

How to effectively perform Legal Due Diligence in Ukraine

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1. General Legal Due Diligence algorithm

Legal Due Diligence in Ukraine is a rather complicated process. Obviously, the scope, timing, and complexity depend on the specific operation, but in general, the algorithm is standard: legal audit preparation, performance, and registration of legal audit results. It seems simple, just like all complicated things do.

Each of the components of this algorithm is a planned process, and each error that slows down the transaction leads to incorrect decisions, which may result in the deal falling apart.

In general, Legal Due Diligence in Ukraine looks like this:

(Click on the image for the full view)

2. Preparing for Legal Due Diligence

2.1. Defining the purpose and object of Legal Due Diligence

Preparing for Legal Due Diligence is an extremely important step essentially determining the effectiveness of the whole process. At this stage, it is necessary to define and record the customer's vision of its goals and clearly define the Legal Due Diligence object.

For example, the procedure will have different parameters if the customer needs to perform a legal audit as part of the overall assessment of the Ukrainian asset meant to purchase, plans to adjust legal aspects of his Ukrainian company, or prepares for certification. The same applies to the definition of the legal audit object – a company, group of companies, or just a property complex.

Besides, at this stage, Ukrainian lawyers help the customer to structure its vision and identify the object of a legal audit. Legal Due Diligence is always a part of a business process, and lawyers need to see the full picture to ensure the synergy of legal audit procedures and results with other transaction processes.

Moreover, a clear definition of the customer's request and object is essential to formalize the relationship between the parties – the definition of conditions and signing of agreements between all participants in the process.

2.2. Entering into agreements and determining the communication structure

In the second stage of preparation for Legal Due Diligence, the parties to the process enter into agreements – an agreement on Legal Due Diligence in Ukraine and agreements on non-disclosure of confidential information.

An important event at this stage is also a constituent meeting with the participation of representatives of all the transaction's parties. Such a meeting should address issues of communication, authority, requirements for lawyers and staff involved in the process by the customer, and the target asset, timing, and ways to resolve possible conflicts – in other words, there should be no obstacles for a continuous process.

2.3. Preparation of questionnaires

The third stage of Legal Due Diligence preparation depends entirely on Ukrainian lawyers, as they at this stage, having sufficient information about the customer's goals and characteristics of the target asset, form requests based on which they will receive information, and documents.

Typically, a query (questionnaire) includes documents and information to analyze:

1. corporate and functional structure of the target asset in Ukraine, 2. management structure and relations with Ukrainian management, 3. ownership structure of the target asset, 4. legal status and encumbrance of property owned and used by the target asset, 5. liabilities of the Ukrainian target asset to third parties, 6. litigation, enforcement proceedings, criminal or administrative proceedings of the target asset, 7. an intellectual property of the target asset, 8. permit documentation, 9. target asset's compliance with the antitrust law of Ukraine, 10. issues of labor relations, 11. issues of personal data protection.

However, an individual questionnaire must be developed for each target asset based on its characteristics.

For example, when conducting Legal Due Diligence of a company that is a regional dealer of equipment, the priority is the analysis of obligations – contracts with suppliers and buyers, contracts for the use of trademarks, terms of guarantees for the sold equipment. It is also necessary to analyse the availability of warehouses and areas for storage of equipment, repair shops, repair equipment, presentation sites, etc.

Legal audit of agricultural assets in Ukraine should include analysis of land use or ownership rights, ownership of industrial buildings and facilities, availability of

specific permits (related to the operation of elevators, grain dryers, farms), as well as specific regulation of labour relations (seasonal workers, dangerous working conditions, etc.).

The audit of Ukrainian IT companies includes a fundamental analysis of intellectual property and personal data protection.

Legal Due Diligence of groups of companies must include, in particular, a wide range of documents and information on compliance with antitrust laws of Ukraine.

The documents required to determine the corporate issues of a joint-stock company are different from similar documents of a limited liability company.

As a rule, no list is limiting and final. Once the initial information is received, Ukrainian lawyers form an additional clarifying request, accordingly.

2.4. Virtual Data Room creation

Obviously, such volumes of information contain hundreds of pages of documents, tables, statements, kilograms of paper, and gigabytes of files. Such a load of information can simply crash the performers and destroy the process unless it is structured.

The main tool of data structuring is the Virtual Data Room – a network repository where data is accumulated and systematized. This repository allows to control the exchange of documents, prevent re-requests, set priorities in data research, and distribute the analysis of data within the team of Ukrainian lawyers among specialized lawyers.

Should the originals of the documents be subject to examination, such repositories allow to organize verification sessions – to establish the correspondence of the provided electronic copies (photographs, scanned copies) to the originals, and not to randomly exchange the originals of documents, constantly exposing them to the risk of loss.

3. Data collection, analysis, and interpretation

Legal analysis is akin a scientific study. For this stage, the communication protocols are established – Ukrainian lawyers constantly have additional queries, questions; discrepancies may arise between the lawyers and the target asset's staff regarding the expediency of providing documents or conclusions on the submitted documents. Without pre-established rules, this will be a bumpy ride.

The legal analysis ends when the experts run out of questions and the Ukrainian target asset runs out of documents. It is a joke by all means, but there is some truth to it – Legal Due Diligence is an extremely meticulous analysis of assets.

Another critical step is the interpretation of the received information. At this stage, the quality of Legal Due Diligence depends entirely on the professionalism and experience of the lawyers, their vision of potential risks. The conclusions forming the basis of the Legal Due Diligence report are built on this vision.

The Legal Due Diligence report is based on the same structure as the questionnaires. Such a report must contain a register of the received documents used by the Ukrainian lawyers for making conclusions.

4. Preparation and issuance of the Legal Due Diligence report

Until the report is approved, representatives of the Ukrainian target asset and the customer will get acquainted with it. The lawyers are not required to make changes to the report at their request, however, they may record comments in a separate document.

In practice, there are often cases where some of the deficiencies identified in the Legal Due Diligence process have been adjusted at the time the draft report is ready, or the circumstances have actually changed. In this case, if the representatives of the Ukrainian target asset provide appropriate evidence of such circumstances, the report may be adjusted. But as a rule, the lawyers draw conclusions based on information and documents as of the date of their submission. That is why it is important to include or mention in the report the date the information or documents were provided.

A report issued by the Ukrainian lawyers completes the Due Diligence procedure, which is then confirmed by relevant documents.