for refusing to grant such approval may include only the non-conformance of the land plot location to the provisions of laws and rules and regulations adopted thereunder, as well as general plans of settlements and other urban planning documentation, land surveying schemes and feasibility studies relating to the use and protection of lands of administrative and territorial units, land surveying plans for the organisation of territory of settlements, which were approved according to the procedure provided by the law.

Based on our experience we would like to say that usually both the administrations and councils do not refuse to grant a permit for the development of the land surveying plan if there is real estate on the land plot. They start to refuse in one or another way in the process of agreeing the plan, when the land is being leased out and when the lease agreement is being concluded. Sometimes, these processes last many years.

Special attention should also be paid to such item of the application as the approximate size of the land plot. In practice such approximate size is

specified based on the information contained in the 6-zem Certificate of the State Agency of Land Resources. Taking into account the experience of our company, we can state that information contained in the 6-zem Certificate may significantly differ from the actual size of the land plot which further leads to subsequent obstacles in obtaining the land.

Thus, the abovementioned company filed an application to the Kharkiv Region State Administration to obtain a permit for the development of the land surveying plan with the approximate area of 6.3279 hectares and obtained the respective resolution. The same area was specified in the 6-zem Certificate. However, in the course of development of the plan, in particular, during the surveying of the land, it was established that the actual area of the land plot used by the company is 4.9534 hectares. The territory of the company is surrounded by a fence which was constructed and was not moved since the end of 1960s. This was the reason of the difference in the area of the actually used land plot specified in the land surveying plan and the area specified in the Resolution of the Head of the Regional State Administration. In our case the difference equalled to more than one hectare of land which lead to a separate procedure for resolving the issue and introduction of changes into the original Resolution on Granting of the Permit. This process took several months of hard work related to constant submission of applications to different authorities, carrying out of repetitive measurements of company's territory. In addition, this required personal communication of company's management with the officials and head of the regional state administration that resulted in the obtaining of a new Resolution on amendment of the original Resolution, which changed the area of the land plot. Such discrepancy in sizes leads to spending of additional money and loss of precious time which we are always short of. Moreover, we would like to note that in practice (not confirmed by legal acts), if the difference of the areas specified in the permit and the plan does not exceed 10%, then the changes are not made in the permit, but if such difference exceeds 10% then the permit for the development of the land surveying plan requires clarification of the area.

Taking into account our experience, we recommend, prior to applying to the competent authorities for obtaining a permit to develop the land surveying plan, to file an application to the land surveying organisation and precisely establish the size and location of the land plot to be obtained into the ownership or use so that there is no need to make any changes in the future.

2. Development of the Land Plot Allocation Plan

After obtaining of the permit for the development of the land plot allocation plan, the company has to apply to the land surveying organisation that has a respective license (permit) to carry out work and enter into agreement for the development of the land surveying plan.

Terms and time limits for the development of land plot allocation plans shall be determined in an agreement to be executed between the customer and the contractor performing such work under a standard-form agreement. Usually such time limits do not exceed one month. The standard-form agreement for the development of the land plot allocation plan is approved by Resolution of the Cabinet of Ministers of Ukraine No. 266 dated 4 March 2004 «On Approval of the Standard-Form Agreement for the Development of the Land Plot Allocation Plan».

According to the Law of Ukraine «On Land Surveying», the land plot allocation plans include the following:

– assignment for the development of the land surveying plan;

– explanatory note;

– copy of the request (application) for obtaining of a permit to develop the land plot allocation plan (in the event of formation and/or change of the designated purpose of the land plot which belongs to state or municipally owned land);

– resolution of the respective authority on granting of a permit to develop the land plot allocation plan (in cases provided for by the law);

– written consent of the land owner (land user) certified by notary (if the land plot is being bought out (expropriated) in accordance with the procedure established by the laws), or judgement;

– certificate from the state statistics reporting authority evidencing availability of land plots broken down by land owners, land users, and lands;

– materials related to geodesic survey and land survey planning (if the land plot is being formed);

– information about the calculation of the area of the land plot (if the land plot is being formed);

– copies of documents of title to real estate items located on the land plot (if any);

– calculation of the amount of losses in the agricultural and forestry production (in cases provided for by the law);

– calculation of the amount of losses incurred by land owners and land users (in cases provided for by the law);

– certificate for acceptance and delivery of boundary marks for storage (if the land plot is being formed);

– certificate for determination in kind (delimitation) of boundaries of protection zones, protective sanitary zones, sanitary protection zones and zones of special regime of land use, if any (if the land plot is being formed);

– list of restrictions related to the use of land plots;

– photocopy of a cadastral map (plan) or other graphic materials displaying the desired location of the land plot (if the land plot is being formed);

– cadastral plan of the land plot;

– materials related to determination in kind (delimitation) of boundaries of the land plot (if the land plot is being formed);
– materials related to approval of the land surveying plan.

3. Submission of the Land Plot Allocation Plan for Approval and Expert Examination of such Plan if Required

The developed land surveying plan is subject to approval depending on the characteristics of the land plot, its location and designated purpose.

The adjacent owners and users of the land, i.e. neighbours, are to be among the first persons that the plan needs to be agreed with. The Land Code sets forth the obligations for the land owners and users, which envisage compliance with good-neighbourly relations rules. In addition, agreeing of boundaries of the land plot with adjacent land owners and users is an element of the cadastral survey which forms, among other things, part of the land surveying plan (Article 198 of the Land Code of Ukraine).

Based on our experience, we would like to say that the absence of the signed act agreeing the boundaries does not serve as the ground for refusal to approve the land surveying plan, however, it may be a major obstacle on the way of obtaining one.

In addition, Article 186-1 of the Land Code of Ukraine sets forth the following powers of the bodies of executive power to the extent related to the approval of land plot allocation plans:

1. The land plot allocation plan for land plots of any categories and ownership forms is to be obligatorily agreed upon with the territorial authority of the central body of executive power which implements state policy in the area of land relations, i.e., with the State Agency of Land Resources.

2. A land plot allocation plan for a land plot within or outside of a settlement underlying a construction facility or intended for allocating such facility shall be also submitted for approval to structural units of district, Kyiv and Sevastopol city state administrations specialising in the area of urban planning and architecture, and if the city does not belong to the territory of a certain district then the same shall be submitted to the executive body of the city council in the area of urban planning and architecture, and if such body had not been formed then to the body of executive power of the Autonomous Republic of Crimea specialising in urban planning and architecture or structural unit of the regional state administration specialising in urban planning and architecture, i.e., to the territorial departments of architecture and construction.

The following land plots need to be additionally approved:

1. Land plot located in the territory or within the boundaries of natural reservation fund object or within coastal protective belt must be also approved by the body of executive power of the Autonomous Republic of Crimea specialising in the area of environmental protection, structural unit

of the region, Kyiv or Sevastopol city state administration specialising in the area of environmental protection;

2. Land plot located in the territory of cultural heritage monuments of national significance, their protection zones and protected archaeological territories must be also approved by the central body of executive power that implements state policy in the area of cultural heritage protection;

3. Land plot located in the territory of lands of historical and cultural use, cultural heritage monuments of local significance, their protection zones, in historical range of settlements and other lands of historical and cultural use, except as specified in paragraph three of this part, must be also approved by the body of executive power of the Autonomous Republic of Crimea specialising in the area of cultural heritage protection, respective structural unit of the region, Kyiv or Sevastopol city state administration specialising in the area of cultural heritage protection;

4. Land plot designated for forestry use must be also approved by the central body of executive power that implements state policy in the area of forestry and in the territory of the Autonomous Republic of Crimea – with the body of executive power of the Autonomous Republic of Crimea specialising in the area of forestry;

5. Land plots for water related use must be also approved by the central body of executive power that implements state policy in the area of development of water economy and in the territory of the Autonomous Republic of Crimea – with the body of executive power of the Autonomous Republic of Crimea specialising in the area of water economy.

Therefore, in order to approve the land plot allocation plan, the customer or the developer files with the relevant department of the State Agency of Land Resources an original copy of the land plot allocation plan and a certified copy of the same plan with the architecture and construction department at the place where the land plot is located.

The laws provide for a 10 day period for the approval of the respective land surveying plan, however, practice shows that such period of time is not being complied with and there is a number of reasons for that.

Special attention should be paid to the approval of the plan with the urban planning and architecture department. While approving the land surveying plan, the urban planning and architecture department must be guided by the information from the general plan of development of the respective settlement, however, the practice shows that today not only do most of the settlements have no approved general plans, they don›t even have their drafts, which very often serves as a formal ground for refusing to approve the land surveying plan. In such cases the approval procedure is being delayed and requires drafting of additional requests and negations with the heads of the settlements (villages, cities, districts, regions), and sometimes even setting up of special commissions.

The same goes for the approval of the plan with the relevant departments of the State Agency of Land Resources which fully check the compliance of the prepared plan with the applicable laws. It would seem that a licensed land surveying organisation is preparing the plan, but there are also instances of revealing mistakes at the stage of the approval. Special attention must paid to the coordinate system and the possible existence of the so called overlapping boundaries of the adjacent land plots which often serve as the ground for further correction of the land surveying plan.

Additional stage in the process of approval of the land surveying plan is the carrying out of state expert examination of the land survey documentation. If there is a need to carry out expert examination of the plan, the approved plan is filed by the customer or developer with the central body of executive power that implements state policy in the area of land relations or its territorial body in order to perform such expert examination, i.e., with the regional departments of the State Agency of Land Resources or with the specialised scientific research institutes.

Thus, the following shall be subject to mandatory state expert examination:

- national and regional (republican) programmes for the use and protection of lands;
- land surveying schemes, feasibility studies regarding the use and protection of lands of respective administrative and territorial units;
- land surveying plans for demarcating (changing) the boundaries of administrative and territorial units;
- land surveying plans for arrangement and demarcating of boundaries of territories designated for natural reserve fund and environmental protection, territories designated for health improvement, for recreational use, and for historical and cultural use;
- land plot allocation plans for highly value lands, lands designated for forestry, for water related use, for environmental protection, for health improvement, for recreational use, and for historical and cultural use;
- land surveying plans providing for environmental and economic substantiation of crop rotations and arrangement of lands;
- land surveying projects for arrangement of settlement territories;
- land surveying projects for establishing of new and arrangement of existing land possessions and used lands;
- technical documentation for soil judgement and standard monetary valuation of land plots.

Each body considers and approves the land plot allocation plan independently and irrespective whether such plan had been approved by other bodies within the period of time established by the law.

4. Forming of the Land Plot and Its Registration with the State Land Cadastre

The formation of the land plot as an item of civil rights is set forth in Article 79-1 of the Land Code of Ukraine and lies in the determination of the land plot as an item of civil rights, determination of its area, boundaries and registration of information about the land plot in the State Land Cadastre.

The so called irreversible process takes place after the formation of the land plot – this means that a cadastral number is assigned to the land plot and the same is being registered with the State Land Cadastre. Cadastral number is a unique number that identifies the land plot according to cadastral division and is assigned only once and if it is cancelled, it may not be used again.

The land plot may be registered after its actual formation and entry into the cadastre (Article 24 of the Law of Ukraine «On State Land Cadastre»). The land plot is registered by the state at the stage of its formation by opening of a Land Register for such a land plot and such registration is made at the place where the land plot is located by the relevant State Cadastre Registrar from the department of the State Agency of Land Resources.

The land plots are registered by the state on the basis of the application filed by the land plot owner, user of state owned or municipally owned land plot, or a person authorised to draft land surveying documentation, and such registration serves as the basis for formation of the land plot when it is being transferred into the ownership or use from the pool of state owned or municipally owned lands, or a person authorised thereby.

The following documents need to be submitted to the relevant State Cadastre Registrar in order to carry out state registration of the land plot:

- an application in the form established by the central body of executive power which ensures formation of state policy in the area of land relations;
- original copies of land surveying documents which serve as the basis for formation of the land plot;
- land surveying documents which serve as the basis for formation of the land plot in the form of an electronic document.

The application with documents enclosed thereto is submitted by the applicant personally or by person authorised thereby, or it may be sent by registered letter with description of the enclosures and advice of delivery. In practice we advise against sending by a letter and try to submit personally and obtain a copy of such application with acknowledgement of receipt.

The State Cadastre Registrar who registers land plots checks, within a fourteen day period from the date of application registration, the compliance of the documents with the laws and carries out state registration of the land plot or gives the applicant a reasoned refusal to carry out such state registration.

For the purposes of evidencing state registration of the land plot, the applicant is provided with an excerpt related to such land plot from the State Land Cadastre free of charge. The excerpt contains all the information about the land plot that was entered into the Land Register. Cadastral plan of the land plot forms part of the excerpt.

We would like to note that this excerpt from the State Land Cadastre will be needed many times during the future process of obtaining the right to lease a land plot. The validity of the excerpt issued during the formation of the land plot is not limited in time as opposed to the excerpt issued for the second time in order to carry out, among other things, notarisation actions and which is valid for three months.

Another feature of the state registration of the land plot with the State Land Cadastre is that such registration is valid only one year and if the information about such land plot will not be entered into the State Registry of Proprietary Rights to Real Estate, then the cadastre registrar must cancel state registration of such land plot in the land cadastre. At first sight, this is quite a long period of time, but in reality one year passes by very quickly and sometimes the companies fail to register proprietary rights to such land plot during the said period. Therefore, in order to avoid cancellation of its registration one must keep track of the twelve months period of time. And if the said period is not complied with, one must contact the cadastral registrar and provide reasonable explanation for failing to meet the deadline.

5. Approval of the Land Plot Allocation Plan and Obtaining of a Resolution (Permit) for Leasing of the Land Plot. Signing of the Lease Agreement

The next stage, which is one of the decisive stages, is the approval of the land surveying plan by the competent authority that granted a permit for its preparation. In the abovementioned case that was the Kharkiv Region State Administration. After lengthy and exhausting processes of approving the land surveying plan comes one of the final stages – approval of such plan.

The procedure and the deadlines for approval of the plan may differ in each case depending on the competent authority. The procedure for consideration and approval of land surveying plans by the Kharkiv Region State Administration consists of a number of phases. After the administration receives an application for approval of the plan from the interested person such application is handed over to the respective division, i.e. Regional State Agency of Land Resources which considers the application together with the plan and prepares the draft of the Resolution. Then the draft of the Resolution undergoes an initialling procedure, including by the head of the legal division department (lawyer). And only after all approvals (signatures) is it handed over for signing to the head of

the regional state administration. According to the current Rules the whole procedure should not last more than 30 days, but in practice it may last several months due to different reasons such as the absence of an official who has to initial the draft resolution at a certain stage, vacations, existence of more urgent matters.

In our practice we had instances when applications and sets of documents were lost during approval and initialling process and the applicants had to renew the documents which took almost as long as the preparation of the same. Only after all approvals are received, the company obtains the long-awaited Resolution (decision) on granting of the land plot for use under the land plot allocation plan.

This decision (resolution) approves the land plot allocation plan and sets forth the following terms and conditions for the leasing of the land plot:

- lease term;
- restrictions and encumbrances related to the use of the land plot;
- body authorised to execute the lease agreement is designated;
- body and authorised person who must report about the performance of the decision (resolution) are being designated).

In our case when the Regional State Administration is the manager of the land the specific feature for entering into a lease agreement is that it supposed to be concluded not with the direct manager of the land but with its territorial body, i.e. district state administration. Thus, regional state administration usually don›t sign land plot lease agreements but just delegate their powers to the respective district state administrations. Which, at a first sight, is quite strange, because the managers of the rights to these categories of lands are regional state administrations and the lease agreements are concluded with district state administrations, which cannot but raise questions, including on the part of state registrars of proprietary rights to real estate, upon registration of title and right to lease the land plot.

As regards to the lease agreement itself, there are two options of concluding it. The first most common option is to enter into lease agreement in simple written form and its further registration with the registration service. The second option is to enter into a notarised lease agreement.

If the first option is chosen, which is inexpensive at the present time and due to this more common, the applicant will deal directly with the legal department of the district state administration which drafts the standard-form lease agreement and prepares schedules thereto. Afterwards the agreement is signed by the parties in the name of the head of the district state administration and director of the company and then it is submitted to the state registrar of proprietary rights to real estate for its state registration.

We would like to note that in Ukraine there is a standard-form land plot lease agreement, and, therefore, there is no need to pay special attention to its content and form. It will be suffice just to check the information related to the land plot, lease term, and amount of the lease payment.

However, taking into account the experience of our company, special attention should be paid to the drafting of the agreement and schedules thereto which are an integral part of such agreement. Since, the agreement is concluded in a simple written form, all pages of the agreement must be numbered and the agreement with schedules thereto have to be bound together, which is not being done in practice and in the future causes problems related to application of such agreement. For example, the bank will not accept the lease agreement if it hadn›t been bound and numbered, and furthermore, if it doesn›t contain all the schedules which are an integral part thereof according to the laws.

Another specific feature of the lease agreement is that in practice the agreements that had been concluded in simple written form don›t have any schedules that are supposed an integral part thereof.

Thus, according to the Law of Ukraine «On Land Lease», the following are an integral part of the land plot lease agreement:

- plan or scheme of the land plot;
- cadastral plan of the land plot indicating any restrictions (encumbrances) regarding its use, and land easements thereon;
- land plot in kind (on-site) demarcation certificate;
- leased object acceptance and delivery certificate;
- land plot allocation plan in cases provided for by the law.

Therefore, upon the signing of the lease agreement in simple written form special attention should be paid to the existence of schedules which are a must according to the laws.

It is a different situation when the agreement is concluded in a notarised form. In this case the notary, who acts as the state registrar of proprietary rights at the same time, verifies the powers of the signatories and personally prepares and binds the schedules to the agreement. In addition, upon the signing of the lease agreement at notary's office, the notary as the state registrar simultaneously carries out state registration of such agreement with the registry of proprietary rights to real estate which doesn›t require any further actions with the agreement in the future.

Furthermore, special attention should be paid to such integral part of the lease agreement as the land plot acceptance and delivery certificate. Thus, it is established that the land plot is transferred to the lessee under the acceptance and delivery certificate after registration of the lease agreement. Usually these dates are different in terms of time, therefore, in order to avoid any unforeseen troubles and taking into account our experience, while preparing and entering into the lease agreement we recommend not printing the signature date of the acceptance and delivery certificate. The date will be put on the day when the land plot is transferred and the certificate is signed.

6. Registration of Title and Land Plot Lease Agreement with the State Registry of Proprietary Rights to Real Estate

The final stage of leasing the land plot is the registration of title to the land plot with the State Registry of Proprietary Rights to Real Estate and registration of the lease right.

According to Article 125 of the Land Code of Ukraine, the title to land plot, the right to permanent use and the right to lease a land plot are acquired from the date of state registration of such rights.

As had been mentioned before, the state registration of the title and lease right may be performed in two ways. First way is when the agreement is concluded at notary's office, in this case the notary in the capacity of the state registrar, simultaneously registers the title and lease right to the land plot. Second way is when the lease agreement is concluded in simple written form. Then, after its conclusion there is a need to apply to the state registrar at the place where the land plot is located and register the title to the land plot and lease right deriving out of it.

Practical feature of registration of title to the land plot in favour of the state and/or territorial community (municipal property) upon the leasing out of the same is that the lawmakers made such procedure simpler. The simplification lies in the fact that the state registration of the state's or territorial community's title to the land plots formed out of the state owned or municipally owned lands is carried out simultaneously with the state registration of the proprietary right to such land plot, which derives out of the title, on the basis of resolution of the body of executive power or local self-government body on the transfer of land plot for use. In such cases the registration of title is carried out simultaneously with the registration of lease on the basis of one application and one set of documents which makes the work simpler even for the state registrars.

As the result of registration of the title and lease right, the state registrar issues a certificate and excerpt from the registry of rights.

In order to obtain the certificate and excerpt evidencing title and lease right to the land plot, the applicant needs to apply to the registration service at the place where the land plot is located and submit the following set of documents:

– application for state registration of rights and their encumbrances (with respect to the other proprietary right);

– copy of applicant's identification document;

– copy of taxpayer registration identification card number complying with the State Registry of Individual Taxpayers (except for individuals who, due to their religious or other convictions refuse to accept taxpayer registration identification card numbers, have officially notified the relevant governmental authorities and have respective records in their Ukrainian national passports);

– document evidencing payment for the provision of an excerpt from the State Registry of Rights;

– document evidencing payment of stamp duty (except when a person is exempt from paying stamp duty);

– resolution of the local self-government body (city council) on leasing out of the land plot;

– documents evidencing the origin, transfer or termination of the land plot lease right (lease agreement);

– original copy of the excerpt from the State Land Cadastre evidencing registration of the land plot;

– copy of an extract from the Unified State Registry of Enterprises and Organisations of Ukraine (if the lessee is a legal entity).

As the result of registration of title to the land plot by the state registrar, the applicant receives a certificate and excerpt from the State Registry of Proprietary Rights to Real Estate.http://zemlevporyadnik.com.ua/zrazok-svidoctva-ta-vitagu-z-ukrderzhreestru.html

According to paragraph 5 of Article 15 of the Law of Ukraine «On State Registration of Proprietary Rights to Real Estate or Their Encumbrances», the state registration of rights (refusal to register the same) is carried out within not more than five days from the date when the state registration authority receives an application seeking such registration and documents required for such registration as provided for by the Law of Ukraine «On State Registration of Proprietary Rights to Real Estate or Their Encumbrances» and regulatory legal acts adopted pursuant to such law.

Another special feature of the lease agreement, which we believe we ought to mention in this article, is the need to send a notice about the signing of the lease agreement to the state tax inspection authority at the place where the land plot is located. In most cases the requirement to notify the tax authority about the signing of the lease agreement is set forth in the agreement itself, however, even if such requirement is not set forth therein, the parties to the agreement must notify the respective tax authority about the signing of the lease agreement within five (5) days from the date of state registration thereof. Notification is understood as filing of the application and copy of the lease agreement.

In this case the lawmakers obligate the lessor to submit such notice, i.e. governmental authority or local self-government body. However, in practice in most cases the lessors obligate the lessees to submit such notices, so the lessees must remember about that and pay special attention.

Additional Stages Related to Leasing of Land Plot

Determination of the amount of lease payment is a mandatory condition of the land plot lease agreement. According to the general rule, the amount of the lease payment is determined in percentage ratio to the standard

monetary valuation of the land. Thus, another phase that the company will need to go through in order to use the land plot is the determination of the amount of standard monetary valuation of the land plot.

The amount of standard monetary valuation of the land plot is calculated and determined by the technical documentation for standard monetary valuation. Such technical documentation is prepared by the special land surveying organisation and has a multilevel system of approval. First of all, such documentation passes mandatory expert examination. Such expert examination is carried out by the central body that has the powers in the area of land relations, i.e., the regional department of the State Agency of Land Resources. After the technical documentation passes the expert examination, it needs to be approved by the collective body of local self-government which is the district council. Resolutions of the district council are adopted collectively and during sessions. As an example we would like to note that usually the council's session is being held not more than once a month.

After the plan is approved by the district council, such resolution together with the plan is handed over to the district department of the State Agency of Land Resources which registers the plan and issues an excerpt from the standard monetary valuation of the land plot to the interested person.

Therefore, in order to speed up the general procedure for leasing a land plot, we advise that you prepare and approve the standard monetary valuation of the land plot in parallel with the approval of the land surveying plan and obtaining of the resolution on leasing out of the land plot.

Another stage that is not provided for by the laws even though it exists in practice is the obtaining of resolution from the land commission on determination of the amount of lease payment under the land plot lease agreement.

According to the Law of Ukraine «On Land Lease» and the Land Code of Ukraine, the amount of the lease payment is determined and agreed by the parties in the lease agreement. The Tax Code of Ukraine separately sets forth that such amount may not be less than 3% and more than 12% of the amount of the standard monetary valuation of the land plot.

Taking into account the abovementioned provisions, it can be concluded that the laws provide the lessor with the right to independently determine the amount of the lease payment ranging from 3% to 12% of the standard monetary valuation of the land plot.

In the case used as an example in this article, the amount of the lease payment was determined by the permanent land commission of the district state administration (the name of the commission may differ depending on the body within which it operates).

The result of the work of the commission and the amount of the lease payment depend on may factors. Such factors include the following: good

will of the leasing company and reputation of its management, the size (scale) of the company and type of its principal business, number of taxes paid by the company and other factors that in aggregate may affect the commission's resolution related to determination of lease payment amount.

Based on our own experience, we advise that the applicant actively participates in the work of such commission and uses all possible facts and evidence in order to reduce the amount of the lease payment because in most cases the amount of the lease payment stays the same during the whole term of the lease agreement and is only subject to the annual indexation pursuant to the applicable laws.

Thus, we may conclude that the procedure for leasing a state owned or municipally owned land plot is rather specific and requires professional involvement of experts and specialists in the course of its implementation.

Expert Opinion

To summarise we may conclude that M&A transactions in agribusiness are a special type of transactions which in its essence are aimed directly or indirectly at obtaining rights, including rights to real estate and land. If the company decides to invest in agroindustrial complex, carrying out of due diligence of the target (i.e. legal and financial audit of the company) is an important stage prior to entering into M&A transactions.

Entering into M&A transactions in agricultural complex almost always results in one or another way in the purchase of rights to real estate and the land on which it is located. At the same time, irrespective of how the rights will be transferred, either by purchasing corporate rights or by way of direct purchase of real estate items, special review should be carried out in respect of the rights to the land, because the procedure for obtaining rights to the land underlying the real estate items is rather complex and lengthy and requires additional financial costs, organisational efforts and thorough preparation.

Taking into account our practical experience in Ukrainian market, we would like to note that the procedure for obtaining rights to the land, especially by companies engaged in agroindustrial complex, needs to be simplified and improved including by way of deregulation of its certain stages which will be separately discussed in our further publication.

Dmytro Alexandrov

Vitaliy Yankovych

AGRARIAN RECEIPTS IN UKRAINE AS A METHOD OF ATTRACTING INVESTMENTS INTO AGRICULTURAL SECTOR

Production of agricultural goods in any economic situation in Ukraine had always been the driving force that developed the real sector of the economy, generated funds from abroad and balanced Ukrainian currency market.

It is definitely clear that the requisite condition for development of this industry is to raise significant sums of money that would boost the production, improve the quality of goods and reduce gross expenditures.

The general practice of attracting real financial investments to promote the development of agricultural activity is to raise loans. However, all sectors of Ukrainian economy, including agricultural sector, suffer from unbearable lending terms of the real sector as compared to developed countries in the world. Therefore, according to information from the Ukrainian Agrarian Confederation, in 2013 the average loan rate in the USA equalled to 3.25%, in France – 3.43%, in Germany – 3.94%, in Canada – 3% and in Ukraine – 18.4%.

In 2014, the rates for financing of Ukrainian agricultural sector were increased by the banks to absurd figures (25-35%), which in aggregate with the political and economic crisis and significant devaluation of hryvnia forced many national producers of agricultural goods to operate solely to cover interest on loans.

Due to high interest rates and low level of technical support of agricultural enterprises, which in aggregate led to the lack of the necessary working capital, the producers of agricultural goods were forced to hire third-party organisations in order to fully or partially ensure the performance of the whole complex of field operations and pay for their services either after the sale of agricultural goods and/or by way of direct transfer of crops at its prime cost.

The issue related to improvement of financing of the agricultural sector of Ukrainian economy and access of producers of agricultural goods to lending resources of commercial banks was supposed to be resolved with the adoption of the Law of Ukraine «On Agrarian Receipts» dated 6 November 2012 (the «Law»), enacted on 19 March 2013, which introduced a new mechanism for the producers of agricultural goods to raise funds for their activity under the pledge of future harvest – an institute of agrarian receipts.

The key purpose of introducing the mechanism of agrarian receipts is to increase, first of all, the volume of investments into agrarian sector and provide Ukrainian agricultural companies with new possibilities of attracting financing for their activity.

An important prerequisite for investing into agricultural area is to carry out due diligence with the help of which the investor will be able to have a true picture about the potential investment target, which includes analysis

of the possible investment risks, carrying out of independent valuation of the potential investment target, full study of company's business and comprehensive check of its financial standing and market position.

Pursuant to Article 1 of the Law, **agrarian receipt** is a document of title to commodity that fixes an unconditional undertaking of an obligor, secured by a pledge, to deliver agricultural goods or to pay monetary funds under the terms and conditions provided for therein. Agrarian receipts are used in transactions with agricultural goods which are listed in groups of Sections 1 through 14 ITA II of Ukrainian Classification of Goods of Foreign Economic Activity pursuant to the Law of Ukraine «On Customs Tariff of Ukraine». In other words, an agrarian receipt is an obligation of the producer of agricultural goods to repay the money or supply products in the future in exchange of having received such money.

Ukraine is the first country amongst the former USSR states where such legal mechanism is being introduced. However, the institute of agrarian receipts as a mechanism of attracting funds into the agrarian sector is not new to the world. The prototype of Ukrainian agrarian receipt is the CPR (CeduladProdutoRural) introduced in Brazil pursuant to Federal Law No. 8.929 dated 22 August 1994, which has the same function as in Ukraine; it is virtually a promise made by the producer to supply agricultural goods or repay the money after the sale of such goods in the future in exchange of receiving (financial or commodity) resources today for the purposes of conducting agricultural activity.

The system of Brazilian CPRs operates on the basis of three elements: agricultural producers, distributors and traders. For example, the distributors supply to agrarians the goods necessary to grow the crops. The latter become the pledge and future payment. At the same time, the distributors sign agreements with traders in which the set prices are already specified. On the basis of this, the interests of agricultural producer are being protected because he knows the final sale price and because the supply of goods is guaranteed, the interests of the trader are protected too. Banks are also interested in financing agricultural sector on the basis of such scheme.

The Law of Ukraine «On Agrarian Receipts» introduced a rather different system. In relations regarding regulation of agrarian receipt there are always two parties – lender and obligor. Obligor is a person (producer of agricultural goods) who issues an agrarian receipt in order to perfect its obligation to supply agricultural goods or repay funds on the basis of the terms and conditions set forth in the agrarian receipt. In its turn, the lender under the agrarian receipt is an individual or a legal entity who provides funds, services, supplies goods, performs work as a valuable consideration under an agreement pursuant to which the obligor under the agrarian receipt issues an agrarian receipt to such lender and grants the rights to the latter to demand that the obligor duly performs its obligations. Also, a lender may be an individual or legal entity that acquired the rights of the lender under

the agrarian receipt from a different lender under the agrarian receipt in a manner not prohibited by the law.

Pursuant to paragraph 2 of Article 2 of the Law, agrarian receipts may be granted by persons who own the title to agricultural land plot or the right of use of such land plot on legitimate basis for the purposes of producing agricultural goods. If the title to the land plot is held by two or more co-owners or the right of use is held by two or more users, the agrarian receipts are issued by them jointly. Persons who jointly issued an agrarian receipt bear joint and several liability for failing to perform their obligations.

Paragraph 3 of Article 2 of the Law expressly sets forth that the transfer of title or right of use of the land plot does not terminate the validity of the pledge of future crop specified in the agrarian receipt and does not cancel obligor's and lender's rights under the agrarian receipt to use the land plot until the respective crop is harvested but shall not last longer than the current marketing year. According to the agrarian receipt, the obligor must notify the persons to whom it transfers the title or right of use of the land plot the agricultural goods on which constitute the collateral under the agrarian receipt, about the existing restrictions under the agrarian receipts.

Agrarian receipts **are divided into two categories** depending on the type of obligation:

- commodities agrarian receipts;
- financial agrarian receipts.

Thus, pursuant to Article 3 of the Law, a **commodities agrarian receipt** is an agrarian receipt which establishes an unconditional obligation of the obligor under the agrarian receipt to supply the agreed agricultural goods, the quality, quantity, location and date of which are specified in the agrarian receipt.

In other words, under a commodities agrarian receipt the producer of agricultural goods must supply the agreed quantity of its goods which in its essence contains features (is an element) of a barter transaction or futures contract depending on the type of resource on the basis of which the farmer is making the supply.

Commodities agrarian receipts are made in writing on the official letterhead, they are subject to notarisation and may not be transformed into a dematerialised form.

The Law sets forth the following mandatory details that must be specified in the commodities agrarian receipt:

1) name – «Commodities Agrarian Receipt»;
2) date when the agricultural goods will be supplied;
3) lender's details and terms and conditions of further transfer of the rights under the agrarian receipt;
4) subject matter – obligation to supply the agricultural goods, determination of quantity and quality thereof. Formulas for recalculation of agricultural goods if the supplied agricultural goods are of a different quality;

5) terms and conditions and location where the agricultural goods will be supplied;

6) description of the collateral including information regarding the quantity of the pledged real estate, cadastral number, location, documents of title to land plots where the future pledged agricultural crop is growing;

7) date and place of issue;

8) full name of the obligor, his/her place of registration, taxpayer registration identification card number (number and series of passport if an individual who, due to his/her religious or other convictions, refuses to accept taxpayer registration identification card number and has notified the relevant tax and revenue authorities about the same) and signature for individuals; name, registered office, EDRPOU Code, signature of the authorised person and seal for legal entities. The details of all obligors will need to be specified if there are two obligors or more.

Taking into account the abovementioned characteristics of the subject matter of the agrarian receipt it is important to determine the quality of the agricultural goods that will be supplied. The law clearly prescribes that the quality of agricultural goods – subject matter of the agrarian receipt – is determined by the obligor and the lender by mutual agreement on the basis of Ukrainian state standards, technical specifications, technical regulations, and classifiers in effect in Ukraine on the date when the agrarian receipt is issued.

If on the date of the dispute related to the quality of the goods the expert institution agreed by the obligor and lender in the agrarian receipt is not statutorily authorised to carry out the necessary expert examinations, the obligor and the lender may, by mutual agreement, select a different expert institution that has the respective powers.

Financial agrarian receipt is an agrarian receipt which establishes an unconditional obligation of the obligor to pay a sum of money which amount is determined on the basis of a formula agreed by the obligor and the lender taking into account the prices for agricultural goods in the determined quantity and quality.

Based on the formal analysis of the abovementioned definition we can come to a preliminary conclusion that in its essence the financial agrarian receipt is rather similar to a promissory note. Promissory note is a security that certifies the unconditional monetary obligation of the maker of promissory note or his instruction to a third party to pay the fixed sum in favour of the holder of the promissory note on the due date.

However, the lawmakers do not treat the agrarian receipt as a security, but as a type of a document of title to commodity that certifies the creation by the lawmakers of a certain specific symbiotic legal instrument in the form of financial agrarian receipt.

The obligor may discharge his obligations under the financial agrarian receipts only in a non-cash form.

The financial agrarian receipt must contain the following mandatory details:

1) name – «Financial Agrarian Receipt»;

2) payment date;

3) lender's details and terms and conditions of further transfer of the rights under the agrarian receipt;

4) subject matter – an unconditional obligation to pay money, determination of a formula for calculation of the amount of obligor's monetary obligation, quantity and generic features of agricultural goods that form an integral part of such formula;

5) terms and conditions and location where the funds will be paid;

6) description of the collateral including information regarding cadastral number, location, documents of title to land plots where the future pledged agricultural crop is growing;

7) date and place of issue;

8) full name of the obligor, his/her place of registration, taxpayer registration identification card number (number and series of passport if an individual who, due to his/her religious or other convictions, refuses to accept taxpayer registration identification card number and has notified the relevant tax and revenue authorities about the same) and signature for individuals; name, registered office, EDRPOU Code, signature of the authorised person and seal for legal entities. The details of all obligors will need to be specified if there are two obligors or more.

An example of financial agrarian receipt is provided in Schedule 1 to this Article.

Article 7 of the Law sets forth that an agrarian receipt **establishes a security of the discharge by the debtor of his obligations under such agrarian receipt by pledging his future crop**. The collateral of such pledge may only be the future crop of agricultural goods. The amount of the pledge may not be less than the amount of the obligation under the agrarian receipt. On the date when the agrarian receipt is issued the future crop of agricultural goods may not be the collateral of any pledges other than the agrarian receipt. On the date of the harvesting, the respective quantity of the harvested agricultural goods becomes the collateral. The obligor is obligated under the agrarian receipt to provide proof of origin of the harvested agricultural goods.

The pledge of the future crop of agricultural goods under the agrarian receipt provides the lender with the right, if the obligor fails to discharge the obligation under the agrarian receipt, to enforce obligor's obligation under the agrarian receipt, satisfy its claims at the expense of the future pledged crop of agricultural goods with higher priority than the priority which other lenders of such obligor have under the agrarian receipt, which right may be exercised in any other manner not prohibited by the law, including:

– by way of transferring to the lender of the title to the collateral in discharge of obligor's real obligation under the commodities agrarian receipt;

– by way of providing the lender under the agrarian receipt with the right to grow the future pledged crop of agricultural goods, to harvest the agricultural goods by itself or by a person authorised thereby and to discharge obligor's real obligation under the commodities agrarian receipt by acquiring the title to such harvested (grown) agricultural goods;

– discharge the obligor's monetary obligation under the financial agrarian receipt by entering into an agreement for the sale and purchase of the pledged agricultural goods with a different entity – a buyer – by way of receiving a payment under such agreement for the account of discharging of obligor's obligations under the agrarian receipt.

In the event of crop failure, the future harvest of which crop comprises the collateral under the agrarian receipt, the obligor must, upon agreement with the lenders, replace the collateral with a different similar or equivalent property of which fact an inscription will be made on the agrarian receipt which inscription will be certified by the signatures of the authorised representatives of the obligor and lender under the agrarian receipt. If the obligor fails to come to agreement with the lender regarding a different collateral in the event of crop failure, the future harvest of which crop comprises the collateral under the agrarian receipt, the future crop of agricultural goods, which grows on the land plot where the failed crop grew, shall become the collateral under the agrarian receipt. In fact, in the event of crop failure, the obligor is the «responsible party» irrespective of the causes.

In order to mitigate the risks, the collateral may be insured by the lender or the obligor under the agrarian receipt who may agree to pay jointly for the insurance of the collateral under the agrarian receipt. Ukraine has comprehensive programs for insuring of future harvests of crops for the period of spring-summer, which envisage insuring of future harvests of winter and summer crops. Insurance policies are put in place in the event of failure or partial shortfall of crop yield due to the occurrence of insured risks which usually include drought, fire, storm, hurricane, blizzard, heavy rain, flood, freshet, hail, lightning, etc.

The insured amount is determined as the cost of the future crop, which is calculated by multiplying the insured crop capacity by the planting acreage and by the value of the metric unit of crop of the respective agricultural good.

After the harvest and full discharge of obligor's obligations under the agrarian receipt at the expense of such agricultural goods, the remaining harvested (grown) agricultural goods or funds received from the sale thereof shall be kept by the obligor.

If the harvested crop is insufficient to fully discharge obligor's obligations at the expense of such agricultural goods, the future crop of

any other agricultural goods becomes the collateral under the agrarian receipt, which agricultural goods are grown or will be grown by the obligor on the land plot where the agricultural goods were growing the future crop of which constituted the collateral under the agrarian receipt, until the full discharge of obligor's obligations unless otherwise agreed by the parties to the agrarian receipt.

The lender has the right to independently or by engaging third parties to monitor the future crop of agricultural goods constituting the collateral under its agrarian receipt. Monitoring can be carried out throughout the whole term of the pledge of the future crop of agricultural goods unless otherwise agreed by the parties to the agrarian receipt.

Monitoring envisages the following:

1) monitoring of the future crop;

2) monitoring of the compliance by the obligor with the respective technological processes with the ability to access the land plots where the future crop is growing;

3) granting of access to the premises where the harvested agricultural goods are kept, which constitute the collateral under the agrarian receipt.

Paragraph 2 of Article 8 of the Law sets forth that the entry into the premises is allowed only in the presence of the obligor or one of his close relatives or legal representatives. It appears that this provision is inconsistent with a number of legislative rules and is in conflict with paragraph 2 of Article 30 of the Constitution of Ukraine, according to which the entry into a dwelling or other property is allowed only on the basis of a well reasoned judgement.

After the harvest, the monitoring is carried out by way of observing the harvested agricultural goods with the ability of accessing the places of their storage. Direct interference into or prevention of obligor's business activity is prohibited, unless otherwise provided for by the law.

Taking into account the abovementioned special features and in order to balance and protect the interests of the obligor and the lender related to the monitoring of crop harvesting it would be appropriate to store such crop in a facility that doesn›t belong to the obligor.

The procedure for issuance of agrarian receipts is prescribed and regulated by Article 9 of the Law. An agrarian receipt is issued separately for each type of agricultural goods identified by generic or individual features. The agrarian receipt must be notarised after it had been issued. The person notarising the agrarian receipt will also enter information about the collateral into the State Register of Encumbrances over Movable Property. If there is any additional security in relation to the agrarian receipt, information about such security may be entered into the respective registers in accordance with the laws.

Agrarian receipts are made in two copies one of which is kept in the records of the person who notarises and registers the same, and the second copy is issued to the lender under the agrarian receipt. If the obligor under

the agrarian receipt wishes so, he may receive a certified copy of the agrarian receipt issued by him. The law doesn't provide any arguments as to why the agrarian receipt should be issued only to the lender, whereas the obligor may only obtain a copy thereof upon request.

The agrarian receipt is deemed to have been issued from the date of its registration with the Agrarian Receipts Register.

Agrarian Receipts Register – is a unified information system that contains information about mandatory details of the issued and redeemed agrarian receipts. The Ministry of Agrarian Policy and Food of Ukraine is the owner of the Agrarian Receipts Register. This authority provides the notaries with powers of registrars of the Agrarian Receipts Register who enter information into the Agrarian Receipts Register about agrarian receipts and provide information from such Register to other persons. At the same time, it is prohibited to put in place any restrictions in respect of access to information related to the issuance of agrarian receipts by a specific obligor under the agrarian receipt, which, at the date of applying to the Agrarian Receipts Register, remain outstanding, and the name of the agricultural goods to which such obligor's obligations are related. The Registrar of the Agrarian Receipts Register may provide other persons with information about the agrarian receipts issued by a certain obligor and the history of their circulation only upon the consent of the obligor or lender under such agrarian receipt in accordance with the Law of Ukraine «On Protection of Personal Data».

The procedure for keeping of the Agrarian Receipts Register is approved by the Resolution of the Cabinet of Ministers of Ukraine No. 665 dated 17 July 2013 (the «Procedure»).

The Procedure prescribes that the Register is kept in electronic form by public and private notaries who have been vested with the respective powers and who carry out the following registration acts:

– making of the following entries into the Register: issue of agrarian receipt; transfer of lender's rights under the agrarian receipt; amendment of information about the lender or other information about the agrarian receipt; making of a writ of execution on the agrarian receipt; termination of the agrarian receipt; inability of the obligor to discharge the obligation under the agrarian receipt due to the absence of the lender;

– issue of excerpts and certificates from the Register.

The law provides for the transfer of the lender's rights under the agrarian receipt to a different person with mandatory notarisation of such transfer. The transfer of the rights under the agrarian receipt without notarisation thereof does not result in any legal implications and does not cause the transfer of lender's rights under the agrarian receipt to a different person.

The agrarian receipts are effective until they are fully discharged. Upon the consent of the lender, the date of discharge of obligations under

the agrarian receipt may be extended until the next marketing year. The discharge of agrarian receipts related to each type of agricultural goods is carried out in the order they were issued.

Commodities agrarian receipts are discharged by way of shipment of the agricultural goods specified in the agrarian receipt from the obligor to the lender under the agrarian receipt on the basis of shipment terms and conditions agreed thereby. The shipment of agricultural goods of a quality different than the quality specified in the agrarian receipt or agreed conversion formulas constitutes a non-fulfilment of the agrarian receipt unless otherwise agreed by the parties to the agrarian receipt. Financial agrarian receipts are discharged by way of transfer by the obligor under the agrarian receipt of funds to the bank account specified by the lender under the agrarian receipt.

Paragraph 6 of Article 12 of the Law sets forth that the lender under the agrarian receipt is obligated, within the period of three days from the date the obligation under the agrarian receipt is discharged, to make the following inscription on such agrarian receipt: «Obligations Discharged» and certify the same with its signature and seal (if any) and return such agrarian receipt to the obligor. The agrarian receipt will be personally returned by the lender to the obligor and if this is not possible, then by sending the same by registered letter with description of the enclosures to obligor's address specified in the agrarian receipt. In the event of failure to comply with this obligation, the lender is liable under Article 13 of the Law.

After the original copy of the agrarian receipt with an inscription that it had been discharged is returned to the obligor under the agrarian receipt, such obligor has the right to apply to a notary to make an entry about the discharge of the agrarian receipt in the respective registers. An agrarian receipt with an inscription that it had been discharged may not be used for the second time. Information about the issued agrarian receipts and discharge thereof is kept in the Agrarian Receipts Register for not less than 10 years.

Upon the consent of the lender and the obligor under the agrarian receipt, the obligations under the agrarian receipt may be discharged partially. For this purpose, the commodities agrarian receipt shall specify the agreed amount of the minimum lot of agricultural goods that may be supplied for the purposes of its partial discharge. The financial agrarian receipt shall specify the minimum amount of funds that may be paid for the account of partial discharge of financial agrarian receipt. In the event of partial discharge of the agrarian receipt, an inscription about the same is made thereon stating the portion of the obligation that had been discharged and the amount of the remaining obligation. Such inscription shall be certified by signatures and seals (if any) of the obligor and the lender under the agrarian receipt. At the same time, the pledge with which the agrarian receipt was secured remains in the original scope.

Upon agreement of the parties, the obligations under the agrarian receipt may be discharged by way of handing over of warehouse documents that certify the title of their holder to the agricultural goods kept at the goods warehouse.

If the obligor fails to discharge the obligations under the agrarian receipt by the deadline specified therein, the lender has the right to ask the notary to make a writ of execution which will be subject to immediate performance and on the basis of which the state enforcement officer will ensure, within the period of seven days, the transfer of the collateral under the agrarian receipt in favour of the lender. If the collateral is not available in kind, which collateral is to be transferred to the lender under the agrarian receipt, the lender has the right to satisfy its claims at the cost of other property owned by the obligor. In the event of alienation by the obligor of property, which constitutes the collateral under the agrarian receipt, to any third party prior to the discharging of obligations under the agrarian receipt, the lender has the right to satisfy its claims against the obligor at the cost of such or any other property of such third party after which the latter will have the right of recourse against the obligor.

In other words if the obligor failed to supply the goods or to repay the funds within the agreed deadlines, the lender may simply ask the notary to make a writ of execution. Pursuant to Article 17 of the Law of Ukraine «On Enforcement Proceedings» the writs of execution made by the notaries are enforcement documents that are subject to enforcement by the state enforcement service. Resolution of the Cabinet of Ministers of Ukraine No. 662 dated 26 November 2014 included the notarised commodities and financial agrarian receipts into the list of documents pursuant to which the debt is collected under an indisputable procedure on the basis of notaries› writs of execution, which list was approved by Resolution of the Cabinet of Ministers of Ukraine No. 1172 dated 29 June 1999. Within the period of seven days the State Enforcement Service ensures the transfer of the collateral under the agrarian receipt in favour of the lender on the basis of the said writ of execution made on such agrarian receipt.

It can be stated that the simplified out-of-court procedure of enforcement of the collateral under the agrarian receipt provides significant additional guarantees to the lender. Of course, this may be considered as a positive step because the general procedure for collection of debt in Ukraine is rather complex: litigations, possible appeals, tracing and attachment of obligor's property, evaluation of the attached property and arrangement of auctions to sell the same. However, such mechanism virtually makes the obligor almost completely dependent upon the lender which has a lot of possibilities to provoke failure by the producer of agricultural goods to perform the obligations under the agrarian receipt on time and as a result enforce the collateral of the agrarian receipt under the simplified procedure.

The lender's liability arises when it fails to return the agrarian receipt after the obligation thereunder had been discharged in full and such liability envisages that the lender will indemnify the obligor under the agrarian receipt for all damages caused to the latter, as well as pay a penalty in the amount of:

– 10 minimum wages if it delays the performance if its obligation for up to one month;

– 100 minimum wages if it delays the performance if its obligation for more than one month;

– 300 minimum wages if it delays the performance if its obligation for more than six months.

Unfortunately, the legal mechanism for collection by the obligor of damages caused by the lender and payment of penalty is not prescribed by the Law. Taking this into account, filing of a claim with the court is the only remedy the obligor has in the event of a dispute.

The discharge of obligations under the agrarian receipt may be additionally secured by any type of security of discharge of obligations provided for by the laws of Ukraine. In particular, Article 14 of the Law provides for the suretyship of financial institutions in order to secure the suretyship related to the performance of obligations under agrarian receipts which fact is specified by the financial institution in the text of the agrarian receipt by making the following inscription: «I hereby grant suretyship», which is certified by the signature of its authorised representative and its seal. *Suretyships under agrarian receipts are granted by financial institutions in accordance with the procedure established for avalisation of bills.*

As of March 2015, there are no practical examples of granting of suretyships by financial institutions in order to secure the discharge of obligations under agrarian receipts in Ukraine.

Despite the obvious drawbacks of the Law of Ukraine «On Agrarian Receipts», its unilateralism and aim to protect the rights and interests first and foremost of the lender, the implementation of its provisions in practice will help to partially ease the situation with the raising of funds by agricultural producers in difficult economic times for our country.

Unfortunately, the bodies of executive power had been postponing the functioning of agrarian receipts mechanism until the autumn of 2014, when the Ministry of Agrarian Policy and Food of Ukraine and the Ministry of Justice of Ukraine with their joint Order No. 331/1471/5 dated 4 September 2014 introduced a pilot project to elaborate a technology of putting the agrarian receipts into practice based on the example of Poltava Region and an Action Plan for implementation of this project.

Putting of agrarian receipts into practice in Poltava Region should help study the mechanism of their practical use and promote preparation of proposals for expanding the same in other regions of Ukraine. In its turn, after the implementation of this pilot project and analysis of its results the

lawmakers will be able to improve the imperfect legislative environment for the purposes of mitigating the risks connected with putting of agrarian receipts into practice as modern instruments for raising funds by agricultural producers throughout Ukraine.

Within the framework of this project, the first agrarian receipt in Ukraine was issued in Poltava Region. Fodder Plant Agricultural Enterprise acted as the lender and PZK-AGRO acted as the obligor. Both companies are registered in Pyriatyn. The agrarian receipt was issued for 32 metric tonnes of sunflower seeds and the agreed price thereof was UAH 192,000.00 Therefore, the mechanism of issuing of agrarian receipts has been triggered not only in theory but also in practice.

Further, with the future development of the practical application of this mechanism Ukraine may have a court practice dealing with the issues and disputes that may arise in the course of raising funds with the use of agrarian receipts.

Expert Opinion

Taking into account the above analysis of the ratified provisions of the law, we may come to a conclusion that the introduction of the institute of agrarian receipts as a component of the infrastructure of Ukrainian agricultural goods market and its efficient implementation will actually have a positive effect. In the difficult economic situation that our country is facing, the provision of funds to producers of agricultural goods will help the latter to develop material and technical basis which will result in enhancement of production efficiency and flow of substantial amounts of funds into the real sector of economy.

The experts from the Ministry of Agrarian Policy and Food of Ukraine believe that even during the first year of use of agrarian receipts the national producers of agricultural goods would be able to raise UAH 2-3 billion of additional loan funds for its business activity. And in the future, taking into consideration the positive experience of Brazil, where the agrarian sector raises each year approximately USD 5 billion with the help of similar instruments, such amount may be increased to UAH 45-50 billion per annum.

Having analysed the applicable laws in the area of regulation of agrarian receipts, we can state that the introduced Law of Ukraine «On Agrarian Receipts» can be characterised as a law with a rather low level of legal drafting methodology and wording of its provisions. Without the improving of the text of the Law, first and foremost at the high level of legal drafting methodology, including ensuring of consistency of its provisions with the provisions of other laws, the implementation of the agrarian receipts mechanism will have a lot of uncertainties for the future parties to the agrarian receipts.

We can state that the agrarian receipts as a real mechanism of raising funds may work only as part of a complex of effective measures aimed at

reforming of the agrarian sector of economy both at the legislative level – by way of improving the provisions of the laws, and at the practical level – by way of assistance provided by governmental authorities without which agrarian receipts as a financial instrument may suffer the fate of derivatives.

The main condition for making this progressive mechanism work is to balance the interests of the parties in such relations so that the lenders would be interested in investing into agricultural sector and the producers would have real legal protection and would execute agrarian receipts on beneficial economic and legal terms and conditions.

Dmytro Alexandrov

Artem Petrenko

FINANCIAL AGRARIAN RECEIPT

10 March 2015 Poltava

1. With this Agrarian Receipt AAA LLC, EDRPOU Code 00000000, having its registered office at XX XXXX St., XXXX (the «Obligor»), as represented by Mr. Ivan I. Ivanov, acting on the basis of a Charter, hereby undertakes to pay by 30 September 2016 in favour of BBBBBBB LLC, EDRPOU Code 00000000, having its registered office at XX XXXX St., XXXX (the «Creditor»), for and on behalf of which this Agrarian Receipt is signed by Mr. Sydor S. Sydorov, Director, acting on the basis of a Charter, the amount of funds determined by the following formula:

S=AxBxC, where

S – is the amount of funds in Ukrainian hryvnias to be paid;

A – is the quantity of agricultural goods with which the determination of the amount to be paid is associated – 100 metric tonnes of wheat;

B – is the price of the futures for the supply of one metric tonne of wheat maturing in November 2015 according to the MATIF commodity exchange at the close of sales on 1 October 2015, EUR/metric tonne;

C – is the EURO/UAH official exchange rate established by NBU at the close of the banking day on 1 October 2015.

2. The funds under this Agrarian Receipt shall be paid by wire transfer to the Creditor's account current No. 00000000000000000 with ABS Bank PJSC, MFO 00000

3. For the purposes of securing the obligations under this Agrarian Receipt, the Obligor pledges the future harvest of wheat that grows on the land plots of the XXXX District, XXXX Region, cadastral numbers 000000000000000:0000:0000, 000000000000000:0000:0000, 000000000000000:0000:0000, 000000000000000:0000:0000, used by the Obligor on the basis of a leasehold pursuant to Lease Agreement No. 123 dated 1 March 2010 valid until 1 January 2020, and on the land plot located in XXXX District, XXXX Region cadastral number 000000000000000:0000:0000 used by the Obligor on the basis of a leasehold pursuant to Lease Agreement No. 12345 dated 1 February 2012 valid until 1 February 2025.

4. The Obligor undertakes to comply with the following agricultural technology during the growing of wheat on the land plots specified in Clause 3 hereof:

1–10 July – harvest of the preceding crop – winter barley;

1–10 August – residue processing (comminuter 4.5 m, KhTZ 180 hp);

20–30 August – ploughing at the depth of 25 cm (PLN-5-35, KhTZ 180 hp);

20–30 August – cultivation at the depth of 8–10 cm (2 KSP-4, KhTZ 180 hp);

10–20 September – application of ammophos 50 kg/ha and further presowing cultivation at the depth of 4–5 cm (Amazone, 1,000 l, 18 m, MTZ 80 hp, Europack 6 m, KhTZ 180 hp);

10–20 September – sowing of seeds of Ukrayinka and Favorytka type – 5.5 million of seeds/ha pretreated with Kinto Duo, 5 l/mt (C3-5,4, MTZ 1.30 hp);;

10–20 September – seed rolling (KZK-6, MTZ 80 hp);

10–20 February – application of ammonium nitrate 100 kg/ha (Amazone, 1,000 l, 18 m, MTZ 80 hp);

1–10 March – harrowing (S-16, MTZ 130 hp);

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1–20 July – harvesting of wheat crop, expected yield 4.5–8 mt/ha (JohnDeere, 7 m).

5. The harvested products shall be delivered to SSSS LLC located at: XX XXXX St., XXXX.

6. During the term of this Agrarian Receipt, the Creditor shall have the right to monitor Obligor's compliance with agricultural technology of growing products and take steps provided for by the applicable laws of Ukraine to prevent deterioration of the collateral.

7. After the harvest of crops in 2016, all Obligor's wheat shall become the collateral which constitutes the security of obligations under this Agrarian Receipt.

8. If in 2016 it appears that there is not enough property pledged by the Obligor to secure the obligations under this agrarian receipt, the future harvest of other crops that grow or will be growing in the future on the land plots specified in clause 3 hereof as well as all other agricultural goods of the Obligor shall be used to cover all the obligations under this agrarian receipt.

9. The Creditor and the Obligor mutually agreed that the value of this Agrarian Receipt is equal to UAH 10,000,000.00.

10. No other additional obligations under this Agrarian Receipt (additional pledge, insurance, restriction on further transfer, etc.) have been agreed.

OBLIGOR CREDITOR

ROLE OF THE ANTIMONOPOLY COMMITTEE OF UKRAINE IN THE M&A TRANSACTIONS

Establishing of a business «from the scratch» is rather time-consuming, therefore, the acquisition of the operating companies is often more attractive for the investors.

It is especially popular to acquire operating companies in the agribusiness as a method of increasing the land bank as quickly as possible. Other purposes of purchasing operating companies by the agrarians may include the following:

1. Operation in the new area of business, if the investor buys a company that conducts such type of activity in which such investor has not specialised yet (for example, a company specialising in growing crops purchases dairy farms).
2. Expansion of services and goods sales network, if the investor is not actually purchasing the company itself, but its client base and concluded agreements.
3. Elimination of a competitor, possible establishment of monopoly in a certain region or in Ukraine.
4. Ability to use a famous trademark and goodwill, if the aim of the purchase is not the company, but a trademark and goodwill.

The advantages of acquisition of the operating company include the resolution of the following key matters necessary for operation of such business:

1. A legal entity has already been set up and operates for a certain period of time, has the necessary goodwill and established connections with the necessary controlling authorities.
2. The necessary property had been purchased for its operation.
3. The necessary premises, land plots, machinery and equipment, etc., had been purchased.
4. The required permits for the carrying out of business activity had been obtained.
5. Agreements with the necessary counterparties and clients had been purchased.
6. Personnel had been hired.

The existence of certain defects in the management of the company allowed by the existing senior management makes it possible for the investor to purchase the business at a significantly reduced price.

However, upon the purchase of any operating business, one should take into account the fact that if the financial indices of the group of companies of the seller and purchaser exceed thresholds established by the laws, such purchase constitutes a concentration which requires approval from the Antimonopoly Committee of Ukraine (the «AMCU»). At the stage of planning of the transaction, this circumstance is extremely important, because it directly affects the time frames of the transaction and/or its structure.

Concentration of Business Entities

Pursuant to paragraph 1 of Article 22 of the Law of Ukraine «On Protection of Economic Competition», in order to prevent the monopolisation of commodity markets, the abuse of the monopolistic (dominant) position and restriction of the competition, the bodies of the Antimonopoly Committee of Ukraine shall exercise state control over the concentration of business entities.

Paragraph 2 of the said article sets forth that the following is deemed to constitute concentration:

1) a merger of business entities or consolidation of a business entity by another one;

2) the acquisition of the control by one or several business entities over one or several business entities or parts thereof either directly or via other entities, for instance, by way of:

a) the direct or indirect purchase, acquisition in any other way of assets in the form of an integrated property complex or in the form of a structural unit of a business entity by way of management, lease, leasing, concession or other acquisition of the right of use of the assets in the form of an integrated property complex or a structural unit of a business entity, including the acquisition of assets of a business entity being liquidated;

b) the appointment or election of a person to a position of the chairman or deputy chairman of the supervisory board, management board, controlling or executive body of a business entity, if such person already occupies one or several positions of the said kind in other business entities, or the creation of a situation, under which more than 50 per cent of the total number of positions of members of the supervisory council, management board, other supervisory or executive bodies of two or more business entities are occupied by the same people;

3) the establishment of a business entity by two and more companies, which will engage in business activities independently over a prolonged period of time, provided that such establishment does not result in the co-ordination of the competitive conduct between the companies that established such business entity, or between the companies and the newly established business entity;

4) the direct or indirect purchase or acquisition in any other way or obtaining into management of participatory interests (shares, stocks) which ensure the attainment of or excess over 25 or 50 per cent of votes in the highest governing body of the business entity in question.

Therefore, Ukrainian laws define a rather wide range of corporate transformations which are considered to be concentrations. Upon determining whether business entities' actions constitute a concentration, it is important to ascertain whether a certain entity is gaining control over the other entity.

It should be noted that participants to the concentration are considered to be not only companies which are direct buyers/sellers/lessees/other acquirers of control but also whole groups of companies which they form part of.

Thus, pursuant to Article 1 of the Law of Ukraine «On Protection of Economic Competition», a business entity means, inter alia, a group of business entities if one or several of them control the others.

However, not all concentrations require AMCU's approval, but only those where the financial indices of participants exceed thresholds established by the laws. Thus, pursuant to Article 24 of the Law of Ukraine «On Protection of Economic Competition», the concentration may take place only subject to the preliminary obtaining of approval from the AMCU:

1) when the aggregate value of assets or the aggregate volume of commodity sales over the last financial year, including those abroad, by participants to the concentration, taking into account the relations of control [means all groups of companies that participate in the concentration], exceeds an amount equivalent to EUR 12 million and, whereby:
    a) the aggregate value of assets or the aggregate volume of commodity sales, including those abroad, by at least two participants to the concentration, taking into account the relations of control [means at least two groups of companies], exceeds an amount equivalent to EUR 1 million, and
    b) the aggregate value of assets or the aggregate volume of commodity sales in Ukraine by at least one participant to the concentration, taking into account the relations of control [means at least one group of companies], exceeds an amount equivalent to EUR 1 million.
2) irrespective of the aggregate value of the assets or the aggregate volume of commodity sales by participants to the concentration, when the share in a certain commodity market of any participant to the concentration or aggregate share of participants to the concentration with due account of control relations exceeds 35% and the concentration takes place either on this or related market.

Concentration which requires approval shall be prohibited until such approval is granted. Participants to the concentration must refrain from any actions which may result in the restriction of the competition and the impossibility of the restoration of the initial situation, until such approval is granted.

In practice, the drafting of the application to the AMCU on approval of concentration and annexes thereto takes about 1–2 months depending on how fast the clients will be providing the documents. AMCU has 15 days, as established by the laws, to decide whether it will accept the application for consideration as well as 30 days for the direct consideration of the same.

For the carrying out of concentration without prior approval of the AMCU, when applicable, the participants to the concentration (group of companies which includes an entity that acquires control), would pay a fine in the amount of 5% of the income of a business entity [understood as the whole group of companies] generated from the sale of products (goods, work, services) for the most recent reporting year preceding the year in which the fine is charged.

That is why when the investor is intending to purchase an operating business, it needs to previously evaluate the financial indices of its group of companies and seller's group. If in the course of analysis it appears that the approval is necessary, the investor has the following two key options on how to proceed:

1) Enter into the necessary framework agreement related to the transaction (most often sale and purchase agreement) with condition subsequent (that the agreement will enter into force after the obtaining of AMCU's approval) or preliminary agreement, and proceed with the obtaining of AMCU's approval. Usually the need of obtaining AMCU's approval of the concentration extends the date of transfer of title to the target for several months.

OR

2) Purchase the necessary asset in the name of a resident or non-resident company which is not related to purchaser's group and doesn›t have any financial indices (the aggregate value of the assets or the aggregate volume of goods sales) equalling to EUR 1 million. Such transaction will not require AMCU's approval. And afterwards the purchaser may proceed with the obtaining of approval while it consolidates the target to its group without any rush (during the buy out of the target from the «clean» special purpose vehicle).

Concerted Actions of the Business Entities

Starting from the mid of 2014, the AMCU strengthened control over concerted actions and intends to thoroughly track concerted actions taking place on the markets (personal statement made by Mr. M. Barash, Acting Head, in September 2014).

This fact is very important for any business in Ukraine, not only agribusiness, because concerted actions are any joint actions of business entities even exchange of information.

Thus, it is quite common when in the process of concentration or upon the signing of a shareholders agreement the parties agree certain actions that may influence competition between them – virtually restrict it. It should be noted that such arrangements are treated as concerted actions and require preliminary approval from the AMCU. Below we provide examples of AMCU's approvals for concerted actions granted in 2015.

No.	Date	Approval of Concerted Actions
1.	4 March 2015	The AMCU granted approval to concerted actions in the form of performance of Clause 5.1 (a) of the Agreement for the Sale of Shares and Purchase of Assets, concluded by and between E. I. du Pont de Nemours and Company (Wilmington, USA), and Denka Performance Elastomer LLC (Wilmington, USA), to the extent related to non-competition.
2.	9 February 2015	The AMCU granted approval to concerted actions in the form of performance of Clause 3.01 of the Shareholders Agreement concluded by and between SOUFFLET AGRICULTURE Société par Actions Simplifiée, Etablissements J. Soufflet Société en nom Collectif (both based in Nogent Sur Seine, France), and European Bank for Reconstruction and Development (London, UK), to the extent related to non-competition for the period of three years.

Approvals granted in 2014 serve as striking examples of how captious the AMCU is with regard to the concerted actions at the present time and that the approvals are required even for the exchange of information between the companies. Such examples include the following:

No.	Date	Approval of Concerted Actions
1.	1 October 2014	The AMCU granted approval to concerted actions in the form of introduction of amendments to Schedule 2 (Rules of Wholesale Electricity Market of Ukraine), approved by Resolution of the National Commission for the State Energy Regulation No. 1028 dated 9 August 2012, to Agreement concluded by and between the members of the Wholesale Electricity Market of Ukraine dated 15 November 1996 (as amended), to the extent related to improvement of mechanism for control over price bids approved by the Board of the Wholesale Electricity Market of Ukraine on 24 January 2014.
2.	1 October 2014	The AMCU granted approval to concerted actions in the form of introduction of amendments to Schedule 10 (Guidelines for Commercial Accounting of Electricity), approved by Resolution of the National Commission for the State Energy Regulation No. 480 dated 30 May 2003, to Agreement concluded by and between the members of the Wholesale Electricity Market of Ukraine dated 15 November 1996 (as amended), to the extent related to additional regulation of relations between participants of electricity market in the process of arranging commercial accounting of electricity approved by the Board of the Wholesale Electricity Market of Ukraine on 24 January 2014.

3.	24 June 2014	The AMCU granted approval to concerted actions in the form of a decision on collection of commercial information from the members of Ukrainian Association of Enterprises and Organizations of Cement Industry «Ukrcement» (Kyiv), namely, data on production and sales volumes of bagged and bulk cement, inter alia, by cement grades (in quantitative terms) and dissemination of information collected from the members of Ukrainian Association of Enterprises and Organizations of Cement Industry «Ukrcement» in general form no earlier than the month after its collection.

The setting up of business associations, public societies, etc., and in certain cases consolidation with them, is also treated as a concerted action.

Below we will analyse concerted actions as a concept from the legislative point of view.

Pursuant to Article 5 of the Law of Ukraine «On Protection of Economic Competition», concerted actions shall be understood as the conclusion of agreements by business entities in any form, the adoption of decisions by associations in any form, as well as any other agreed competitive conduct (activity, inactivity) of business entities.

Concerted actions shall also include setting up of a business entity or association aimed at or resulting in the co-ordination of the competitive conduct between business entities, which have set up the said business entity or association, or competitive conduct between them and the newly established business entity, or entrance into such association.

Pursuant to Article 6 of the said Law, anti-competitive concerted actions shall be understood as concerted actions which have resulted or may result in the prevention, elimination or restriction of the competition. The concerted actions related to activities specified below shall be deemed to be anti-competitive concerted actions:

1) setting of prices or other conditions of the acquisition or sale of goods;
2) restriction of the production and markets of goods, the technical and technological development, investments or placing them under control;
3) allocation of markets or sources of supply on the basis of the territory, range of goods, sales or acquisition volumes, range of sellers, purchasers or consumers, or on the basis of other features;
4) distortion of the results of bids, auctions, competitions and tenders;
5) removing of other business entities, purchasers or sellers from the market or restricting their access to the market (exit from the market);
6) applying of different conditions to equivalent agreements with different business entities, thus placing them into an unfavourable competitive position;
7) conclusion of agreements with other business entities based on their acceptance of additional conditions which do not concern the subject

matter of such agreements in terms of their contents or under trade and other fair practices in business activities;

8) considerable restriction of the competitiveness of other business entities on the market without any reasonable grounds therefor.

As set forth in Article 10 of the Law of Ukraine «On Protection of Economic Competition», concerted actions set forth in Article 6 hereof may be allowed by relevant bodies of the Antimonopoly Committee of Ukraine, if their participants can prove that such actions contribute to:

- the improvement of production, acquisition or sales of a good;
- the technical, technological and economic development;
- the development of small and medium entrepreneurs;
- the optimisation of the export or import of goods;
- the development and application of unified technical specifications and standards for goods;
- the maximization of efficiency of production.

The carrying out of concerted actions provided for by the law is prohibited prior to the obtaining of approval from the bodies of the Antimonopoly Committee of Ukraine or the Cabinet of Ministers of Ukraine.

The law sets the following time frames for the obtaining of the AMCU's approval of concerted actions:

15 days – for the acceptance of the application;

3 months – for consideration of the application.

The drafting of the application and all additional documents thereto in practice takes about 1-2 months upon the condition that the clients quickly provide the information.

The filing of any information to the AMCU requires detailed analysis of financial information, constituent documents, and control relations between each participant of concerted actions in groups of the company. This means that the thorough analysis has to be carried out in respect of all entities connected with participants to the concentration both via corporate and kinship relationship (requirements of the Regulation on Concerted Actions).

Taking into account the fact that the time frames for the obtaining of approvals of concerted actions are rather lengthy (only the AMCU studies the documents for approximately 3.5 months), the participants to the concerted actions try to take a short cut and obtain preliminary conclusions of the AMCU on the need of obtaining the respective approval, because it is possible to obtain such preliminary conclusions within the period of 1.5 months. We advise, however, to apply this mechanism very carefully taking into account the below.

Thus, business entities may file an application for provision of preliminary conclusions with respect to the proposed concerted actions with the bodies of the AMCU upon their own initiative. Preliminary conclusions and conclusions regarding qualification of actions are not mandatory and are provided solely if a business entity has an urgent need for that.

Bodies of the AMCU provide preliminary conclusions regarding the granting of approval to concerted actions or introduction of a change into the concerted actions to business entities, governmental authorities, local self-government bodies, bodies of administrative management and control on the basis of an application for provision of preliminary conclusions, application for provision of conclusions with respect to qualification of actions and information enclosed therewith.

Preliminary conclusions of the respective body of the AMC are provided in the form of a letter which specifies the following:

- the ability to grant an approval to concerted actions or introduction of a change to the concerted actions;
- the ability to refuse to grant an approval to concerted actions or introduction of a change to the concerted actions;
- the need or the lack of the need to grant an approval to concerted actions or introduction of a change to the concerted actions;
- the lack of information to provide any conclusions.

The obtaining of preliminary conclusions regarding concerted actions, as provided for by Clause 3.1 of the Regulation on Concerted Actions, does not free the participants to the concerted actions from the need to file an application for approval of concerted actions with the relevant bodies of the AMC in cases provided for in Article 10 of the Law of Ukraine «On Protection of Economic Competition».

In practice, the AMCU may:

- provide clear conclusions whether there is a need for obtaining approval of concerted actions;
- recommend to withdraw the application which may, based on the results of analysis of the market by AMCU employees, cause harm to the client (for example, serve as the ground for initiation of a separate investigation by the AMCU);
- provide abstract conclusions containing information which will be difficult to use (for example, «that concerted actions may be carried out without an approval if they do not limit competition on the market»);
- specify that there is not enough information to provide any conclusions.

The application for provision of preliminary conclusions is deemed to have been accepted for consideration after the lapse of 15 days from the date it had been filed if during this time the State Commissioner of the AMC or head of the territorial unit of the AMC has not returned the application to the applicant with a notification stating that the application and other documents enclosed therewith do not meet requirements established by the AMC and this prevents it from considering the same.

The period of time for consideration of applications for provision of preliminary conclusions with respect to the granting of approval of concerted

actions, applications for provision of conclusions with respect to qualification of actions, applications for introduction of changes to concerted actions, is 1 month from the date such application is accepted for consideration.

The application for provision of preliminary conclusions is filed in accordance with clause 6.9 of the Regulation on Concerted Actions. Upon the filing of application for provision of preliminary conclusions, the applicant independently determines the scope of information and documents taking into account his own understanding of the specific features of the concerted actions pursuant to this Regulation and in accordance with Schedule 1.

In the course of consideration of application for provision of preliminary conclusions, the State Commissioner of the AMC (or upon his/her instruction – AMC's employees), head of the territorial unit (or upon his/her instruction – employees of the territorial unit) may consult with the applicant only in respect of elimination of minor drawbacks in the information filed thereby.

In practice, AMCU's bodies are not apt to provide preliminary conclusions because the parties provide incomplete sets of documents. For the purposes of successful acceptance of the documents by the AMCU, we advise to file the same set of documents which is filed with the application for approval of concerted actions.

Thus, as the result of filing with the AMCU of the application for provision of preliminary conclusions in respect of the need of obtaining approval of concerted actions, the applicant may receive a conclusion stating that it is still required to obtain an approval. Accordingly, 1.5 months of work will be wasted. Therefore, we advise to be very careful with this mechanism and apply for preliminary conclusions if you are sure that the concerted actions will not influence in any way the competition on the market.

Expert Opinion

In agribusiness, the acquisition of operating companies is an effective method of increasing investor's land bank or expanding its business profile (for example, purchase of cattle breeding facilities by a crops growing investor, etc.).

However, upon the purchase of any operating business, it should be taken into account that if the financial indicators of the group of companies of the seller and the purchaser exceed thresholds established by the laws, such purchase constitutes concentration which requires approval from the Antimonopoly Committee of Ukraine. At the stage of planning of the transaction, this circumstance is extremely important, because it directly affects the time frames of the transaction and/or its structure. The time frames for the obtaining of AMCU's approval of concentration range from 2 to 3 months.

When the investor is intending to purchase an operating business, it needs to previously evaluate the financial indices of its group of companies

and seller's group. If in the course of analysis it appears that the approval is necessary, the investor has the following two key options on how to proceed:

1) Enter into the necessary framework agreement related to the transaction (most often sale and purchase agreement) with condition subsequent (that the agreement will enter into force after the obtaining of AMCU's approval) or preliminary agreement, and proceed with the obtaining of AMCU's approval.

OR

2) Purchase the necessary asset in the name of a company which is not related to purchaser's group and doesn›t have any financial indices (the aggregate value of the assets or the aggregate volume of goods sales) equalling to EUR 1 million. Such transaction will not require AMCU's approval. And afterwards the purchaser may proceed with the obtaining of approval while it consolidates the target to its group without any rush (during the buy out of the target from the special purpose vehicle).

Also, in his business activity any businessman should bear in mind that a number of actions are qualified by the AMCU as concerted actions and may also require a special approval. In particular, the setting up of business associations and public societies and in certain cases consolidation with them, any arrangements regarding limitation of competition and sometimes even exchange of information are treated as concerted actions.

Oksana Kryzhanivska

Anton Fedun

PROTECTION AGAINST VIOLATIONS OF ANTITRUST LAW IN AGRICULTURAL SECTOR

Having ratified the Association Agreement between Ukraine and the European Union, our country demonstrated its intention of becoming a full member of the European Union. However, Ukraine's aspiration to become a member of the European Community requires continuous obeying of European laws and compliance with the following Copenhagen criteria which must be met by members of the European Union:

I) stability of institutions guaranteeing democracy, the rule of law, human rights, respect for and protection of minorities (political criteria);

II) existence of a functioning market economy as well as the capacity to cope with competitive pressure and market forces within the European Union (economic criteria);

III) ability to take on the obligations of membership including adherence to the aims of political, economic and monetary union (other criteria).

The existence of a functioning market economy, which is characterised by a balance between the supply and demand as the result of free interaction of market forces, lack of barriers to access and exit markets and adequate development of financial sector for investing savings into production, is achieved, inter alia, by way of protection of interests of the businessmen and consumers against violations of antitrust and competition law. In Ukraine, this function is assigned to the Antimonopoly Committee of Ukraine and is being performed in accordance with the Law of Ukraine «On Protection Against Unfair Competition», the Law of Ukraine «On Protection of Economic Competition» as well as Rules for Considering Applications and Cases Related to Violation of Laws on Protection of Economic Competition approved by Order of the Antimonopoly Committee of Ukraine No. 5 dated 19 April 1994, registered with the Ministry of Justice of Ukraine on 6 May 1994 under No. 90/229.

In connection with the development of the agricultural sector in Ukraine, we are currently observing that the investors are becoming more and more interested in the purchase of assets of agricultural enterprises which in most cases use land plots leased from the owners of the land parcels (shares). When the decision is made to purchase assets of the existing agricultural enterprises or to establish a new enterprise, it is necessary to take into account the strict and biased policy of the Antimonopoly Committee of Ukraine aimed at interference into relations that occur between the agricultural enterprise and owners of the land shares from whom the land plots are being leased, for the purposes of determining the rate of lease payment. In connection with this, during the investment analysis of the enterprise it is necessary to pay special attention to the rate of fixed payment for the lease of agricultural land,

which should not be less than 3% of the value of the land plot determined in accordance with the laws. The importance of determining the rate of the land lease payment at the level of 3% is based on the following.

Article 21 of the Law of Ukraine «On Land Lease» sets forth that the rate, form and due dates of the land lease payment shall be determined in the relevant lease agreement upon the parties' approval (except for due dates of lease payment for state owned and municipally owned land plots, which are determined pursuant to the Tax Code of Ukraine).

The Law of Ukraine «On Land Lease» does not establish the minimum or maximum rate of lease payment for the lease of privately owned land plots or any other restrictions regarding the rate of lease payment for the use of the abovementioned land plots.

The rate of lease payment is not fixed and is not regulated by the state. It can be freely fixed and is being determined pursuant to Articles 627 and 632 of the Civil Code of Ukraine upon consent of the parties.

At the same time, it is stated in Decree of the President of Ukraine No. 725 dated 19 August 2008 «On Urgent Measures Aimed at Protection of Owners of Land Plots and Land Parcels (Shares)» that it is necessary to establish a payment for the lease of agricultural lands at the level not less than 3% of the value of the land plot determined in accordance with the laws.

Taking into account Decree of the President of Ukraine No. 725 dated 19 August 2008 «On Urgent Measures Aimed at Protection of Owners of Land Plots and Land Parcels (Shares)», it can be concluded that its provisions have a recommendatory nature and may serve as the ground for the amendment of the terms and conditions of the lease agreement to the extent dealing with price thereof, which price the parties agreed on when they concluded such agreement, or for the termination of the agreement upon consent of the parties as set forth in Article 651 of the Civil Code of Ukraine or pursuant to the rules set out in Article 652 of the same Code.

However, the Antimonopoly Committee of Ukraine took up a different position and interprets the fixing of the rate of lease payment lower than 3% of the value of the land plot determined in accordance with the laws in lease agreements with owners of the land shares as violation of the laws on protection of economic competition.

This is the exact situation that one of our clients faced. It is a major agriholding that leases 5,433.5 hectares of land parcels and which signed approximately 500 agreements with owners of such land parcels.

In August 2011, the Kharkiv Regional Territorial Unit of the Antimonopoly Committee of Ukraine issued an order «On the Unscheduled Investigation of an Enterprise». Such investigation was invoked by written requests from the owners of the land parcels (shares) which indicated that the Enterprise was making the lease payments for the use of the land plots (shares) at the rates lower than those set forth in Decree of the President of Ukraine No. 725

dated 19 August 2008 «On Urgent Measures Aimed at Protection of Owners of Land Plots and Land Parcels (Shares)», i.e. less than 3% of the standard monetary valuation of the land plot. At the same time, it was stated in the written requests that allegedly they verbally asked the lessee to increase the rate of lease payment.

According to the findings of the unscheduled investigation, the Enterprise received recommendations from the Administrative Board of the Kharkiv Regional Territorial Unit of the Antimonopoly Committee of Ukraine «On Cessation of Actions that have Signs of Violation of the Laws on Protection of Economic Competition».

According to the above recommendations, the enterprise was advised to:

«cease any actions regarding the fixing of understated rates of lease payments in lease agreements with owners of the land parcels (shares) as compared to the rates set in the applicable regulatory legal acts, which is a material condition of the Agreement, by way of introducing amendments into the lease agreements with owners of the land parcels (shares), in particular, amendments related to the changing of the rate of lease payment pursuant to the applicable laws and regulations and elimination of causes of violation and conditions that facilitated the same.

The Enterprise is to inform the unit about the compliance with the recommendations within the period of two months».

In order to prevent holding the Enterprise liable for not complying with the AMC's recommendations, we decided to hold General Participants Meeting of the Enterprise in order to address the issue of complying with the recommendations and setting of the payment rate for the lease of agricultural lands under land lease agreements signed with individuals at the level of not less than 3% of the value of the land plot determined in accordance with the laws. In September 2011, the General Participants (Founders) Meeting of the Enterprise resolved to meet the AMC's recommendations, however they decided to start making the increased lease payments for using the land plots to the individual lessors from 1 January 2012 and sent a respective letter about the same to the Kharkiv Regional Territorial Unit of the AMC. The letter also stated that the Enterprise does not agree with the conclusions that there are grounds for its abuse of monopoly (dominating) position and asked to extend the deadline for complying with the recommendations until 1 January 2012 because the procedure for introduction of amendments and registration of amendment agreements to the lease agreements is lengthy given the quantity of lease agreements.

However, with its Order dated 18 October 2011 the Kharkiv Regional Territorial Unit of the AMC refused to extend the deadline for compliance with the recommendations, moreover, the Administrative Board of the Kharkiv Regional Territorial Unit of the Antimonopoly Committee of Ukraine issued an Order on Commencement of Investigation and commenced the investigation on the grounds of violation of the laws on protection of

economic competition in the form of abuse of the monopoly (dominating) position on the market.

Usually, persons against whom an investigation dealing with violation of the laws on economic competition had been commenced try to challenge the respective order in the court. However, as the practice shows the courts dismiss such claims referring to the fact that the very commencement of the investigation does not violate the protected by the law rights and interests of persons who are being investigated because no penalties are being applied to them. Issuing of an order to commence the investigation or an order to refuse to consider the applicant's case is reserved to the exclusive competence of the AMC bodies and is one of the methods how they implement their governmental powers vested in them by the laws.

As a rule, the order is invalidated only if there are circumstances that give grounds to believe that the appealed order was made with violation of the procedure for its issue.

Taking into account the respective position of the judicial branch of power, the Enterprise decided not to waste any time on hopeless lawsuits and direct all effective mechanisms to refute the AMC's arguments.

During the investigation, the bodies of the Antimonopoly Committee of Ukraine sent respective requests to the Enterprise and demanded to provide the necessary information.

It should be noted that such demand of the AMC cannot be ignored in any way. This is because according to Article 22-1 of the Law of Ukraine «On the Antimonopoly Committee of Ukraine», business entities, associations, governmental authorities, local self-government bodies, bodies of administrative management and control, other legal entities, their business units, branches, representative offices, their officials and employees, and individuals are obligated upon the demand of the body of the Antimonopoly Committee of Ukraine, head of the territorial unit of the Antimonopoly Committee of Ukraine, employees authorised by the Antimonopoly Committee of Ukraine and its territorial unit, to provide documents, materials or other media, explanations, other information, including sensitive information and banking secrecy, required for the Antimonopoly Committee of Ukraine and its territorial units to perform the duties provided for by the laws on protection of economic competition.

Pursuant to Article 22 of the Law of Ukraine «On the Antimonopoly Committee of Ukraine», orders, resolutions and demands of the body of the Antimonopoly Committee of Ukraine and head of the territorial unit of the Antimonopoly Committee of Ukraine, demands of employees authorised by the Antimonopoly Committee of Ukraine and its territorial unit issued within their competence must be complied with within the time frames set forth therein, unless otherwise provided for by the law.

Failure to meet the requirements of the orders, resolutions and demands of the body of the Antimonopoly Committee of Ukraine and head

of the territorial unit of the Antimonopoly Committee of Ukraine, demands of employees authorised by the Antimonopoly Committee of Ukraine and its territorial unit shall entail liability provided for by the law.

Paragraph 13 of the Law of Ukraine «On Protection of Economic Competition» sets forth that violations of the laws on protection of economic competition include failure to submit information to the Antimonopoly Committee of Ukraine or its territorial unit within the time frames specified by the bodies of the Antimonopoly Committee of Ukraine, head of its territorial unit or regulatory legal acts.

Pursuant to paragraph two of Article 52 of the Law of Ukraine «On Protection of Economic Competition», for violation envisaged in Paragraph 13 of Article 50 of this Law a penalty shall be imposed on a business entity in the amount of up to one per cent of its income (proceeds) from the sales of products (goods, work, services) over the last reporting year, which preceded the year of the penalty.

Therefore, the actions of the person who fails to provide the respective information at the request of the AMC will be qualified as violation of the laws on protection of economic competition and will result in the imposition of a penalty.

It is also important to understand that the repetitive failures to provide information by one and the same business entity, which information is requested by the body of the Antimonopoly Committee of Ukraine, is not a continuous violation in the meaning of Article 42 of the Law of Ukraine «On Protection of Economic Competition», but constitute independent (separate) violations of the laws on protection of economic competition (Recommendations of the Presidium of the High Commercial Court of Ukraine No. 04-5/247 dated 29 October 2008 «On Certain Issues in the Practice of Applying Competition Laws»).

Some business entities try to challenge in courts the demands of the AMC and its units regarding provision of information to the court. However, as the practice shows, the courts treat such demand as a demand sent to the business entity to obtain information and establish whether there are any signs of violation of the laws on protection of economic competition and, therefore, the AMC's units act in accordance with the applicable laws and that is why the courts dismiss the claims. Ruling of the High Commercial Court of Ukraine dated 26 November 2014 in Case No. 922/2560/14 is an example of such judgement.

It should be noted that sometimes the AMC abuses its rights and powers and qualifies the provision of the requested information by the business entity as violation of the laws on protection of economic competition referring to the fact that the provided information is insufficient. In such cases the court takes the position of a business entity and invalidates the resolutions of administrative boards of the Antimonopoly Committee units with respect to violation of the laws on protection of economic competition

and imposition of a fine (Ruling of the Kharkiv Commercial Court of Appeal dated 24 February 2014 in Case No. 922/4339/13).

Having received the respective demand and having realised the need to provide information, we decided to give only those documents and scope of information that would not cause any harm to the Enterprise during the investigation.

It was on the basis of this evidence in the case that the resolution with preliminary conclusions was prepared and submitted for consideration by the AMC's body and sent to the Enterprise.

After the agricultural enterprise received the resolution on preliminary conclusions in the case regarding violation of the laws on protection of economic competition, the enterprise prepared a reply in which it refuted all arguments of the Kharkiv Regional Territorial Unit of the Antimonopoly Committee of Ukraine. The following arguments were provided in the abovementioned reply:

1. ***Regarding determination of the rate of lease payment for the use of the land plots,*** *we stated that the key principle of price formation regarding the determination of the rate of lease payment for the use of agricultural land plots is that the parties to the agreement are free to agree and establish the rate of lease payment. The provisions of the Law of Ukraine «On Land Lease» (Article 21) determine the key principles of establishing a lease payment, in particular, its contractual and indexation procedure, and such provisions prevail the provisions of Decree of the President of Ukraine No. 725 dated 19 August 2008 «On Urgent Measures Aimed at Protection of Owners of Land Plots and Land Parcels (Shares)».*

Therefore, the provisions of the abovementioned Decree of the President of Ukraine dealing with the determination of the lease payment at the rate of not less than 3% of the standard monetary valuation of the land plot have a recommendatory nature that can be taken into account by the parties of the lease agreement upon the signing of such agreement and determination of the lease payment rate.

This conclusion is also supported by the existing court practice. For example, with its Ruling No. 6-8114св10 dated 29 September 2010, the Panel of Judges of the Civil Chamber of the Supreme Court of Ukraine found that the provisions of Decree of the President of Ukraine No. 725 dated 19 August 2008 «On Urgent Measures Aimed at Protection of Owners of Land Plots and Land Parcels (Shares)» have a recommendatory nature and may serve as the ground for the amendment of the terms and conditions of a lease agreement which the parties agreed upon its signing or for its termination upon the consent of the parties (Paragraph 1 of Article 651 of the Civil Code of Ukraine) or in accordance with the rules set forth in Article 652 of the Civil Code of Ukraine.

2. ***With respect to determination of the monopoly (dominating) position of the Enterprise we argued that*** the AMC erroneously determined the suppliers and consumers of the services on the commodities market

and erroneously interpreted the legal relations which existed between the agricultural enterprise and individual lessors who owned the land parcels (shares). The abovementioned legal relations arose out of and were regulated by land plot lease agreements and didn›t have any signs of provision of services, and, therefore, the Enterprise did not provide any services related to the lease of land parcels (shares), on the contrary the enterprise was the consumer of the good (land parcels (shares)) under land lease agreements. Given the above, we also stressed that the conclusions set out in the resolution, which was provided to the Administrative Board of the Kharkiv Regional Territorial Unit of the Antimonopoly Committee of Ukraine, regarding the existence of abuse of the monopoly (dominating) position on the market by way of determining the rate of lease payment did not comply with the provisions of the applicable laws of Ukraine.

However, despite well-founded and legitimate arguments of the Enterprise which refuted the arguments of the AMC regarding violation of the laws on protection of economic competition by the agricultural producer, in December 2011 the Administrative Board of the Kharkiv Regional Territorial Unit of the Antimonopoly Committee of Ukraine adopted the following resolution at its meeting:

1. It was recognised that pursuant to paragraph one of Article 12 of the Law of Ukraine «On Protection of Economic Competition», the Enterprise enjoyed monopoly (dominating) position on the market of services related to lease of land parcels (shares) with a share of 100% within the boundaries of the leased land parcels (shares) located on the territories of Yurchenkove, Kotiv and Pilnianske Village Councils of Vovchanskyi District of Kharkiv Region during the period from 2008 until 2010 and during the ten months ending 31 October 2011.

2. It was recognised that the Enterprise failed to comply with Decree of the President of Ukraine No. 725/2008 dated 19 August 2008 by way of bringing the land lease agreements with the owners of the land parcels (shares) in compliance with the said Decree to the extent dealing with the fixing of the rate of lease payment at the level of 3% and, therefore, violated the laws on protection of economic competition by way of abusing monopoly (dominating) position on the market as provided for by paragraph one of Article 13 and paragraph 2 of Article 50 of the Law of Ukraine «On Protection of Economic Competition», in particular, by taking actions that led infringement of consumers› interests that would have been impossible had there been a stronger competition on the market of services related to lease of land plots (shares).

3. Pursuant to item two of paragraph two and paragraph six of Article 52 of the Law of Ukraine «On Protection of Economic Competition», for violation of the laws on protection of economic competition, envisaged by paragraph one of Article 13, paragraph 2 of Article 50 of the Law of Ukraine «On Protection of Economic Competition», the Enterprise was charged with

a fine in the amount of sixty eight thousand hryvnias 00 kopiykas (UAH 68,000.00).

4. The Enterprise was obligated to cease violations of the laws on protection of economic competition by way of:

– provision of documents evidencing payment to the owners of the land parcels (shares) of lease payment at the rate of not less than 3% of the standard monetary valuation of the land plot and introduction of amendments to land lease agreements concluded with the owners of the land parcels (shares) to the extent of fixing the rate of lease payment at the level of 3% within the period of two months from the date of receiving the resolution;

– carrying out state registration of amendments to agreements for the lease of land parcels (shares) by 1 April 2012.

Article 59 of the Law of Ukraine «On Protection of Economic Competition» provides the persons involved in the investigation with the right to appeal the Resolution of the Antimonopoly Committee of Ukraine and its territorial units in the court of law, and defines the following grounds for alteration, cancellation and invalidation of the respective resolutions:

- the incomplete ascertainment of circumstances being of importance for the case;
- the lack of proof of circumstances, which are important for the case and declared to be ascertained;
- the incompliance of conclusions stated in the decision with the circumstances of the case;
- the violation or incorrect application of rules of the substantive or procedural law. However, violation or incorrect application of rules of the procedural law may be a reason for the alteration, cancellation or invalidation of a resolution only if such violation resulted in a wrong decision.

We would like to note that resolutions of the bodies of the Antimonopoly Committee of Ukraine may be appealed against in full or in part at the commercial court within two months of the date of receipt of the decision. This period is not renewable.

When we were making the decision to appeal against the illegal Resolution of the Kharkiv Regional Territorial Unit of the Antimonopoly Committee of Ukraine, we considered **the fact whether we had all the grounds for its cancellation as provided for in Article 59. Consequently, we filed the respective claim with the commercial court.**

With its Judgement dated 6 February 2012, the Commercial Court of Kharkiv Region upheld Enterprise's claim against the Kharkiv Regional Territorial Unit of the Antimonopoly Committee of Ukraine and invalidated the Resolution of the Administrative Board of the Kharkiv Regional Territorial Unit of the Antimonopoly Committee of Ukraine on abuse by the Enterprise of monopoly (dominating) position. The Commercial Court stated in its Judgement that the body of the Antimonopoly Committee of Ukraine failed

to provide adequate proof of the fact that the Enterprise refused the owners of the land parcels (shares) to review the rate of lease payment for using their land plots. The Enterprise, as one of the parties to the lease agreements, is not authorised to unilaterally amend the lease agreements as prescribed in the land plot lease agreements.

The Court found that the land lease agreements in question complied with the provisions of Resolution of the Cabinet of Ministers of Ukraine No. 220 dated 3 March 2004 «On Approval of the Standard Form Lease Agreement».

In addition, the Court stated that the AMC failed to duly prove that the terms and conditions of the land lease agreements were unilaterally determined by the Enterprise itself and that the term of the lease agreements and other conditions of the agreements created for the owners of the land plots additional obstacles for termination of the agreement or amendment of the same, in particular, it failed to specify in more detail what would those additional obstacles be.

Also, in the opinion of the Court, the body of the Antimonopoly Committee failed to take proper measures to establish the actual commodity frames of the market, in particular, it failed to conduct a survey of the buyers (consumers) of legal entities and individuals as provided for in the Temporary Methodical Recommendations on Determination of the Main Types of Commodities Markets, nor did it take any other measures to establish the actual commodities frames of the market.

Taking into account the above, the Court found that upon the determination of the fact that the Enterprise is enjoying monopoly position, the Administrative Board of the Kharkiv Regional Territorial Unit of the Antimonopoly Committee of Ukraine violated Sub-clause 2.1.1. of the Methodology for Determining the Monopoly (Dominating) Position of Business Entities on the Market to the extent dealing with correct identification of the good produced, supplied, consumed or sold by such business entity, Sub-clauses 2.1.2., 2.1.4. of the Methodology to the extent dealing with correct compilation of the list of goods (work, services) with respect to which the monopoly position is determined, correct identification and compilation of the list of the key sellers (suppliers) and buyers (consumers) of goods, as well as it failed to correctly identify the commodity frames of the market.

The determination of the territorial (geographic) boundaries of the market in the disputed resolution artificially narrowed the said boundaries of the market, because it did not deal with the boundaries of the respective village councils of the Vovchanskyi District of Kharkiv Region or boundaries of other administrative and territorial units, but just the land plots leased by the Enterprise. Such determination of territorial boundaries of the market contravened Clause 1.3 of the Methodology for Determining the Monopoly (Dominating) Position of Business Entities on the Market, which states that

territorial (geographic) boundaries of the market is a territory with the scope of mutual relations related to sale and purchase of a good (group of goods) within which the consumer may easily meet his demand for a certain good under the usual circumstances and which scope may usually be a territory of a country, region, district, city, etc., or parts thereof.

The disputed resolution identified barriers for entering into the market by other business entities such as inefficiency, namely, to cultivate the land parcels (shares) in the areas located at a considerable distance due to high level of transportation costs. The AMC failed to provide any evidence that they prepared any calculations of transportation and any other costs of cultivating the land plots in order to support this argument.

Also, as one of the barriers for entering into the market to which the AMC referred was the economic inefficiency of cultivating small (less than 8 hectares) land parcels (shares) of separate owners, high energy and capital intensity of agricultural production, absence of adequate material and technical resources in other agricultural enterprises located near the leased lands and at the same time failed to provide any specific economic calculations, locations of the land parcels (shares), total area of agricultural lands within the abovementioned village councils and without studying the material and technical resources of the actual and potential competitors of the Enterprise.

The abovementioned circumstances served as the ground for invalidation of the Resolution of the Kharkiv Regional Territorial Unit of the Antimonopoly Committee of Ukraine dated 8 December 2011.

However, we would like to note that our client's Enterprise was just the first «victim» of a tough and illegal policy of the Antimonopoly Committee of Ukraine aimed at winning of the voters by the previous government by increasing the rate of lease payment for using the land plots up to 3% of the standard monetary valuation of the same.

Taking into account the above, the Antimonopoly Committee of Ukraine was forced to engage an administrative mechanism of influencing the court in order to exclude formation of a well-established court practice which would completely contravene the position of the government with the help of which mechanism the respective legitimate and well-founded Judgement of the Commercial Court of Kharkiv Region was cancelled by the appellate and cassation courts.

A lot of other Ukrainian companies faced the same unlawful acts in the future. On 16 January 2015, one of our other clients received subsequent demand from the Antimonopoly Committee of Ukraine to provide information necessary for consideration of a case regarding violation of the laws on protection of economic competition and studying of markets of services related to lease of land parcels (shares) from their owners. This evidences the fact that at the present time the policy of the Antimonopoly Committee of Ukraine is firm, the agricultural producers one by one are

being held liable for violation of the laws on protection of economic competition by way of abusing monopoly (dominating) position on the market because their land lease agreements with owners of land shares do not comply with Decree of the President of Ukraine No. 725/2008 dated 19 August 2008 to the extent dealing with the fixing of the rate of the lease payment at the level of 3%.

Expert Opinion

In the event of acquisition of assets of agricultural enterprise, it is necessary to ascertain whether such enterprise has in place any lease agreements concluded with owners of the land shares in which the rate of lease payment is lower than 3% of the value of the land plot established in accordance with the laws. If such enterprise has in place any valid lease agreements in which the abovementioned rate of lease payment is specified, in the future it will be necessary to make the actual lease payments to the owners of the land parcels (shares) at the rate of not less than 3% of the standard monetary valuation of the land plot and gradually amend the lease agreements with owners of the land parcels (shares) to the extent dealing with the fixing of the rate of lease payment at the level of 3%.

Kseniya Sheyin

Oleksandr Sydorenko

SHAREHOLDERS AGREEMENT: IMPORTANCE AND LEGAL FEATURES OF SHAREHOLDERS AGREEMENT IN M&A's PERTAINING TO AGRARIAN SPHERE

Ukrainian agrarian sector is a rather profitable area of economy which operates with a significant return provided that there are three key factors: reasonable preliminary planning of the business, use of innovative technologies and hiring of highly qualified management. Successful implementation of all three factors is usually beyond the scope of small farms (2,500 – 5,000 hectares) and is more common for large farms with the land bank of more than 10,000 hectares).

As to large farms – they are usually managed via foreign holding companies and as a rule such businesses are owned by more than one person. When a business is controlled by several owners, it is necessary to clearly fix the arrangements between them related to the management of the business, settling of conflict situations, terms and conditions of sale of shares, etc. In cases like this it becomes useful to enter into shareholders agreements.

Shareholders agreement is an effective and flexible tool for governing the relations between the partners in the process of management of their joint business, which is widely used in foreign jurisdictions.

Objectives of concluding shareholders agreements:

1. Establishing the procedure for management of joint business, in particular, not only procedure for legal relations between shareholders, which is often envisaged in the charter of the company, but also business relations, «the rules of team game», filling the gaps in the legislative regulation.
2. Securing the ways to resolve deadlock situations.
3. Providing for the ways to withdraw from joint business.
4. Making provisions for the cases and possibilities for a shareholder to sell a part of his shares.
5. Liability of the parties for violations of the rules of doing business established by them, the order of payment of damages, etc.
6. Subordination of relations between shareholders to the most appropriate and flexible law.
7. Providing for the most convenient court to which the parties agree to submit their disputes.

When entering into shareholders agreements there should always be borne in mind that they in no way replace the company charter or provisions of the current legislation and must not be contrary thereto. For example, in Punt vs. Symons & Co Ltd (1903), an English court held that the company's obligation under the shareholders agreement not to amend the charter is null and void, because the shareholders agreement whereto the company is a party may not prohibit making changes to the constitutional documents.

Shareholders agreement is a way to create convenient rules of the game for the partners of a joint business, and protect their own interests and investments in the event of a conflict. However, pursuant to the laws of Ukraine the institute of shareholders agreements is merely declaratory and limited. Ukrainian lawmakers do not offer participants of business relations to make use of advantages of shareholders agreements which have been used throughout the world for years.

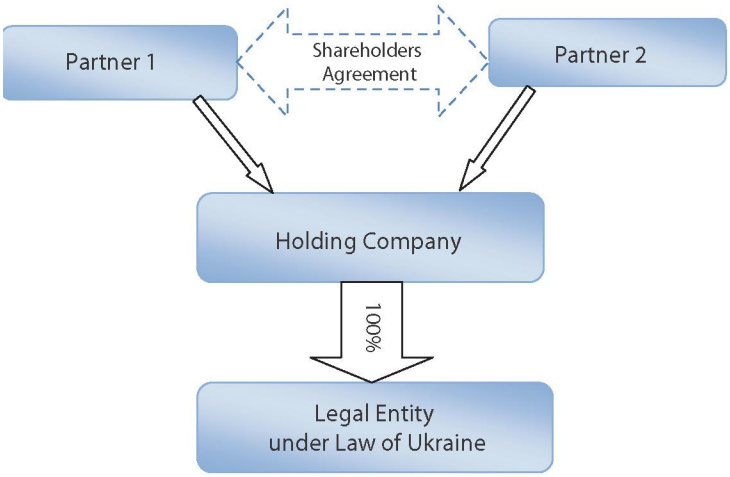
For example, throughout the world the parties to the shareholders agreement are free to choose the law applicable to the relations between the shareholders, as well as the venue of dispute resolution. In Ukraine, this practice is prohibited by law, many aspects of company governance are subject to stringent regulation and the rules may not be modified by agreement of the shareholders.

According to the recommendations of the Supreme Commercial Court of Ukraine and the Supreme Court of Ukraine, in case of signing the shareholders agreement on subordination of relations between the shareholders, as well as between shareholders and joint-stock company, on the activities of the company to foreign law, such agreement is null and void.

The relentless position of the Ukrainian lawmakers with respect to the shareholders agreement is also seen in the accumulated court practice. In particular, demonstrative in this respect is the case regarding the shareholders agreement entered into between the Norwegian company Telenor and Company «Storm» – the shareholders of «Kyivstar». Shareholders agreement between these parties was subject to the laws of the state of New York, and all disputes thereon were arbitrable according to the rules of UNCITRAL effective in New York. One of the conflicts escalated between the parties was resolved by the International Arbitration Court in the state of New York. Although, the Pechersk District Court of Kiev refused to recognize and enforce the decision of the International Arbitration Court as devoid of legal force and referred to the earlier decision made by a Ukrainian court to the effect that the shareholders agreement at issue was invalid. The same situation can be seen in the legislation of the Russian Federation.

In the cases where owners of an expensive business are a few persons and the need for regulation of their business relations is urgent (in this case, the desired mode of regulation and their arrangements do not always conform to the procedures established by law), and the provisions of the shareholders agreement should be, in the event of escalation of a conflict, the basis for the protection of rights and interests, the partners enter the business by involving the non-resident structures.

For instance, business partners, either directly or through subsidiaries, found a foreign holding, which further becomes the only participant / shareholder of the Ukrainian legal entity. Thus, the relations between the partners are governed by the shareholders agreement on the level of governance of the foreign holding and may be subject to foreign law:



The structure and contents of shareholders agreements always depend on the specifics of the business, the sector of industry the company – the object of governance is involved, the internal structure of the company, the percentage of portions of shares held by the shareholders, the volume of their financial investments in their joint ventures, as well as on several other factors.

But we can still identify the main topics included in the shareholders agreements.

SECTION 1. Parties to the Agreement

In determining the parties to the agreement one should pay attention to the situations where shareholders may be a few legal entities or physical persons, who seem to be formally independent, but, in fact, will have a the concerted will and will be coordinated from the same centre, and in this connection in the shareholders agreement they must act as one and the same party.

Business partners may act as shareholders of the holding company and, accordingly, as the parties to the shareholders agreement, whether personally or indirectly through subsidiaries.

SECTION 2. Recitals

In this section, the parties may disclose both the major goals of the agreement or joint activities and essential circumstances that are taken into account by the parties at the conclusion of the agreement.

In describing the structure of shareholders agreement we deem it necessary to illustrate the commentary with examples from shareholders agreements drafted by Alexandrov & Partners ILC in the course of advising clients on significant projects.

Example from the shareholders agreement, 2010

WHEREAS:

(1) COMPANY 1 holds or intends to purchase 1,000 (one thousand) ordinary shares of the Company, with a par value of EUR 1 (one) each comprising 50 % of the issued share capital of the Company.

(2) COMPANY 2 holds or intends to purchase 1,000 (one thousand) ordinary shares of the Company, with a par value of EUR 1 (one) each comprising 50 % of the issued share capital of the Company.

(3) The Parties hereto will become Shareholders of the Company as of the purchase of Company's Shares.

(4) The Parties agree to enter into this Agreement to operate the Joint Venture and manage the Company, as well as to set the procedure for taking decisions by the Shareholders.

SECTION 3. Definitions

This, at first glance – a secondary part of a shareholders agreement requires special scrutiny. For example, the concept of the business day, often used in determining terms in the relations between the shareholders, is not construed similarly in all countries.

Also, there are cases where one party to the agreement purposefully defines only the term «shares», without distinguishing their classes (types). This unremarkable step is associated with reluctance of the shareholder to sell vote-bearing ordinary shares in the event of a crisis pursuant to the terms of the agreement. A party to the agreement will be able to sell to the counterparty preference shares which bear no voting rights.

Example from the shareholders agreement, 2014

1. TERMS AND INTERPRETATION

"Completion Date" shall mean the date of sale of the Object to any third party upon the mutual consent of the Parties.

"Selling Shareholder" shall mean a Shareholder that received a commercial offer from any third party to purchase the Object or Joint Venture by means of acquiring 100% of Shares of the Company and that expressed its intent to sell, together with the second Shareholder, the shares owned by them in the Company to such third party on the proposed terms and conditions.

"Business Day" shall mean the day of the week from Sunday to Friday from 9 a.m. till 6 p.m., the Cypriot time that is not weekend or national holiday under laws of the Republic of Cyprus, Ukraine and/or the Russian Federation.

SECTION 4. Schedules

We recommended specifying in the text of the shareholders agreement the list of schedules it contains. Thus, for example, if the agreement contains no references to schedules such schedules may be concealed from the court by the abusing party, which may result in incorrect interpretation by court of the provisions of the shareholders agreement.

SECTION 5. The Order of Company Governance

This section is one of the key sections in the shareholders agreement, as it enshrines a set of rules the parties are guided by in running their joint business.

This section regulates the activities of shareholder meeting as well as other bodies of the company (the board of directors, the supervisory board, etc.), up to the procedure for voting, if necessary. An example of a rough plan of this section is as follows:

I. Governing Bodies

1. General Meeting of Shareholders
    - 1.1. Representatives of the shareholders by proxy
    - 1.2. Venue of the Meeting of Shareholders
    - 1.3. Convocation of the Meeting of Shareholders
    - 1.4. Agenda
    - 1.5. Quorum
    - 1.6. Voting
    - 1.7. Minutes of the Meeting of Shareholders
    - 1.8. Written Resolution
    - 1.9. Exclusive Competence
2. The Board of Directors
    - 2.1. Appointment and Dismissal of Directors
    - 2.2. Meetings of the Board of Directors
    - 2.3. Notice of Meeting
    - 2.4. Agenda
    - 2.5. Information Package
    - 2.6. Quorum
    - 2.7. Distribution of Votes
    - 2.8. Adoption of Resolutions
    - 2.9. Written Resolution
    - 2.10. Competence
    - 2.11. Signature of Documents

As it has been stated above, the provisions of the shareholders agreement must not contradict the law applicable to the agreement. In the absence of any such contradictions, if a party breaches its obligations under the shareholders agreement, it may be forced by the respective court order to fulfil its obligations. Thus, in Puddephatt v. Leith (1916), an English court made a decision ordering a shareholder to vote at

the meeting in such a manner as it was envisaged by the shareholders agreement.

Example from the shareholders agreement, 2013

2.2.3. **Agents of the Shareholders**. Shareholders may issue identical proxies to their agents. Any actions to be performed by the Shareholder hereunder may be performed by agent of this Shareholder. Each Shareholder may appoint only one agent. Any actions of agent of the Shareholder shall be deemed as the actions committed by the Shareholders himself.

2.2.7. **Agenda**. Each Shareholder shall be entitled to enter additional matters in the agenda. To introduce changes to the agenda, the Shareholder shall within 5 Business Days before the Shareholders' Meeting send to the Company, the second Shareholder with a copy to the agent of the second Shareholder, the letter specifying the additional items of the agenda. In case the Notice of the Shareholders' Meeting is received by the Shareholder later than 5 Business Days prior to the Shareholders' Meeting, the Shareholder, which intends to change the agenda, shall send the letter specifying the additional agenda items to the second Shareholder, its agent with a copy to the Company not later than the next Business Day following the receipt of the Notice of the Shareholders' Meeting. The additional items shall be deemed included into the agenda in case the Shareholder sends the letter within the time limit specified in this clause and has the written confirmation of sending such a letter. The agenda may be changed or updated directly at the Shareholders' Meeting upon the consent of the Shareholders.

SECTION 6. The Order of Running Joint Business / Running Joint Venture

In the shareholders agreement, the parties may fix the rules for running their joint business, and the order for managing the companies controlled by the company and where the parties to the agreement are shareholders.

It is also possible to establish in this manner the order for management of a Ukrainian legal entity – because the parties to the shareholders› agreement run this legal entity through the governing bodies of the holding. In case a party breaches its obligations regarding making decisions on the management of a Ukrainian company, this party may be ordered to perform such obligations by the respective court decision, or serious penalties may be imposed for any such breach, and collection of such damages will be enforced by court (the latter option is more efficient because execution the court decision on recovery of funds is not as abstract as the specific performance (compulsion to act), of course, if the debtor has money or property which may be foreclosed). In most cases, participants in the holding company are also non-resident structures controlled by the partners. As a

result, the court decision is enforceable in a foreign jurisdiction and does not conflict with law of Ukraine.

It is also possible to envisage in this section the procedure for appointment of governing bodies of the Ukrainian company controlled by the holding, that is, for example, the number of directors of each partner in the board of directors, positions the persons are appointed to under the quota of each partner, etc. But, in any way, all procedures regarding the activities of the Ukrainian company will be in accordance with law of Ukraine.

The following is an approximate plan of the section relating to the management of the joint venture:

I. Governing Bodies

1. General meeting of participants (General Meeting)
    - 1.1. Adoption of Resolutions
    - 1.2. Minutes
    - 1.3. Exclusive competence
2. 2Directorate
    - 2.2. Appointment of members of the Directorate
    - 2.3. Voting
    - 2.4. Competence
    - 2.5. Minutes of the Directorate
    - 2.6. Signing documents
3. Technical supervision body/ another governing body.

Example from the shareholders agreement, 2013

5. MANAGEMENT OF THE SPECIAL PURPOSE VEHICLE (UKRAINIAN COMPANY)

Management Bodies

All decisions in **the** Special Purpose Vehicle shall be taken by the following management bodies:

A) The General Participants› Meeting — in accordance with Article 5.2. hereof;

B) The Joint Executive Body — the Management Board — in accordance with Article 5.3 hereof.

At the General Meeting of Participants the Company shall be represented by both Directors of the Company personally or through their representatives, acting jointly on the basis of the identical powers of attorney on behalf of the Company. The Directors/representatives shall act jointly on behalf of the Company: register for the participation in the meeting, vote and take decisions, sign the minutes of the General Meeting of Participants of the Special Purpose Vehicle. The representatives of the Company shall act jointly at the General Meeting of the Special Purpose Vehicle as if the Company is represented by the Directors of the Company. The decision on the delegation of powers shall be taken by the Board of the Company.

Management Board

The Management Board shall be an executive authority of the Special Purpose Vehicle that deals with the current management of the project, construction and operation of the Object and takes decisions on all matters falling within the competence by this Agreement, the Charter of the Special Purpose Vehicle (to the extent the Charter of the Special Purpose Vehicle is in compliance with the provisions hereof) and the applicable laws of Ukraine.

SECTION 7. Individual Provisions of a Shareholders Agreement

This section is the evidence of importance of making shareholders agreements where the parties are free to make provisions for a variety of situations and non-standard occasions.

Example from the shareholders agreement, 2014

3. JOINT VENTURE

3.6. Activity Restrictions

By the Completion Date, the Company may not:

(a) carry out any activity not related to the management of the activity and the property of the Special Purpose Vehicle;

(b) be the participant/shareholder of any legal entities except for the Special Purpose Vehicle.

SECTION 8. Financing of Company Activities. Distribution of Profits

When resolving these issues the parties should pay special attention to international tax planning, since, as it has already been noted, the shareholders are often persons – residents of different countries.

SECTION 9. Withdrawal from Company, Procedure for Alienation of Shares

Provisions governing the procedures for withdrawal of shareholders from the company are actually a section that ensures protection of the rights of shareholders.

In most cases, this section, includes provisions regarding the pre-emptive right to purchase shares, the order and the cases of joint sale by the shareholders of their shares, procedure for and cases of sale of shares to shareholders, etc.

Example from the shareholders agreement, 2014 p.

8.3.1. **Preemptive Right.** The Shareholder shall have the preemptive right to the purchase of the shares in case of their sale by another Shareholder. In case the Shareholder does not exercise its preemptive right for the buy-out of the shares of the Alienating Shareholder within **30 Business Days from the receipt of the Notice of Transfer**, the latter shall be entitled to transfer its shares

to any third party on the conditions proposed to the Shareholder that refused to acquire the shares. The Shareholder shall exercise the preemptive right to acquiring the Shares of another Shareholder in case the latter, within the time specified herein, sends the Alienating Shareholder the notice in writing on buy-out of the shares on the conditions proposed by the Alienating Shareholder.

SECTION 10. Applicable Law and Arbitration Clause

The parties can subordinate the shareholders agreement to the law convenient to all of them, subject, however, to the restrictions imposed by the legislation of the country whose law they want to apply. Thus, the shareholders agreement of a Ukrainian company may be governed only by Ukrainian law or, otherwise, it may be invalidated in court upon a claim by an interested party.

Of special convenience to the parties to the shareholders agreement is an opportunity to include provisions on the territorial jurisdiction used in dispute resolution, in particular, the parties may choose any international arbitration as the venue for the resolution of their disputes. However, in determining jurisdiction one should do preliminary research into the specific characteristics of a particular court. For example, commercial arbitration court might not consider claims brought by individuals.

The court's decision on a dispute between shareholders can be recognized and enforced in the country of enforcement subject, however, to the laws of that country. In practice, the issue of enforcement of court decisions is quite important. Thus, if the parties to the agreement are shareholders – holding companies, they have no another property which may be levied except for the corporate rights of legal entities.

In this case, it is advisable for a shareholders agreement to foresee the possibility of collection of debt or penalties from the counterparty through obtaining the ownership of the shares owned by the latter through court procedure, or of transfer of the rights to performance under the debtor's contracts in which the debtor is a creditor, or of security for the obligations of the parties by means of surety.

In the event that the arbitration clause and the provisions on applicable law are held invalid, the applicable law and the venue of arbitration will be determined in accordance with international law.

Example from the shareholders agreement, 2014

9. APPLICABLE LAW AND DISPUTE RESOLUTION

9.1. This Agreement shall be entered into and shall be construed and governed in all respects in accordance with the laws of England and Wales.

9.2. All disputes, discrepancies and requirements arising out of this Agreement or in relation to it including those related to its execution, violation, termination or invalidity, in case they cannot be settled by the Parties through mutual concessions and peaceful negotiations, shall be subject to the settlement in the London Court of International Arbitration; LCIA (the "Court") in accordance with the Arbitration Rules of LCIA.

(a) The number of arbitrators – 3 (three).

(b) Place of arbitration (country, city) — England, London.

(c) Language of the court proceedings — English.

(d) Applicable law — the substantial law of England and Wales.

9.3. The decision rendered by the Court shall be final and binding for the Shareholders and applicable in any court of the competent jurisdiction.

SECTION 11. Confidentiality

The issue of confidentiality is one of the most important in the course of running joint venture, which requires special treatment of the confidentiality clause in the shareholder's agreement.

Example from the shareholders agreement, 2015

10. CONFIDENTIALITY

10.2. The Parties shall agree that that the confidentiality undertaking envisaged in Clause 10.1. of the Agreement, shall remain in full force and effect within the whole validity term of this Agreement and within 5 (five) years from its termination date.

10.3. The confidential information shall be disclosed or transferred by the Party only upon the consent of another Party.

SECTION 12. Notifications

Benefit of this section becomes evident in the case of escalation of a conflict between the shareholders. Great many actions in the relations of shareholders are bound to the terms. Sometimes, the slightest flaw in regard of the timing of and compliance with the procedure for notification may result in serious harm.

Therefore, the «Notification» clause should spell out in detail the procedure for «communication» between the parties – the form, terms, manner of transmission of notices, addresses and contact persons for notification, the need for duplication of notifications (for example, any notice sent to the shareholder must also be sent to the company's address, etc.).

Example from the shareholders agreement, 2015

11.1. The notice or any other correspondence related hereto (the "**Notice**") shall be, unless otherwise provided herein:

- in writing;
- in English and Ukrainian;
- sent to the Notice Address with the copy to e-mail.

11.2. All correspondence related to this Agreement shall be sent by courier, the registered letter or otherwise ensuring the receipt by the party sending the Notice, of the written prove that it is received by the addresses.

Shareholders agreements may also include the following sections: «Financing of the Business», «Terms and Conditions of Joint Investment», «Exclusive Rights of Representatives of the Parties», «Independent Financial Controller», «Annual Audit», «Insurance», «Right to Information», «Term of Validity», «Miscellaneous», «Signatures of the Parties», etc.

A key section of the same shareholders agreement, in our view, is a section devoted to solving deadlock situations.

Shareholders agreement is, in fact, the only document whereby the parties may settle the procedure for resolving deadlock situations and withdrawal from the joint business. What situations are deadlock and are subject to the provisions of the shareholders agreement is determined by the parties in the agreement itself. Typically, a deadlock situation is the one where, for whatever reason, it is impossible to make a decision on one of the key issues of running a joint business.

Traditionally, the following means to resolve conflict situations are elected by the parties in the agreement:

- Delegation of the disputed issue to another governing body of the company.

For example, if the issue cannot be resolved by the Board of Directors, it is submitted to the board of shareholders. In fact, this method implies a formal temporary procrastination in the process of resolving the conflict situation in the course of which the business partners will either agree on what will be fixed by the respective resolution of shareholders, or make use of another way to handle the situation, for example, involve options.

- Involvement of third parties to resolve the deadlock situation.

This method in most cases provides for mediation and is not very common, because you cannot always be sure of the independence and non-biasness of the mediator. This method also implies additional extra costs to pay the fee for the services of the mediator.

- Liquidation of the company.

Rarely used, because any of the parties is usually interested in saving the business.

• Sale of shares to a third party – a joint sale or sale by one of the shareholders.

In the event of use of this method, the relations of the parties often imply pre-emptive right of shareholders to purchase shares of their partners.

• Compulsory purchase or sale of shares of one shareholder by another shareholder (options).

Option (Lat. Optio – choice, desire, discretion) – an agreement by which a potential buyer or potential seller (option holder) gets the right, but not the obligation, to buy or sell an asset (in this case, shares) at a predetermined price in the future moment or period of time determined by the agreement. A few types of options are distinguished: the option to sell (put option), to buy (call option) or bilateral (double option).

Options to sell (put option) – the right of the shareholder – an option holder – to demand from the other shareholder, who issued / sold the option, to purchase shares on the pre-agreed conditions in the future or when certain conditions occur.

Option to buy (call option) – the right of the shareholder – option holder to demand from the other shareholder, who issued / sold the option, to sell shares on the pre-agreed conditions.

Thus, when the parties enter into a contract for sale of option, one shareholder, for consideration (option premium), sells to another shareholder the right to demand from the option writer to buy shares from or sell shares to the shareholder – depending on the type of the option.

Of great interest is the question of determining in option sales contracts the price of shares at which these shares should be sold (strike price). It often happens that at the moment of conclusion of the contract one strike price of shares is fixed in the option, and when the option is used after a certain period of time the price specified in the contract comes to be significantly lower or higher as compared to the market price, which results in losses for one of the parties.

To avoid such situations we recommend the parties to determine in the option sales contracts the mechanism of determination of the price at the time of sale rather than a fixed price of the shares.

For example, in order to determine the market value of shares to be disposed of under the contract the parties agree that since the moment of shareholder's receiving notification from the other shareholder regarding application of the option, each party must appraise the shares by referring to one of the pre-agreed appraisal companies. Further, these estimates are added and divided by half,

and as a result the parties receive the average share price. In case one of the parties fails to conduct an appraisal in due time the results of appraisal by the other party will be used as the basis for determining the price.

Draft call option is provided in Schedule 1 to this section.

The diversity in the ways of resolving deadlock situations has led to occurrence of several classic widely practiced models of conflict resolution and they have rather extravagant names.

Russian Roulette. In the event of a deadlock situation, a shareholder sends another shareholder an offer to buy out shares of the latter at certain price. The shareholder who receives such a notification has a choice: either to sell another shareholder his shares at the specified price or, vice versa, to buy a package of another shareholder at the same price.

This method is a kind of a two-way option and leaves room for abuse of the right. Thus, the shareholder who sends the notification may be aware of the financial difficulties of the partner, and he, therefore, indicates a lower price for shares in order to buy shares of the partner for half price.

Texas Shoot-out. Each of the parties to the shareholders agreement involved in the deadlock situation sends to an independent mediator a sealed bid with the price at which this party is ready to buy a stake on the other party. The envelopes are opened simultaneously and the bid with the highest price wins, that is, the party who made such a bid must buy, and the other party – sell its stake at the specified price.

Dutch auction. There are several variants of this model: 1) as in the Texas Shoot-out, the parties send their bids to an independent mediator / facilitator, but the winner (the party who offered the highest price) redeems the shares of the other shareholder at the price proposed by the under-dog party, and 2) the party, who received an offer from the other party about redemption of its shares, sells its shares on the proposed terms and conditions, or makes a counter-offer to repurchase shares of the other party, but in this case the purchase price shall be increased by agreed amount.

There are also many other ways to resolve the deadlock situation, that may additionally provide for penalties, but in any case, if the partners fail to reach agreement, strict adherence to the procedure of resolving deadlock situations gives the right to have recourse to the court, that is, the conflict will be resolved through court procedure, and by the time the court makes decision on the matter, it is important whether the defendant, who, for example, is obliged by the court to redeem shares, the possibility to execute the court decision – funds to buy out the shares, etc.

Expert Opinion

Shareholders agreement is a document which provides an opportunity to set the rules of the business game and to effectively protect the interests and investments of the partners in the joint business, which explains the frequent use of such agreements in practice.

The key point of any shareholders agreement is the establishment of the procedure for out of court resolution of disputes and determination of the applicable law and competent court (in most cases – the International Arbitration court), which has jurisdiction over all disputes between the parties. In practice, after the court decision has been made, the question of its enforcement becomes important.

At the same time, there are no unsolvable situations – such situations and ways to resolve them just have to be explicitly set forth in the shareholders agreement.

Oksana Kryzhanivska

Schedule 1

OPTION CONTRACT TO
PURCHASE SHARES IN COMPANY
«X LIMITED»
(CALL-OPTION))

This Option Contract to Purchase Shares in Company «X LIMITED» (hereinafter referred to as the «**Contract**») is made in Kyiv, __ July 2015 between:
_____ **LIMITED** [•] (hereinafter referred to as the «**Company 1**»), represented by _____, acting on the basis of [•];
and
_____ **LIMITED** [•] (hereinafter referred to as the «**Company 2**»), represented by _____, acting on the basis of [•],
hereinafter collectively referred to as the «**Parties**» and each individually as a «**Party**», enter into this Contract on the terms and conditions set out below:

WHEREAS

(A) Company 1 and Company 2 are shareholders of Company «X LIMITED», duly incorporated under laws of the Republic of Cyprus, registration number _____, with the office located at: _____ _____ _____.

(B) Company 1 and Company 2 each owns fifty percent (50%) of shares in the authorized capital of Company «X LIMITED».

(C) This Contract is an integral part of the Shareholders Agreement of Company «X LIMITED « dated «___» _____ ___ (hereinafter referred to as the «Shareholders Agreement») and governs the procedure for the exercise by shareholders of Company «X LIMITED» of the right to purchase shares in Company «X LIMITED» in the cases of compulsory alienation of shares in Company «X LIMITED» in accordance with clause ____ of the Shareholders Agreement.

1. TERMS AND INTERPRETATION

1.1. Definition of Terms

All terms and concepts used in this Contract have the same meaning as the terms and concepts in the Shareholders Agreement. If the following terms and concepts were not defined in the Shareholders Agreement, they shall have the following meanings:

Bona Fide Shareholder – the Party who or whose representatives properly performed the terms and conditions of the Shareholders Agreement, and whose actions did not result in a Deadlock situation.

Defaulting Shareholder – a Party, whose action or omission has resulted in Deadlock situation, or whose representatives' action or omission resulted in a Deadlock situation.

Notice of Deadlock Situation – a written notification sent by the Bona Fide Shareholder to the Defaulting Shareholder in connection with the occurrence of one of the conditions set out in clause 10.1 of the Shareholders Agreement (Deadlock Situation) resulting from actions or omissions of the Defaulting Shareholder or any person representing the Defaulting shareholder (a Shareholder's representative under the power of attorney, the Director of Company «X LIMITED» appointed under the quota of the Defaulting Shareholder, a representative acting under the power of attorney for the Director of Company «X LIMITED» appointed under the quota of the Defaulting Shareholder). A Notice of Deadlock Situation must be written in the form provided in Schedule 1 to this Contract.

Notice of Call-Option – a written notification sent by the Bona Fide Shareholder to the Defaulting Shareholder and notifying the latter of the application of the provisions of this Contract for the purpose of coming out from the Deadlock Situation. Notice of call-option shall be made in the form provided in Schedule 2 to this Contract.

Notice of Second Option (call-option) – a written notification sent by the Bona Fide Shareholder to the Defaulting Shareholder and notifying the latter of the application of the provisions of this Contract if the Parties fail to exercise the put-option previously selected by the Bona Fide Shareholder. Notification of the Second Option (Call-option) must be written in the form provided in Schedule 3 to this Contract.

1.2. Interpretation

Unless there is an express provision to the contrary, in this Contract:

(a) references to paragraphs and schedules mean references to paragraphs of and schedules to this Contract;

(b) a reference to the Contract shall mean a reference to this Contract with all amendments and alterations hereto;

(c) any actions that must be performed by the Parties under the terms of this Contract, must be performed by the Directors of the Companies-Parties – in line with the powers granted to them under the constituent documents of their respective Companies, or by the Parties' representatives authorized by power of attorney.

2. TERMS OF EXERCISING OPTION

2.1. In the event of a Deadlock Situation the Bona Fide Shareholder may use the option provided for in this Contract upon sending to the other Party – the Defaulting Shareholder – a Notice of Deadlock Situation.

2.2. After the Bona Fide Shareholder sends to the Defaulting Shareholder a Notice of Deadlock Situation, the Bona Fide Shareholder has the right to choose, at its own discretion and for the purpose of resolving the Deadlock Situation, from between the two options envisaged by option-purchase contracts signed by the Parties simultaneously with the Shareholders Agreement and making an integral part of the Shareholders Agreement, – the present call-option or the second put-option.

2.3. The Bona Fide Shareholder shall notify the Defaulting Shareholder of its choice of the present call-option by giving the latter a Notice of call-option no later than ten (10) Business days of the date when the Bona Fide Shareholder sent the Notice of Deadlock Situation.

2.4. In the event that the Bona Fide Shareholder makes choice for the put-option, but for any reason whatsoever the conditions of this option were not met by the Parties when due under the terms of Contract for sale of put-option, the Bona Fide Shareholder also has the right to exercise this option by way of sending a Notice of the Second Option (call-option) to the Defaulting Shareholder. In case the terms of the instant option are used for the second option and the Parties do not agree in writing to the contrary, all the terms and conditions of this Contract shall apply to the second option, in which case the Parties have the right not to re-appraise the Shares and to use the reports of their Authorized Appraisers obtained in the course of put-option, however the terms set forth in this Contract are reserved.

2.5. The terms and conditions of this Contract shall enter into force upon receipt by the Defaulting Shareholder of the Notice of call-option, or Notice of second option (call-option).

3. SUBJECT MATTER

3.1. If for the purpose of resolving the Deadlock Situation the Bona Fide Shareholder has chosen the present call-option by sending to the Defaulting Shareholder a Notice of call-option or a Notice of second Option (call-option), the Bona Fide Shareholder is deemed to have bought from the Defaulting Shareholder the call-option – an option to purchase shares in Company «X LIMITED» owned by the Defaulting Shareholder (the «Shares»). In this case, the Bona Fide Shareholder acquires an optional right to purchase Shares and the status of the buyer of the Shares (the «Buyer»), and the Defaulting Shareholder – the obligation to sell shares to the Buyer at the term and on the conditions

set forth in this Contract, as well as the status of the Seller of Shares (the «Seller»).

3.2. Shares to be sold under the conditions specified in this Contract shall have the following characteristics:

Issuer	Company "X LIMITED"
Number of shares to be purchased	one thousand (1000) shares
Nominal value of 1 share	one (1) Euro
Correlation between shares to be purchased and all shares of the issuer	fifty per cent (50%) of all shares in Company "X LIMITED"

4. STRIKE PRICE OF SHARES

4.1. Notice of call-option, sent by the Bona Fide Shareholder to the Defaulting Shareholder, shall be made in the form prescribed in Schedule 2 hereto, and shall contain the data of the Authorized Appraiser who will appraise the Shares upon the order received from the Buyer. The Appraiser is selected from the list of the Authorized Appraisal Companies agreed by the Parties, which list makes a schedule to the Shareholders Agreement.

4.2. The Defaulting Shareholder shall, within five (5) Business days of the date of receipt of the Notice of call-option, provide the Buyer with a notice specifying the data of the Authorized Appraiser who will appraise the Shares upon the order from the Defaulting Shareholder – Seller of Shares.

4.3. Each Party shall appraise the Shares within a period not exceeding twenty (20) Business Days from the date of receipt by the Defaulting Shareholder of the Notice of call-option (hereinafter referred to as the «Appraisal Period») and provide the other Party with the report prepared by its Authorized Appraiser regarding the estimated value of 100% of shares in Company «X LIMITED».

4.4. The strike price at which Shares will be disposed of under the terms of this Contract shall be determined with the use of the following method:

Strike Price of Shares = half the average value of the business according to the data of the appraisal company of one Shareholder and that of the appraisal company of the other Shareholder, that is:

$$\text{Average value of business} = \frac{\text{Value Appraised by Shareholder 1} + \text{Value Appraised by Shareholder 2}}{2}$$

$$\text{The value of a 50\% stake} = \frac{\text{Average value of business}}{2}$$

4.5. The Strike Price of Shares may not be lower than the value determined by the method specified in paragraph 4.4 of this Contract, unless the Parties agree in writing to the contrary.

4.6. If, within the Appraisal Period, the Seller fails to provide the Buyer with the Appraisal report prepared by the Authorized Appraiser representing the Seller, the Seller is deemed to have accepted the results of the appraisal of Shares held under the order of the Buyer, and the Average value of the business is the value of Shares determined according to the appraisal by the Buyer, but only on condition that an Appraisal Report prepared by the Buyer's Authorized Appraiser has been properly delivered to the Seller and the Buyer has got written confirmation of this fact.

4.7. If the Parties fail to approve the Strike Price of the Shares in writing by their mutual agreement, the Buyer shall, within two (2) Business days of the date of expiry of the Appraisal Period, send to the Seller a notice stating the Strike Price of the Shares (a «Notice of Strike Price»).

5. EXERCISING OPTION

5.1. This option is exercised by the Parties' signing the Share Purchase Agreement made in the form approved by the Parties and set out in Schedule 4 to this Contract, as well as by signing any other documents necessary for the Buyer to register the Shares in its name and for the title to the Shares to pass from the Seller to the Buyer, under law of the Republic of Cyprus.

5.2. If the Parties fail to mutually agree in writing on the place and time of signing the Share Purchase Agreement, the Parties shall hereby undertake to ensure the presence of their duly authorized representatives on the tenth (10) Business Day from the date of expiry of the Appraisal Period at: _____, at noon (12:00 p.m.) Kyiv time.

5.3. Prior to the exercise of the option, the Parties shall take all provisional measures necessary to transfer option shares, including adoption of all necessary resolutions of shareholders / members.

5.4. In order to guarantee payment by the Buyer of the Strike Price, unless the Parties agree in writing to the contrary, the Buyer shall, on the date agreed by the Parties for the conclusion of the Share Purchase Agreement or on the date determined in accordance with the provisions of paragraph 5.2 hereof, transfer the amount equivalent to the Strike Price of Shares to the deposit account of the notary specified by the Seller. And if the Seller did not specify the details of a notary for the transfer of funds in that notary's deposit account – onto the deposit account of a notary defined at the choice of the Buyer.

5.5. The Buyer shall provide the Seller with evidence of transfer of the amount equivalent to the Strike Price of Shares on the notary's deposit account at the time of conclusion of the Share Purchase Agreement.

6. OPTION PREMIUM

6.1. The Option Premium under this Contract is _____ (_____) dollars.

6.2. The Option Premium is paid by the Bona Fide Shareholder to the Defaulting Shareholder on the date of making the Share Purchase Agreement, or the Strike Price is increased by the amount of the Option premium, either of the aforesaid at the discretion of the Parties.

7. DURATION OF CONTRACT

7.1. The provisions of this Contract governing the procedure for disposition (alienation) of the Shares shall take effect upon receipt by the Defaulting Shareholder of a Notice of call-option, or Notice of second option (call-option) and continue until the Parties fulfil their obligations under this Contract when due hereunder, unless the Parties have agreed in writing to the contrary.

7.2. If the Shareholders Agreement is dissolved, terminated or held invalid, this Contract shall be deemed dissolved, terminated or held invalid as from the date of dissolution, termination or invalidation of the Shareholders Agreement.

7.3. The call-option provided for by this Contract is deemed one that was never exercised by the Buyer (unless the Parties agree in writing to the contrary), in the cases where the Buyer:

- did not provide the Seller with the report on the appraisal of Shares prepared by the Authorized Appraiser of the Buyer, within the Appraisal period; or
- did not send to the Seller a Notice of value within the period of time specified in paragraph 4.7 of this Contract, or
- did not ensure the presence of its duly authorized representative at the place and time chosen by the Parties for signing the Share Purchase Agreement or, if the Parties did not specify the place and time for signing the contract by their mutual written agreement – at the place and time set out in section 5.2 of this Contract, or
- the Buyer's representative refused to sign or did not sign the Share Purchase Agreement, as well as other documents necessary for transfer of the title in the Shares to the Buyer and for compliance with the required registration procedures, or
- at the conclusion of the Share Purchase Agreement did not provide the Seller with the evidence of transferring the sum equivalent to the

Strike Price onto the deposit account of the notary in accordance with the provisions of paragraph 5.4 of this Contract, or

- did not pay the Seller the Option Premium in the manner prescribed by Article 6 of this Contract, or
- if the call-option was not exercised as a result of any action or omission by the Buyer.

8. SELLER'S LIABILITY

8.1. In the event that:

- the Seller did not ensure the presence of his duly authorized representative at the place and time chosen by the Parties for signing the Share Purchase Agreement or, if the Parties did not specify the place and time for signing the contract by their mutual written agreement – at the place and time set out in section 5.2 of this Contract, or
- the Seller's representative refused to sign or did not sign the Share Purchase Agreement, as well as other documents necessary for transfer of the title to the Shares to the Buyer and for compliance with the required registration procedures, or
- the Seller did not accept from the Buyer the Strike Price or the Option Premium, or
- if the call-option was not exercised in the result of any action or omission by the Seller,

The Seller shall pay the Buyer a penalty of one million U.S. dollars (USD1,000,000) within a period not exceeding ten (10) Business Days from the date of receipt of the respective written request from the Buyer («Demand of Penalty»). Demand of Penalty must contain grounds for the Seller's obligation to pay the penalty and specify the details of the Buyer's bank account where to transfer the money funds, if such details differ from those contained in paragraph __ of this Contract.

9. NOTICES

9.1. Notices or any other correspondence regarding this Contract (hereinafter referred to as the «Notice») shall be:

- in writing;
- in English and Russian languages;
- with a copy to the representatives of the Parties under the power of attorney;
- sent to the address for Notices with a copy sent by E-mail;

9.2. All correspondence related to this Contract shall be sent by courier, registered mail or other means ensuring receipt by the Party sending

such Notice of the return of service, the written evidence of the fact that the recipients have been served with the Notice.

9.3. No notice may be revoked unless the Party – the recipient of the Notice – has given its written consent thereto.

9.4. «Address for Notices» to the Parties to this Contract and their representatives acting under power of attorney:

Participant of Relations	Address for Notices	E-mail	Contact Phone Number/Fax
Company 1			
Representative of Company 1 under Power of Attorney			
Company 2			
Representative of Company 2 under Power of Attorney			

9.5. Each Party or any other Participant of legal relations may change its Address for Notices by sending a written notification thereof to the other Participants of legal relations.

10. CONFIDENTIALITY

10.1. The Parties undertake to keep all information relating to this Contract confidential and ensure compliance with confidentiality obligation on the part of officials and representatives of the Parties acting under the powers of attorney and on the part of consultants of the Parties.

10.2. The Parties agree that the confidentiality obligation, provided for in Paragraph 10.1 of this Contract, remains in full force and effect during the term of validity of the Shareholders Agreement and 5 (five) years after termination thereof.

10.3. Confidential information may not be disclosed or transferred by a Party without obtaining written consent thereto from the other Party.

10.4. Information is not considered confidential unless it is clearly defined as confidential by the Party / Parties, or when the information has passed to public domain due to actions by third parties who are not parties to this Contract..

11. GOVERNING LAW AND DISPUTE RESOLUTION

11.1. This Contract is made and shall be construed and governed in all respects in accordance with the law of England and Wales.

11.2. If the Parties fail to resolve any dispute, controversy or claim arising out of or in connection with this Contract, its performance, breach, termination or invalidity through mutual concessions and amicable

negotiations, they must be resolved at the London Court of International Arbitration (the «Court») in accordance with the LCIA Arbitration Rules.

(a) Number of Arbitrators – three (3).

(b) The venue of arbitration (city, country) – London, England.

(c) Language of arbitration proceedings – English.

(d) Applicable law – the substantive law of England and Wales.

11.3. An arbitral award rendered by the Arbitration Court shall be final and binding on the Shareholders and enforceable in any court of competent jurisdiction.

12. FINAL PROVISIONS

12.1. In the event of replacement of a Party in the Shareholders Agreement, the application of the terms of this Contract also extends to the new Party.

12.2. The Parties shall equally bear all costs associated with the execution of this Contract, its conclusion or conclusion of the Share Purchase Agreement, unless otherwise stipulated by the provisions of this Contract or unless the Parties by their mutual agreement agree in writing to the contrary.

12.3. Rights hereunder may not be transferred or assigned to third parties.

12.4. No alterations or amendments to this Contract shall be valid unless the Parties give their consent thereto in written form.

12.5. Provisions of Section 10 (Confidentiality) and Section 11 (Governing law and dispute resolution) shall remain in full force and effect after the termination of the Shareholders Agreement and / or this Contract.

12.6. This Contract is made in duplicate in Russian and English languages, one copy for each Party. In case of discrepancies between the English and Russian texts of the document, the English text shall prevail.

13. LIST OF SCHEDULES

13.1. This Contract contains the following schedules, agreed upon and approved by the Parties and constituting an integral part hereof:

A) **Schedule 1** – Notice of Deadlock Situation.

(B) **Schedule 2** – Notice of call-option.

(C) **Schedule 3** – Notice of second-Option (call-option).

(D) **Schedule 4** – Share Purchase Agreement.

PARTIES' DETAILS AND SIGNATURES

About

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Alexandrov & Partners International Law Company has been taking care of all details of successful business of its Clients for over 12 years already.

The company provides comprehensive services to businesses in Ukraine and ensures professional support in the following areas:

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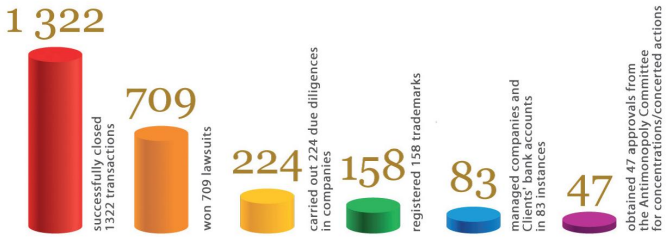

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Certification

International Law Company "Alexandrov & Partners"

58, Polevaya Street, Sofievskaya Borshchagovka, Kyiv region, 08131, Ukraine

Bureau Veritas Certification certify that the Management System of the above organization has been audited and found to be in accordance with the requirements of the management system standard detailed below

Standard

ISO 9001:2008

Scope of certification

Providing of legal services.

Certification cycle start date: **30 September 2013**

Subject to the continued satisfactory operation of the organization's Management System, this certificate expires on: **01 October 2016**

Original certification date: 13 November 2004

Certificate No. UA227324 Version 0, Revision date: **24 September 2013**

O. Adamenko

UKAS MANAGEMENT SYSTEMS

008

Certification body address: Brandon House, 180 Borough High Street, London, SE1 1LB, United Kingdom

Local office: 5th floor, 28, Simon Petlyura St., Kyiv, 01032, UKRAINE

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