

Documenting the damage caused to agribusinesses by the war in Ukraine

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As a result of the Russian aggression, the Ukrainian agricultural business has suffered significant losses, and continues to do so. Ukraine is in the process of developing and implementing legal mechanisms to compensate for such losses. In terms of actual compensation, these mechanisms are not working yet since there is a war going on.

Even after the war is over, one should not expect quick payments as reparation mechanisms have not been in operation for decades and require, if not development, then adaptation to present realities. The intentions of the international community to compensate the losses of farmers in Ukraine through the collection of reparations from the aggressor will require adjustments and supplementation, both of Ukrainian legislation and at the level of international treaties.

The dynamics of the agribusiness do not allow agricultural companies to wait for the actual reimbursement. Most begin to quickly restore

capacity and operate on the land. After such restoration is carried out, it is much more difficult to prove damage and claim compensation if the damage has not been properly documented.

Therefore, the most pressing issue today is the recording of damage caused by the hostilities or other factors related to the Russian aggression. After all, no matter how the methodologies of determining the amount of damage and the procedures for its recognition and compensation may change, they will be applied based on the evidence demonstrating such damage.

1. Current regulation of the damage assessment procedure

To date, the key pieces of legislation providing guidance on how war damages can be awarded to businesses are as follows:

- The Order approved by Resolution of the Cabinet of Ministers of Ukraine No. 326 as of 20.03.2022, "On Approval of the Procedure of Determination of Damage and Losses Inflicted on Ukraine as a Result of the Armed Aggression of the Russian Federation";
- The Methodology approved by Order of the Ministry of Environmental Protection and Natural Resources of Ukraine No. 167 dated 04.04.2022, "On approval of the Methodology for determining the amount of damage caused to land, soils as a result of emergency situations and/or armed aggression and military operations during martial law".
- The Methodology approved by Order No. 295 of the Ministry of Agrarian Policy of 18.05.2022 "On approval of the methodology for determining the damage caused to the land fund of Ukraine as a result of the Armed Aggression of the Russian Federation".
- Methodologies, rules, and procedures that were adopted before the war but are also used to regulate procedures for compensation for damages caused by the war (e.g. the Methodology for determining the amount of damage caused by pollution and contamination of land resources due to violation of environmental laws, approved by Order No. 171 of the Ministry of Environmental Protection; Resolution of the Cabinet of Ministers of Ukraine No. 1325 "On approval of norms of maximum allowable concentrations of hazardous substances in soils, as well as of the list of such substances"; the Methodology for determining the amount of damage caused by unauthorised occupation of land plots, use of land plots not for their designated purpose, land damage, violation of the regime, norms, and rules of their use, approved by Resolution of the Cabinet of Ministers of Ukraine No. 963; the Order of determining damages and compensation for land owners and land users, approved by Resolution of the Cabinet of Ministers of Ukraine No. 284, etc.).

The Order establishes the procedure for determining the damage and loss sustained by Ukraine as a result of the armed aggression of the Russian Federation. The determination of damage and loss is carried out separately for different areas and indicators related to these areas. Regarding agribusiness activities, the most relevant areas are as follows:

a) losses of the land fund, which includes losses of the land fund as well as related lost profits. Determination of damage and losses is carried out in accordance with the Methodology, approved by an order of the Ministry of Agrarian Policy, in agreement with the Ministry of Integration. The regional state administrations, Kyiv city state administration (during martial law – military administrations) are responsible

for determining damage and losses in this area. In determining damage and losses the following indicators shall be assessed:

- actual costs for recultivation of lands that were damaged as a result of military operations, construction, arrangement, and maintenance of engineering and fortification constructions, fences, boundary signs, boundary openings, means for arrangement of the state border;
- losses incurred by owners (land users) of land plots of agricultural purposes;
- expenditures for restoration of land melioration areas;
- de-mining costs.

b) economic losses of enterprises, including losses of enterprises of all ownership forms due to destruction and damage of their property, as well as lost profits due to impossibility or hindrance in performance of economic activity. Determination of damage and losses of enterprises is carried out according to the methodology approved by a joint order of the Ministry of Economy and the State Property Fund of Ukraine, upon approval of the Ministry of Reintegration of Temporarily Occupied Territories. The regional state administrations, Kyiv city state administration (during martial law – military administrations) are responsible for determining damage and losses in this area with respect to companies.

In determining the damage and losses the following indicators are assessed:

- the value of the companies' lost, destroyed or damaged property;
- lost profits of the companies;
- losses of companies from the goods, works and services provided and consumed in the temporarily occupied territories that were not paid for.

c) damage caused to land resources, which includes damage caused by pollution and contamination of land resources. Determination of damage and losses shall be carried out in accordance with the methodology approved by the order of the Ministry of Environmental Protection and Natural Resources upon submission of the State Environmental Inspection in agreement with the Ministry of Reintegration of Temporarily Occupied Territories. The State Environmental Inspection is responsible for determination of damage and losses in this direction. When determining damage and losses the following indicators are assessed:

- damage of soils and land plots due to soil contamination with substances negatively affecting their fertility and other useful properties;
- damage of soils and land plots as a result of contamination of land plots with foreign objects, materials, waste and/or other substances.

Currently, these indicators are not exhaustive and can be further supplemented.

2. Documenting damages

The documentation of the damage involves the collection of evidence of the occurrence of the damage and the preparation of documents which prove the damage. The legal logic for proving such circumstances is similar in general to peace-time emergencies. Obviously, some ways of collecting evidence may not be available given the objective circumstances (hostilities, shelling, occupation). Certain changes to the way in which evidence is recorded and the list of admissible evidence are likely to be introduced at a later date. But it is important to record damage rather than waiting for such changes or clarifications.

Overall, the fixation of damage has a basic algorithm, regardless of the circumstances in question:

- establishing the condition of the property (soils, economic condition, etc.) prior to the occurrence of the adverse circumstances (in this case, hostilities). Basically, it is a question of proving that the property was intact (soils are not contaminated, economic condition is better);
- establishing the condition of the property (soil, economic condition, etc.) after the occurrence of the adverse event;
- confirming the fact of the existence of adverse circumstances;
- establishing a causal link between the adverse circumstances and the change in the condition of the property (soil, economic condition, etc.).

At present, the relevant adverse circumstances are hostilities and their consequences. Therefore, in any case, when collecting evidence of damage, security considerations must be the first priority.

3. Evidence

Under effective law, possible pieces of evidence may include the following:

- documents issued by authorised state bodies and officials;
- documents issued by the agricultural company that has suffered the damage, including video and photo evidence;
- testimonies of witnesses.

4. Documents issued by authorised state bodies and officials

Such documents may include as follows:

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- documents confirming the occurrence of force majeure issued by the Chamber of Commerce and Industry of Ukraine;
- protocols/decisions of the commission on technogenic and ecological safety and emergency situations at the regional (district) state administration, recognizing events and consequences of the emergency situation;
- fire certificates;
- confirmation of the Ministry of Defence of Ukraine, etc.

5. Documents issued by the agricultural company having incurred damages

Such documents may include:

- certificates of inventory of the property;
- orders on the impossibility of using the property;
- orders for putting the property into operation;
- documents confirming the use of the property at the time of the damage.

In circumstances where it may be difficult to obtain documents from the relevant state authorities, special attention should be paid to the order of internal execution of documents of the agricultural company, video and photo documentation and witness testimonies.

5.1. Inventory

In the case of loss, damage or destruction of the company's property, an inventory must be taken. The inventory shall also include video and photographic evidence of damage.

The decision to take an inventory must be documented in an order. The order defines, among other things, the inventory type.

Typically, an inventory may be carried out by:

- an inventory commission;
- a special commission for recording and documenting the damage caused, which in addition to the company's employees also includes outside experts;
- by an authorised person.

The commission or an authorised person is appointed by order of the head of the company.

If a commission is formed, it should include persons with special knowledge of the condition of the property (engineers, technicians, agronomists, accountants, etc.). The commission is appointed to identify damage or destruction to the property, assess its condition, establish the cause of the property damage, evaluate it, document it, including by means of video and photo recording.

If an authorised person is appointed, such a person shall carry out the inventory with the involvement of two or more witnesses. Witnesses do not have to be employees of the company. It is reasonable to engage representatives of local authorities and departments of the State Emergencies Service, the National Police, and local residents. Information about witnesses is recorded in the inventory records. Witnesses must sign these records.

As a result of hostilities or occupation, it may be objectively impossible to ensure a proper inventory procedure (issuing an order, involving witnesses, etc.). In such a case, the recording, documentation and establishment of the evidence base of the facts of direct property damage to the agricultural company as a whole may be carried out by its employee or even some other person.

5.2. Video and photo documentation

When taking video recordings, it is important to note

- the time and place of filming;
- the identity of the person filming the video;
- the details of the property being filmed;
- information about the owner of the property;
- a verbal description of the damage;
- a verbal description of the circumstances in which the damage occurred;
- information about the witnesses.

This information may be spoken out during the filming so that it accompanies the visual part.

The photographic record should include the documenting of each individual damage as well as the damaged object as a whole. A separate document containing the same data as the video recording itself should preferably be prepared during the photo capture. Such a document should be signed by the person taking the photographs and the witnesses.

5.3. Witness statements

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The witness statements must be recorded on paper and signed by the witnesses. It is obligatory to indicate the following details of the witnesses:

- surname, first name, patronymic;
- details of their identity document;
- contact details: contact phone number, email address, link to Instagram, Facebook profile, etc.

If possible, all evidence collected should be backed up electronically and stored in the cloud. Even in the case of complete destruction of documentation, it will be possible to recover information about the damage and seek compensation.