

## Legal Due Diligence of renewable energy projects in Ukraine

### 1. Development of renewable energy in Ukraine

#### 2. What is Due Diligence?

- Corporate issues• Land issues• Technical issues and permits• Other issues

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### 1. Development of renewable energy in Ukraine

According to information from the National Energy and Utilities Regulatory Commission (NEURC), the total installed capacity of renewable energy facilities that receive the 'green' tariff is 8,431 MW.

At that, 1,345 MW were commissioned in 2020, while during the first three quarters of 2021, 692 MW of installed capacity of alternative energy facilities were commissioned. Thus, the development of alternative energy in Ukraine, although slightly reduced in 2021, still demonstrates the interest of investors, including foreign ones, in construction of new facilities.

Related article: Renewable energy in Ukraine: current state of affairs

It should be noted that currently most investors prefer to buy ready-to-build renewable energy projects, rather than to obtain all necessary permits and prepare all necessary documentation on their own. Hence, the object of an agreement to purchase such a project is the corporate rights of Ukrainian companies, in which the relevant projects have been registered and permits have been obtained.

It is, therefore, these companies that are subject to legal due diligence because, given the significant amount of investment and the complexity of litigation, it is essential to ensure that a potential alternative energy facility can be developed. At the same time such a facility can be established in compliance with Ukrainian legislation and meeting the objective of obtaining the 'green' tariff.

#### 2. What is Due Diligence?

Due Diligence in Ukraine is a rather complicated process. Obviously, the scale, timing and complexity depend on the specific operation, but in general, the algorithm is standard and includes the following: the legal due diligence preparation and conducting, and registration of its results. Carrying out a Due Diligence and a list of necessary actions and documents depend on the scope of the enterprise and must take into account the peculiarities of each individual market.

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Conducting Due Diligence of renewable energy objects in Ukraine is characterized

by the need to not only verify the safety of purchasing corporate rights of the enterprise, but also to check the enterprise and all the documents for compliance with established requirements and the possibility of obtaining the 'green' tariff.

It should also be noted that even in the absence of the ultimate goal, namely obtaining a 'green' tariff, due diligence of a project for the construction of a power generation facility is largely the same as for projects obtaining a 'green' tariff (except for certain peculiarities).

The Due Diligence process covers the following areas: corporate issues, land issues, technical issues and permits, financial-operational issues, accounting and general legal issues.

### **Corporate issues**

The audit determines the rights and obligations of the participant(s) of a Ukrainian enterprise, whether they have enough authority to enter into an agreement for the sale of corporate rights, whether the enterprise and the participants comply with legal requirements, etc.

Ukrainian legislation establishes certain rules for the disposal of corporate rights, as well as the conditions that must be met for such disposal. For example, if the seller sells only a share of the corporate rights (rather than 100% of all shares), the consent of the other participants that have a pre-emptive right to acquire such a share is required. The consent of the spouses is also required if the share is alienated by an individual (in the absence of a marriage contract regulating such matters).

Related article: [Legal Due Diligence in Ukraine: uncovering risks](#)

It should be kept in mind that only the fully paid-up share can be alienated, so it is necessary to check how the authorised capital of the Ukrainian company was formed and paid-up.

It is also necessary to check the history of the relationship between the participants, in particular, whether the withdrawal of former participants is complete, whether there are (or may be) disputes regarding the withdrawal of a participant or the acceptance of an inheritance (share).

In addition, it is also important to ensure that the participants and/or manager of the company have followed all legal requirements for the execution and/or updating of the company's incorporation documents and information about the company.

For example, all limited liability companies must have brought their incorporation documents into compliance with the Law of Ukraine "On Limited Liability Companies and Additional Liability Companies". In practice, however, some enterprises (especially the "dormant" ones – those not conducting business activities and waiting for a buyer) often fail to register relevant changes in their constituent documents. This carries the risk to at least delay the transaction of sale and purchase of corporate rights.

Ukrainian companies also sometimes fail to comply with the requirements to

disclose their ownership structure and to update their ultimate beneficiaries.

Thus, not only the enterprise itself is audited, but also the corporate rights held by its participants, potential encumbrances on such rights and the participants' ability to fully dispose of the rights.

It is also necessary to analyse whether the agreement for the sale of corporate rights would require the approval of certain authorities. In particular, under some circumstances an agreement for the sale of corporate rights must be approved by the Antimonopoly Committee of Ukraine.

### Land issues

Land issues are one of the reasons why investors prefer to buy ready-to-build projects rather than building their own project from scratch. It is because allocation of land usually requires much time and preparation of numerous documents.

In order to accommodate a renewable energy facility in Ukraine, a land plot must meet several basic criteria:

1. It must be owned or leased by the enterprise owning the project.
2. Its designated use must be "...energy industry land..."
3. It must not be located in a legally protected area: forest, water, historical, etc.

However, even if all required documents are available, it is also necessary to check the grounds for obtaining such documents. For instance, if the lease agreement for a land plot was entered into in violation of the procedure, this is the basis for invalidating such an agreement in the future with certain legal consequences. This also applies to the allocation of a land plot in violation of the respective protected areas or in the event of a change of the land plot's designation.

In some cases, the change of designation of a land plot occurred even though the law expressly prohibits changing the designation of such land plots. Or, for example, when a Ukrainian company has obtained all necessary permits and documents, but the intended use of the land plot does not comply with the requirements of Ukrainian legislation. At the same time, in most cases a land plot is allocated not in one but several adjacent lots.

It should be noted that the regulations for allotment of land plots may differ for auxiliary buildings and structures (e.g., power lines or substations). For instance, land for transmission line supports may be allocated under an easement.

It is also necessary to pay attention to the obligations of the land user, including monetary obligations, and the extent thereof.

In addition, during the Due Diligence, the land user's compliance with the obligation to update information about the land plot is verified. For example, the landowner may have outdated documents and the information about the land plot in the Land Register may be incorrect.

Additional project capacities should also be considered: for completed or partially completed projects, the availability of a vacant (additional) land plot with all the necessary characteristics, on which additional construction can be carried out, can be considered a further advantage.

### Technical issues and permits

When checking the facility documentation, first of all, it is necessary to pay attention to:

1. the availability of all documents necessary for further construction and commissioning. Note that different additional documents may be required for different renewable energy projects.
2. the order in which these documents have been obtained and its compliance with the established procedure. For example, commissioning cannot take place before a building permit has been issued. This may seem absurd, but it is possible in practice.
3. compliance of the documents with the current legislation. In practice, there are cases where a preliminary contract for the sale of electricity has been signed not with the Guaranteed Buyer, but with the former enterprise (the state enterprise Energorynok). Or documents that were not required at the time of documentation development, but are mandatory under current legislation, are not available.
4. compliance of the documents with the technical capabilities. There are cases when the documents seem to be in order, but when the technical capabilities are checked it turns out that the actual transfer of the planned capacity is technically impossible. In such cases, either the capacity has to be reduced or a new substation and transmission line have to be built at the developer's expense, which will consequently affect the cost of the project itself.

It is also worth considering the location of the project. For example, the cost of the project may be determined by:

- the distance to the connection point and the cost of connection,
- the geographical terrain and accessibility of roads which may complicate or preclude delivery of equipment or heavy machinery for construction,
- availability of raw material and willingness of the supplier to sell it (in case of biogas/biomass production), etc.

Also when buying fully or partly constructed projects it is necessary to take into account the order and date of commissioning as this determines the rate of the 'green' tariff in Ukraine.

In addition, some projects are sold with additional capacity. Indeed, a project may be sold with all documents and the land under it may be twice the size needed for the project. On the one hand this provides further possibilities of building a power plant of higher capacity, but on the other hand it is necessary to check whether such a project is feasible.

Also, when buying finished projects in Ukraine, in addition to assessing the

above-mentioned risks, it is important to additionally check the availability of the 'green' tariff and all the necessary documents. In some cases small projects may not be able to obtain the 'green' tariff, thus selling electricity under the general market rules.

### **Other issues**

For the most part, audit of other matters follows the general procedure of Due Diligence. It is essential to confirm:

- the proper registration and conduct of the employment relationship in the enterprise,
- the absence of contracts and commitments with high risks,
- the absence of credit obligations, other debts,
- the absence of disputes, in particular litigation, the absence of enforcement proceedings,
- the absence of arrests, encumbrances, pledges,
- the proper maintenance of accounting records,
- the proper registration and accounting of the assets of the Ukrainian company,
- the timely and complete reporting,
- the absence of debts before the state, etc.

The presence of problems in any of these categories carries the risk of negative consequences for investors, ranging from fines to loss of control over the Ukrainian assets. Therefore, a full and professional Due Diligence of a renewable energy project could save an investor's time and money, as well as protect against many possible risks in the future.