

Grain storage and elevator construction in Ukraine

Introduction

1. Rules of grain storage

2. Elevator acquisition

3. Elevator construction

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As a result of the aggression of the Russian Federation, large-scale destruction of agricultural infrastructure and long-term sea blockade of Ukrainian ports, the issue of grain storage in Ukraine has become extremely pressing. This is primarily due to the necessity to store large volumes of both the previously accumulated grain and the grain harvested in 2022. According to forecasts, by early October 2022, the deficit of grain storage capacities in Ukraine could reach 10-15 million tonnes.

The need to restore the infrastructure of grain storage facilities and the growing demand for their services create opportunities for rapid development of this industry. To effectively invest in grain storage business and construction of elevators it is important to understand the basic legal conditions for such a business in Ukraine.

1. Rules of grain storage in Ukraine

The key law that establishes the basic rules of grain storage is the Law of Ukraine "On Grain and the Grain Market in Ukraine". In addition, document flow matters associated with grain storage (issuance and circulation of storage documents), accounting of grain (procedure of declaration, maintenance of registers of storage documents), technical and permitting issues and a number of other matters associated with the construction and operation of grain storage facilities are subject to special regulation.

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Grain is to be stored in grain storage facilities (e.g., grain elevators, bread bases, bread receiving facilities, flour mills, and feed mills). However, grain producers also have the right to store the grain they produce in their own or leased premises without special permits.

It should be taken into account that in Ukraine it is not the specific premises where grain is stored (such premises are called granaries) but the companies or entrepreneurs who own granaries and provide grain storage services, issue storage documents for grain and have the right to perform such activity that are considered to be grain warehouses.

Grain storage services include reception, processing, storage, and shipment of grain.

In Ukraine, grain storage services are not subject to licensing. However, owners of granaries who plan to provide such services with the issuance of warehouse documents must be participants (temporary participants) in the Guarantee Fund for ensuring obligations under warehouse documents for grain. It is mandatory for grain warehouses to participate in the Guarantee Fund. Provision of grain storage services with the issuance of warehouse documents for grain by persons other than participants (temporary participants) of the Guarantee Fund is prohibited.

In addition, grain storage and processing activities in Ukraine are classified as high hazard works. Therefore, to perform such works (in fact, for the proper functioning of a grain warehouse as such), a grain warehouse must obtain a permit to perform high hazard works and operate machinery, mechanisms and equipment of high hazard.

If the grain storage has a laboratory for analysing grain quality, the laboratory may be accredited and certified to carry out the claimed activity.

Grain that is in storage shall be subject to declaration (declarations shall be submitted according to the procedure established by the Cabinet of Ministers of Ukraine) and quality control (when grain is accepted for storage, a grain warehouse shall analyse its quality).

Grain is stored in a grain warehouse under an agreement on grain storage concluded between a grain owner and a grain warehouse. Such an agreement shall be made in writing, which shall be confirmed by issuing a storage document for the grain belonging to the owner.

Under Ukrainian legislation, warehouse documents for grain are as follows:

- a double warehouse certificate;
- a simple warehouse certificate;
- a warehouse receipt.

A grain warehouse shall be obliged to release the grain at the owner's first request, even if the storage period stipulated by the storage

agreement has not yet expired. However, unless the storage agreement prescribes some other procedure, the owner of the grain shall compensate the warehouse for the costs associated with the early release of the grain.

2. Elevator acquisition

There are different ways to acquire an elevator in Ukraine, namely:

- to acquire a company-owner of an elevator;
- to buy an elevator as a property complex.

The key difference between these two options is that if an elevator is acquired as a property complex, the new owner will have to pass the procedures necessary for the provision of grain storage services (i.e., become a member of the Guarantee Fund, obtain a permit for hazardous works and the operation/use of machinery, mechanisms and equipment of high hazard). By acquiring a company owning an elevator, however, there is no need for this.

Furthermore, the preparation for different acquisition options and the acquisition process itself are also different. While the acquisition of the property complex is subject to a fundamental examination of the legal status of the assets being sold and the seller's powers, the acquisition of corporate rights of a grain elevator company must also include a separate examination of corporate matters, liabilities, and history of the target company.

The property complex of an elevator is acquired according to the rules established for real estate purchase and sale, effective in Ukraine at the moment of conclusion of such an agreement (notarisation of a sale and purchase agreement, registration of proprietary right to real estate). Acquisition of an elevator company is carried out subject to the regulation of corporate relations (following the procedure for alienation of corporate rights, securities, obtaining corporate approvals, amendments to constituent documents and state registers).

The particularities of Ukraine's post-independence economic development are caused by the fact that most grain storage facilities were previously state-owned and subsequently privatised. Therefore, it is also important to carefully examine the privatisation history of an elevator as non-compliance with privatisation procedures or existence of specific privatisation obligations (e.g., target use of the elevator, limitations on alienation of privatised property within a certain period) may pose a significant risk for further efficient use of the acquired asset.

The process of privatisation of state and municipal enterprises with capacities for grain storage is still ongoing. Accordingly, it is important to consider the provisions of the Law of Ukraine "On Amendments to Certain Legislative Acts of Ukraine to Facilitate the Process of Enterprise

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Relocation under Martial Law and Economic Recovery" published on 18 August 2022, which opens new opportunities for the acquisition of grain storage facilities.

This law simplifies privatisation procedures and allows the sale and registration of title to privatised assets, even if they are encumbered with seizures (unless such seizures have been imposed as part of criminal proceedings). The law also provides for a 1-year suspension of enforcement proceedings.

Besides, the purchaser of such assets will not need to obtain new licenses and permits necessary for the use of properties acquired through privatisation.

In addition to Ukrainian companies, foreign investors may also be buyers of such property. To participate in property auctions in a privatisation process, they must meet the criteria and fulfil the conditions stipulated by the legislation of Ukraine on privatisation (for example, to have a 100% transparent ownership structure, not to be participants or beneficiaries of the Russian Federation or its residents, and to pay a registration fee and a guarantee deposit).

3. Elevator construction

From a technical point of view, the basic stages of elevator construction in Ukraine include the following:

- development and approval of the technical assignment;
- development of the technical scheme;
- designing work;
- construction works;
- commissioning.

The legal support for the elevator construction process required for the technical phases usually covers the following:

- establishment (acquisition) of the company owning the prospective elevator;
- registration of the right of ownership or the right to use the land plot on which the elevator is to be built;
- concluding agreements;
- obtaining of permits and approvals;
- commissioning;
- day-to-day operation of the elevator as a grain warehouse.

a) Establishment (acquisition) of the company owning the prospective elevator

This company will be a party to all contracts and approval procedures related to the elevator construction (e.g., obtaining the ownership or use of land for construction, construction works, obtaining building permits, connection to utilities). In Ukraine, the most efficient legal form for such company is a limited liability company. When establishing such a company, its activities relating to the grain storage and the provision of storage and processing services must be carefully considered and reflected in the company's charter.

b) Registration of the right of ownership or the right to use the land plot on which the elevator is to be built

In most cases, such land plots are in municipal or state ownership, thus registration of rights to them may take a long time and will require compliance with a large number of conditions and procedures. The Ukrainian government has approved a draft law to simplify the procedures for obtaining land titles and for the commencement of construction during the implementation of projects aimed at economic recovery. According to the draft law, during martial law and the recovery period, for industrial projects worth over EUR 500,000, it is proposed to:

- reduce the terms for acquiring rights to a land plot – from 18 months to 3 months;
- transfer the right to a land plot without an auction, without land management documentation, and with guarantees for the alienation of the plot;
- allow the change of land use designation and construction planning without the observance of town-planning conditions and restrictions of the condition of compliance with construction standards).

c) Concluding agreements

In general, the agreements related to the elevator construction process (such as land leases, general contracts, geological survey contracts, design contracts, equipment supply contracts, installation contracts) are standard for any other design, construction, supply and service activities.

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With respect to the grain elevator construction process, the main requirement for such agreements is to clearly regulate the conformity of the results to the technical conditions and the observance of the construction deadlines, to define the delivery conditions, to formulate the

appropriate wartime force majeure clauses, and to clearly regulate the parties' liability and consequences in case of non-compliance with the terms of the agreement.

d) Obtaining of permits and approvals

The permits are drawn up during the whole period depending on the stage of construction and launch of the elevator. Under martial law, the Ukrainian government sets a number of concessions and reliefs with regard to the permitting procedures or even waives them completely. The list of such concessions and exemptions changes dynamically as Ukraine's economy and legislation adapt to the harsh wartime conditions. Accordingly, the order (or even the need) for obtaining permits must be determined at each stage of elevator construction and operation according to the rules in effect at that time.

e) Commissioning

Under Ukrainian law, for any completed construction project, documentation must be available to verify its commissioning and compliance with building standards and regulations. Commissioning is the final stage of construction of an object allowing the proper registration of title and the ability to connect the object to technical infrastructure and utilities. An object is deemed to be ready for commissioning when all works (construction and assembly, finishing, commissioning) have been completed and all related paperwork has been drawn up and duly approved. The list of permits and approvals will depend on the class of impact and category of difficulty of the elevator as a construction object.

f) Day-to-day operation of the elevator as a grain warehouse

In spite of the fact that grain storing activity in Ukraine is not subject to licensing, operating an elevator nevertheless requires a number of permits (e.g., permit to carry out hazardous works, emission permit, permit to work with precursors for the laboratory). In addition, the provision of grain storage services involves maintenance of special records of storage documents, grain and, therefore, maintenance of relevant registers and related reporting.