

# How Can Foreign Investors Obtain Possession of Agricultural Land?

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The main precondition for reforming Ukrainian land laws is the land market formation. The land market formation and the agricultural relations improvement will contribute to the creation of an agricultural sector in Ukraine, which will be competitive both domestically and internationally. This, in turn, will ensure stable budget revenues, increased incomes of agricultural producers and food security of the country.

At the same time, the moratorium on agricultural lands alienation established by the *Land Code of Ukraine* before the entry into force of the *Law On the Circulation of Agricultural Lands* is a major obstacle to reforming Ukrainian land laws. The moratorium introduced in 2001 makes it impossible to buy the land for commodity production, and thus reduces the attractiveness of the Ukrainian agricultural sector for foreign investors. The only way to carry out agricultural production for a foreign investor is to lease land plots, despite the difficulties arising in this option's implementation, in particular, when obtaining the necessary documents.

In order to produce agricultural products, foreign investors may lease the agricultural land used by agricultural enterprises, such as a collective agricultural enterprise, an agricultural cooperative, a limited liability company or a legal entity of any other legal form. The land can

be used by a collective agricultural enterprise on the basis of lease agreements concluded with owners of respective land parcels or land plots.

Thus, the main possible options available to foreign investors who want to obtain possession of agricultural land for the purposes of agricultural production are as follows: subleasing the land, leasing a collective agricultural enterprise or a part thereof as an integral property complex and property management.

## SUBLEASING THE LAND

When subleasing the land, foreign investors can come across two types of land ownership by farmers, namely, land parcels and land plots.

Theoretically, land plots/land parcels can be subleased. Currently, the sublease of land plots is more thoroughly regulated by law. Law of Ukraine No. 161-XIV *On Land Lease* of 6 October 1998 explicitly provides for the right to sublease land plots. At the same time, there may be some nuances with the land parcels sublease, as this issue is not clearly regulated. The *Law On Land Lease* only states that the holders of title to land parcels (shares) are authorized to conclude agricultural land lease agreements. However, the Law does not specify the details of the land parcels lease procedure and does not in principle explicitly provide for the possibility of land parcels sublease. Given the fact that

the land parcel is not a land plot, the provisions of *Law On Land Lease* do not apply to the land parcels sublease; therefore, the sublease shall be governed by the general civil law norms on the assignment of things for use by another person (Article 774 of the *Civil Code of Ukraine*).

Subleasing land parcels/land plots may be associated with the following problems:

- A direct prohibition on sublease of land parcels/land plots in lease agreements. This problem can be solved by amending the lease agreements. This process is complicated by the need to implement relevant organizational procedures and to carry out registration actions. Special attention should be paid to the reaction of land parcels/land plots owners who may refuse to make necessary amendments to the lease agreements, which makes it impossible to sublease such land. One of the options to solve this problem may be a rent increase.

- The need to obtain consent for sublease from the owners of land parcels/land plots where the lease agreement does not specify that the tenant has the right to sublet land parcels/land plots. Landowners may refuse to consent to sublease. It is possible to minimize this risk by trying to suggest a rent increase, by making respective amendments to the lease agreement with regard to the rent and carrying out respective registration actions.

## LEASING COLLECTIVE AGRICULTURAL ENTERPRISES

Ukrainian law provides for the possibility of leasing an enterprise (or a part thereof) as an integral property complex (Article 191 of the *Civil Code of Ukraine*, Articles 66, 145 of the *Economic Code of Ukraine*). At the same time, Ukrainian law does not regulate the lease procedure for enterprises as integral property complexes, which may create certain problems in practice.

Pursuant to the provisions of the *Civil Code of Ukraine*, the enterprise as an integral property complex includes all types of property intended for its activities,

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including land plots, buildings, structures, equipment, tools, raw materials, products, claims, debts, as well as the right to trademark or another designation and other rights, unless otherwise provided by a contract or by law.

Since the procedure for leasing an enterprise as a whole is not statutorily regulated, the conditions of and procedure for leasing the property complex of an enterprise (a part thereof) must be specified in the lease agreement.

Leasing the property complex of an enterprise also means that all assets and liabilities (i.e. claims, debts, intellectual property rights, etc.) shall be transferred together with movable/immovable property. Each of these types of assets/liabilities shall be transferred within the framework of its transfer regime.

In particular, as regards land parcels/land plots, it will be necessary to replace the party to the obligation in accordance with civil law provisions, which require the consent of the landlords for the transfer of the debt for rent payment from a collective agricultural enterprise to a foreign investor's company. This also applies to all other contracts. That is, consent will need to be obtained from all creditors under other obligations. If the creditors (in particular, landlords) do not give their consent to such an obligation transformation,

they may withdraw from the contract and take back their land parcels/land plots.

Leasing a collective agricultural enterprise requires conducting a comprehensive due diligence of all business activities of such an enterprise in order to clearly understand what obligations will be assumed by a foreign investor's company (if the collective agricultural enterprise is leased as a whole) or to determine which assets the foreign investor is interested in and which assets should not be leased.

Moreover, there is a problem with goods in circulation (raw materials, stock): under what conditions will such material assets be transferred.

Leasing a property complex of an enterprise does not involve the transfer of permits. Therefore, a foreign investor's company will have to obtain the necessary permits itself.

It should be noted that the lease of collective agricultural enterprises or agricultural cooperatives may be complicated by the fact that the collective agricultural enterprise, by its legal nature, is a voluntary association of people for the purpose of agricultural products joint production. Such an enterprise property belongs to its members holding the right of joint partial ownership. Therefore, the members need to make a decision on leasing the property

complex of such a collective agricultural enterprise.

### PROPERTY MANAGEMENT

The owner shall transfer the property (which may include the whole enterprise as an integral property complex) to the manager. Such property shall be managed on behalf of the manager in the interest of the property owner or a third person — a beneficiary. The manager has to inform the persons he concludes transactions with that he/she is the manager, and not the property owner. The manager shall be entitled to remuneration provided for in the contract.

This option may be useful if it is not possible to obtain consent for sublease from all landowners or if foreign investors come to the conclusion that it is impossible to lease a collective agricultural enterprise or a part thereof.

In order to implement such an option, it will most likely be necessary to get the respective decision of the collective agricultural enterprise members or the limited liability company general meeting (if the target collective agricultural enterprise which holds the land is a limited liability company). In practice, however, foreign investors use this option to obtain possession of agricultural land quite rarely.