

Land Rights: Development Trends in 2008

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Analysis of the legislative amendments and the legal practice in Ukraine over 2008 suggests the following main trends in the development and state regulation of land relations in the period in question.



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1. Introduction of Competition Principles for the Acquisition of Rights to State and Municipal Lands

The *Land Code of Ukraine* which came into force in January 2002 introduced competition for the acquisition of titles to construction-free state and municipal lands.

However, there were different rules for the lease of the state and municipal lands prior to 2008, when such construction-free lands were leased on the basis of a competition only if two or more parties expressed their interest in the lease of one land plot.

At the beginning of 2008, Ukraine introduced an exclusively auction-based mechanism for the lease of construction-free state and municipal lands. This approach, however, did not take into account special rules established for the acquisition of rights to certain kinds of state and municipal lands, for example the lands intended for the use of their mineral resources or water, and could result in conflicts when the rights to use minerals and/or water belong and the rights to use land belong to totally different people. These drawbacks were often highlighted by various experts. The relevant observations were also made by the National Security and Defence Council of Ukraine.

In this context, the amendments made to land legislation in June 2008 established a number of exceptions from the auction mechanism used for the acquisition of lease rights to the state and municipal lands (e.g. as regards the leasing of lands for use of special water and mineral resources).

According to the amendments to land legislation which came into force in October 2008, the same auction mechanism was extended also to the right to develop state and municipal lands (superficies).

Thus, Ukraine has introduced auctions for the acquisition of construction-free state and municipal lands. The law, however, does not establish a mechanism for holding such land auctions, which is a significant barrier to the efficient acquisition of rights to state and municipal lands through auctions.

2. Circulability of Land Rights

2.1. Circulability of Private Land Lease Rights

Before October 2008, the circulability (the possibility of sale, pledge, or contribution to the corporate charter capital) of private land lease titles was rather disputable. In

practice, the land lease right would not normally be recognised as circutable, except for the right to mortgage. The peculiar feature of mortgage is that at the beginning of 2006 mortgage legislation was supplemented with a norm which actually makes it possible to mortgage land provided for development. In practice, especially in relations with foreign creditors, such agreements would often be concluded to secure loan obligations.

In October 2008, land legislation was amended and the private land lease right was recognised as circutable, i.e. such right can be alienated, including its sale at auctions, pledged, passed down (inherited) and used as a contribution to charter capital. In particular, it is stipulated that private lands can be leased for up to 50 years.

Thus, as of October 2008 private land lease rights can be sold, pledged, and contributed to the charter capital for a period of up to 50 years. The terms and procedure for such transactions with land lease rights should be set out in the relevant land lease agreement.

2.1. Circulability of State and Municipal Land Lease Rights

Before June 2008, the circulability of state and municipal land lease rights was disputable. In practice, land owners (state and municipal authorities) did not recognise the circulability of such rights as recognition would deprive them of the possibility to influence the further turnover of such lands.

In this aspect, the mortgage of such lands had certain peculiarities. As mentioned above, at the beginning of 2006 legislation was supplemented with a norm that actually allowed the mortgaging of lands provided for development. In practice, such mortgage agreements were concluded also in relation to state and municipal property.

In June 2008, however, the Ukrainian law was amended to prohibit alienation of state and municipal land lease rights, and the October amendments did not cancel such prohibition, instead making it more specific.

Thus, currently, Ukraine prohibits landholders to alienate to a third party, pledge or contribute to the corporate charter

capital leasing rights to state and communal lands.

Thus, there are risks of default on credit obligations that are secured by the mortgage of lease rights to state and municipal lands.

3. Activated Use of Superficies as the Instrument of Land Acquisition for Development

The superficies (as the right to use the land belonging to another landowner for development purposes) was introduced in Ukraine by the new *Civil Code* at the beginning of 2004. Over 2004-2007, this institute was not widely used as it was not regulated by the *Land Code* (a special law that regulates land relations).

In the middle of 2007, the *Land Code* was brought into compliance with the *Civil Code* and supplemented with norms envisaging superficieses.

At the beginning of 2008, however, land legislation was amended with a norm requiring that the rights to all construction-free state and municipal lands be acquired through auctions.

The appearance of this norm, as well as the absence of a land auction procedure, which made it impossible to conduct any auctions, resulted in the active application of the superficieses norms to the state and municipal lands, as the superficieses rights could be for some time acquired without an auction.

Therefore, in practice the superficieses mechanism was used by investors to get around the norm on the auction-based acquisition of leasing rights to state and communal lands. Advantages of the superficieses included the possibility to alienate the superficieses rights, unlimited period of the superficieses, regulation of the legal consequences related to the termination of the superficieses period and the legal status of the real estate constructed on the relevant land plot.

A certain drawback of the superficieses, in particular as regards state and municipal lands, was the unregulated procedure for the acquisition of the superficieses land titles, in particular, such issues as the necessity to develop, reconcile, and approve the land allocation, the state registration procedure, the date when the user can actually start using the land. An attempt to partially resolve these problematic issues was made by the relevant explanation of the state regulator in the area of land resources which appeared this July.

In October 2008, land legislation was amended in order to regulate the peculiarities of the superficieses for the state and municipal lands which, in our opinion, regulated the procedure for the acquisition of land superficieses rights. In particular, the following rules were established:

(a) normally, an auction should be conducted to acquire superficieses rights, excluding a number of exceptions (same as for the land lease);

(b) prohibition to alienate superficieses rights, pledge, or contribute to corporate charter capital, excluding cases of the transfer of ownership titles to real estate facilities located on the land covered by the superficieses rights; and

(c) the superficieses period is limited to 50 years.

This means that due to the relevant legislative amendments the superficieses rights to the state and municipal lands lost its main advantages and were actually equated to the land lease regime.

In addition, despite the October amendments, the problem related to the state registration of the superficieses was not solved. According to the law, the superficieses come into effect upon state registration, but there is no procedure for such registration (no rules that would define the list of documents necessary for registration, sum of payment to be made and pro-

cedure, the registration terms, and the documents that would confirm the fact of such registration, etc), which complicates and sometimes even makes it impossible to use this legal institute.

To sum up, in 2008 Ukraine introduced mainly auction-based mechanisms for the acquisition of rights to state and municipal lands, prohibited the turnover of state and municipal land rights on the secondary market, and liberalised the turnover of private land rights. At the same time, however, the terms and conditions for the acquisition of non-agricultural lands have not been liberalised for foreigners, which does not help to attract foreign investment to the Ukrainian economy. Such investment is particularly necessary in the conditions of the current world financial crisis.

PRO file

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