

Protection of Ukrainian land assets from possible raider attacks

1. Hostile schemes
2. Automatic renewal of lease agreements
3. Simplified procedure for lease agreement registration
4. Simplified procedure for lease assignment
5. Land lease agreement is a significant transaction
6. New rules for writing of awards on the manager change
7. Changes in registration procedures

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1. Hostile schemes

In most cases, the agricultural business in Ukraine is conducted on leased lands. The connection with the primary production asset of an agricultural company, land, is mainly determined by the land use rights, rather than the rights of ownership to it. This legal bond provides some opportunities for land raiders to implement fraudulent schemes to take over the lease rights of Ukrainian agricultural companies.

In most cases such schemes involve:

- tracking by land raiders of the contracts that are expiring and entering into lease agreements with landowners before the renewal of a lease agreement by an agricultural company;
- termination of existing lease agreements by the executives of agricultural companies as a result of collusion with them;
- manipulation with state registries, allowing the change of manager of an agricultural company and the realization of the termination of lease contracts followed by the conclusion of the contracts with a raider.

These schemes are not new, and many Ukrainian agricultural companies are struggling with them, establishing strict controls over the authority of directorship, management of lease rights, and cooperation with lessors. However, under conditions of war, when communications and logistics can be disrupted and access to state registries is limited, such measures of corporate control may be ineffective.

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Ukrainian lawmakers have responded to the wartime challenges by adopting several laws aimed at creating tools to protect agribusinesses from land raiders. At the same time, these tools, while regulating and sometimes simplifying certain formal procedures, require a proper application.

2. Automatic renewal of lease agreements

As realized by Law of Ukraine "On Amending Certain Legislative Acts of Ukraine on creating conditions for food security under martial law" No. 2145-IX of March 24, 2022 (hereinafter, – the Law on Food Security), the automatic renewal is essentially a one-year extension of the lease without signing any additional agreements (or new contracts) and without entering information about the renewal of the contract in the State Register of immovable property rights.

Such automatic renewal is allowed under the following contracts:

- lease, sublease, emphyteusis, superficies, a land servitude; state, communal property, unclaimed, unallocated land plots;
- which are subject to lease term expiration after the introduction of martial law; those remaining in collective ownership and being leased out by local self-government authorities;
- under which the following types of agricultural land plots are leased: private property.

Important to bear in mind

Automatic renewal of lease agreements is not a way to manage lease rights. It should not be considered as an opportunity to save money on the formalization of lease relations or as a vacation for the "land manager" (land lease specialist) of an agricultural company. Automatic renewal of contracts is a crisis tool, which gives Ukrainian agricultural companies time (1 year) to properly renew the lease of land, i.e. the conclusion of new contracts, their proper registration, etc., without fear of the lease hostile interception.

As stated above, lease agreements will be automatically renewed for 1 year. At the same time, termination or cancellation of martial law in Ukraine under the Law on food security will not be the reason for termination of automatically renewed contracts. But this Law, for example, also does not regulate the repeated automatic renewal in case martial law lasts longer than 1 year. This precisely unclear wording may become a loophole for land raiders.

Therefore, Ukrainian agricultural companies should spend this year formalizing the extension of land use, if it is possible. Namely, it is vital to generally conclude and register agreements on the extension of the lease term or to conclude new lease agreements for the land plots.

3. Simplified procedure for lease agreement registration

The Law on food security grants district military administrations the authority to register land lease agreements, in particular:

- lease agreements for agricultural land plots leased out by executive authorities and local administrations;
- lease agreements for agricultural land plots leased out by permanent users, emphyteutae;
- lease assignment agreements;
- agreements on amendments to the indicated agreements and agreements on their termination.

Important to bear in mind

The simplified procedure specified by the Law on Food Security does not refer to the rules of registration of private property lease agreements. The vast majority of agricultural land cultivated by agricultural companies in Ukraine is leased by private owners. Therefore, this simplification, in principle, has relative efficiency, because the very management of land lease agreements concluded with thousands of counterparties is the most complex thing.

4. Simplified procedure for lease assignment

The Law on Food Security allows tenants and subtenants to make an assignment of the land lease (sublease) to another person for up to one year term. Such an assignment is formalized by a written agreement concluded in an electronic form. In this case, the consent of a landowner is not required as it is sufficient to inform him of the fact of assignment within 5 days from the date of the state registration of the lease agreement. The registration of such an agreement is conducted by district military administrations, while the transfer of the leasehold is not subject to registration at all.

Important to bear in mind

The simplification of the lease assignment paperwork has a negative side too. By implementing the scheme of land seizure through collusion with the management of an agricultural company, raiders can quickly obtain the right to use large areas of land. Thus, the Law provides that the agreement on the land use assignment cannot be renewed or concluded for a new term, and it is terminated upon the expiry of its term. However, for Ukrainian agribusiness, 1 year is a huge period during which a raider can block an agricultural company's access to the land plots, collect a harvest, work with the landowners, etc. The consequences of such a situation can be extremely negative.

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To avoid this, it is necessary to separate and restrict the competence of the manager of a Ukrainian agricultural company in the foundation documents regarding the conclusion and execution of the agreements on the land use assignment.

5. The land lease agreement is a significant transaction

Law of Ukraine "On Amending Certain Laws of Ukraine to Improve the Anti-Raiding Mechanism" No. 2255-IX of May 12, 2022 (hereinafter, – the Law on Improvement of the Anti-Raiding Mechanism) stipulates that a transaction on the termination of the lease (sublease) of agricultural land is significant. This rule applies if:

- a lessee (a sub-lessee) is a legal entity of private law;
- a lessee (a sub-lessee) is neither a joint-stock company nor a full and limited liability company;
- the charter of a lessee (a sub-lessee) does not explicitly stipulate that a transaction on termination of a lease (a sublease) for agricultural land is not significant.

If the decision of the supreme governing body of a lessee (a sub-lessee) on granting consent to such a significant transaction is absent, such a deed is considered null and void.

Important to bear in mind

First of all, it should be taken into account that this rule will take effect on 26 September 2022. Until that time, it is necessary to apply the mechanism of restricting a director's authority to terminate lease agreements by establishing a corresponding regulation in the company's foundation documents. In any case, we should not fully rely only on the mechanism defined by the Law on Improvement of the Anti-Raiding Mechanism.

For example, this Law does not cover the risks of possible assignment of the lease to third parties by the manager of a Ukrainian agricultural company. As indicated above, the Law on Food Security currently provides for the possibility of a simplified procedure for such an assignment.

In addition, agricultural companies which have not yet made such restrictions in their foundation documents will have to take care to obtain the approval of the company's highest governing body regarding the termination of lease agreements. Certainly, the termination of lease agreements by an agricultural company itself is an unusual phenomenon. But such cases occur, for example, during optimization of land bank management, when within one group lease agreements are reissued from one Group Company to another one. At present, for such a technical operation as such, the approval of the highest governance body of an agricultural company is required, even if previously the charter of an agricultural company has not contained any restrictions on the conclusion of the contracts for termination of lease agreements by its manager.

When acquiring the leasehold on legal grounds, it will also be necessary during the legal due diligence of such rights to pay attention to the existence of a decision by which such an assignment is approved, and to include this document in the relevant checklists.

6. New rules on the writing of awards regarding the change of a manager

According to the Law on Improvement of the Anti-Raiding Mechanism a decision to change the manager of a legal entity shall be signed by all founders (participants), who have voted for such a decision, and provided that the number of their votes is sufficient for the decision. This mechanism is not subject to the application if a Ukrainian agricultural company is a joint stock company and when more than 10 people are required to make such a decision.

It is important to bear in mind

Despite the changes in the management of a company, such a procedure for changing managers will become a routine corporate formality. It will be necessary to monitor its implementation, because as a result of a legal but improperly executed change of manager, his authority may be called into question.

This rule will take effect on 26 September 2022.

7. Changes in registration procedures

The Law on Improvement of the Anti-Raiding Mechanism also introduces a number of innovations regarding:

- procedures for amending the state registers of Ukraine;
- informing the owners about the registration actions related to their assets;
- procedure for appealing against decisions, actions, or omissions of the state registrars and some other procedures;
- easing of the requirements for filing complaints against the state registrars;
- an extension of a period for appeals;
- halting the expiry of the term in the event of returning an improperly filed complaint;
- the right of the Ministry of Justice of Ukraine to prohibit any registration actions during consideration of the complaint on registration actions and some other registration procedures.

Important to bear in mind

These innovations should enable agricultural companies to detect and quickly stop raider seizures. However, their efficiency shall be put to the test and it is too early to assess it.

In addition, as practice shows, if there is already a need to appeal the actions of registrars, it confirms that the process has gone too far. Under such conditions, agricultural companies will require much more resources to protect themselves from raiders. From this point of view, it is more effective to exercise permanent control over the land bank and to regulate the powers of the Ukrainian agricultural company representatives, the procedure for their appointment, and change.