State Registration of Land Lease Rights

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Last year the Ukrainian land market as well as the real estate market as a whole saw the introduction of a new title-based system of registration of proprietary rights, which makes the accrual of a right conditional on the registration of the same, as opposed to the previous transaction-based system, which treated the registration of a transaction giving rise to a right as a condition precedent to the accrual of such right or title. The new developments have a substantial impact on the procedure for acquiring a land lease right, which is the most popular model of doing business in Ukraine. In this context, the year 2014 is expected to be less promising and in the main limited to the development and further legislative strengthening of the principles underlying the current reform of registration of real estate and land rights.

Peculiarities and basic principles

One of the main approaches to reforming the system of registration of real estate rights was abolition of the state registration of agreements confirming rights to real estate, including land lease agreements. Instead, amendments to Article 6 of the On Land Lease Act of Ukraine and Article 125 of the Land Code of Ukraine became effective, which required mandatory registration of a lease right. According to the On State Registration of Proprietary Rights to Immovable Property and their Encumbrances Act of Ukraine (the Registration Act), such registration is a condition precedent to the accrual of the lease rights as such. To put it in another way, it is only after the registration of a lease right (rather than after the execution of a lease agreement) that the lessee is lawfully authorized to use the land plot.

The main goal of the new registration system combines both private and public components. The first one consists of bringing order to relations aimed at establishing, changing, terminating real estate and land rights as well as at strengthening and protecting those rights. The second component deals with arousing the interest of the public and the government, which is primarily associated with exercising control over budget revenue coming from the taxation of real estate and real estate transactions.

Thus, with effect from 1 January 2013, all rights to and encumbrances on lands, along with rights to buildings located on them, are recorded in one register: the State Register of Proprietary Rights to Immovable Property (the State Register of Rights). The said register in itself replaced all the previously used registers, namely: the Register of Ownership Rights to Immovable Property, the Unified State Register of Prohibitions on Alienation of Immovable Property, the State Register of Mortgages, the State Register of Transactions, and the State Register of Lands — in terms of registration of land rights.

Principle of double registration of land and land rights

Notwithstanding the unification of the above registers, two separate registers are actually being launched pertaining to lands: the State Land Cadastre (the Cadastre) and the State Register of Rights, respectively. In this respect, such a system of “double registration” is something new for Ukraine. The above new registers actually replaced the previously existing State Register of Lands, which contained information on both the land plots and the rights to such land plots.

From now on, a land plot as an object of civil rights shall be registered in the Cadastre, which will include information on the location, cadastral number, area, intended purpose, regulatory monetary value, composition of land parcels and restrictions, while information on rights to the land plot, including ownership and lease rights shall be recorded in the State Register of Rights. Chronologically, the law requires that a land plot be first registered in the Cadastre, whereupon rights to the land plot may be registered in the State Register of Rights.

It is also noteworthy that registration of a land plot in the Cadastre does not qualify the land plot as an object of a lease right. Under the law, a land plot may be let on lease and may be an object of other derivative rights only after its formation and state registration of an ownership right to the land plot. In other words, a land plot may be an object of a lease agreement only after relevant information has been recorded in both registers: first — information on the formation of the land plot must be recorded in the Cadastre and then — an ownership right to the land plot must be recorded in the State Register of Rights.

Until recently, such requirement regarding registration of an ownership right as a condition to registration of a lease right actually precluded the registration of a right to lease municipal and state lands. This was because, unlike in the case of private lessees in relations with which this issue only involved process organization and cost funding, everything was much more complicated in the case of public lessees: an ownership right to lands of state and of territorial communities was provided by law, i.e. no title documents were issued to such bodies. Now the law requires that they register their rights on equal terms with other entities, which posed a number of practical problems. The solution to these problems had been found only after amendments were made to the Registration Act on 14 May 2013, which authorized executive bodies and local self-government authorities to make decisions on the transfer of land plots for use without state registra-
tion of their rights to such land plots. From now on, the state registration of public rights to such land plots will be carried out simultaneously with the state registration of lease rights. The same approach is applied to amendment and extension agreements to land lease agreements, which were executed before 1 January 2013.

Registration authorities

The changes to the rights registration procedure brought changes in the system of authorities in charge of state registration. The registration of land plots in the Cadastre is carried out by territorial authorities of the State Agency for Land Resources. The registration of rights to land plots and immovable property located on them in the State Register of Rights is carried out by registration services of territorial directorates of the Ministry of Justice.

It must be noted that access to the State Register of Rights, together with the authority to actually perform the state registration of rights arising under notarized agreements, has also been granted to notaries. Although the law no longer requires notarization of a land lease agreement, the parties may agree to notarize it, and in this case they will go to a notary to register both the right of ownership, in particular where such registration does not require a title document to be issued, and the right of lease in respect of the respective land plot.

Considering the amount of criticism leveled against the work of territorial directorates of the Ministry of Justice over the past year, including against the irrational approach exercised by government authorities towards the registration of rights to municipal lands, at the end of the last year the website of the Verkhovna Rada of Ukraine published a draft law proposing to return some powers, in particular those related to the registration of land lease rights, to local self-government authorities. Judging from the public and political discussions on these problems, such legislative initiatives are most likely to be addressed as early as this year, but it is hard to predict in the current social and political situation whether lawmakers will support the idea of returning the powers to register rights to land plots to local self-government authorities.

Interaction of the old and the new registers and between the new registers

The State recognizes all rights arising under agreements entered into and registered in accordance with the previously existing laws. However, at present there is no well-established mechanism of interaction either between the State Register of Rights and the Cadastre or between the previous State Register of Lands and other data systems.

The transitional provisions of the On the State Land Cadastre Act of Ukraine state that land plots formed before 1 January 2013 must be automatically transferred to the new Cadastre, but practice shows that, given the absence and incompleteness of data in the State Register of Lands, lessees should themselves arrange for the entry of information about their leased land plots to the Cadastre.

Notably, the Registration Act does not contain any similar provisions envisaging the automatic transfer of data on lease agreements entered into before 1 January 2013 and the rights arising thereunder from the previously existing registers to the new State Register of Rights. Information about the lease of a land plot under such agreements may appear in the new register only at the initiative of the lessee and only after registration of the owner’s rights to such land plot.

But this situation may change already this year, if the Verkhovna Rada adopts Draft Act No.3257 On Amending Certain Laws of Ukraine to Specify the Powers of Notaries and the Peculiarities of Registration of Derivative Proprietary Rights to Agricultural Land Plots, which has been registered in Parliament and which compels the Cabinet of Ministers of Ukraine to arrange for the automatic transfer of entries from the State Register of Lands in respect of previously registered agreements and land rights to the new State Register of Rights.

On top of that, respective work is expected to be carried out to eliminate problems arising during the transfer of information from the State Register of Lands to the Cadastre, usually due to the different formats of electronic data in these data systems. To this end, a respective draft law has been developed that also sets out the procedure for interaction between the new registers and other data systems, in particular the city planning, water and forest cadastres.

This interaction is expected to result in the unification of data on lands and other natural resources and the improvement of their accounting practices.

A separate draft law proposes providing notaries with access to the Cadastre for the purpose of obtaining up-to-date information on land plots during execution of transactions, including land lease agreements. Approval of this initiative would considerably simplify the agreement execution procedure and save both financial and time resources of the parties, because there would no longer be the need to apply to bodies of the State Land Agency to obtain the necessary excerpt from the Cadastre.

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Undoubtedly, reform of the system of registration of rights to immovable property is an important and necessary step towards the strengthening of guarantees of the right of ownership and of the right of lease equated thereto. However, one must admit that in the context of land lease rights, this reform is fraught with certain difficulties. In addition to the fact that state registration authorities are unprepared for any prompt and qualified performance of their assigned functions in terms of their organizational and technical resources and their personnel, the past disorderly system of registration of land rights now has a negative effect on the input of data to the new registries. Nevertheless, it is possible to say that the main problems have already been solved, while the remaining issues are mainly of a technical nature.

It is most likely that, considering the current social, political and economic situation, this year we should not expect any radical changes in the sphere of regulation of land relations. We will hardly see any high-profile legislative initiatives this year. Apparently, work will continue on the practical aspects of the implementation of last year’s reform: we expect that it will become faster and cheaper to register rights to land plots, including land lease rights. There are now several legislative initiatives registered in the Verkhovna Rada of Ukraine that are aimed at further improving operations of the registers and registration authorities and to overcome some practical drawbacks of the new registration system.