



**February 21, 2011**

**LEGAL OPINION**  
**on Draft Law of Ukraine No. 8053 “On amendments to the Law of Ukraine**  
**“On State Support of Agriculture in Ukraine”**  
**(regarding peculiarities of exports subject to the state price regulation)**

The Draft Law No. 8053 (hereinafter – the Draft Law) sets forth that commodities subject to state price regulation (*wheat, corn, barley, etc.; sunflower and rape seeds; wheat and rye flour; granulated sugar, cattle and poultry meat; dry milk; butter; sunflower seeds oil*) shall be exported **only by the agricultural producers of the listed commodities in the volume of their own production and state agent that provides of export** of subjects of state price regulation.

According to the Draft Law “the state agent that provides export” shall be represented by the public enterprise or business entity, the capital stock of which comprises the state share, and which shall be determined by the Cabinet of Ministers of Ukraine by tender. However, the Draft Law sets forth no requirements to the state share in the capital stock of such business entity.

Taking into account that breeding and growing (production) of the agricultural products in Ukraine involves over **60 thousand of** agricultural producers, and that objectively, only few hundred of them will be able to manage agricultural exports independently, it can be assumed that most of them will be deprived of exportations and forced to sell goods, as previously, processors and the state agent only. Therefore, adoption of such draft law shall lead – for the wholesale grain purchasers and traders (i.e. exporters), which, at the same time, are major investors to the agricultural complex and owners of the logistics and infrastructure facilities operating in the agricultural market – to the lost possibility (sense) to pay for grain and other agricultural products with Ukrainian currency, as they will scarcely be able to export these commodities in future.

At this rate, the Draft Law regarding export of agricultural products, if adopted, would contradict provisions of the current Laws of Ukraine, including International Agreements with Ukraine, and violate legal rights of ‘business entities’ protected by law.

**1. Discrimination of the acting business entities according to the characteristics of the economic activities set forth by the current laws**

Should the Draft Law be adopted, the right to export agricultural commodities included to the list of products subject to the state price regulation, would be vested **exclusively** in the state agent **and might be effected by the insignificant number of agricultural producers** (1-2 percent), able to manage such exports: those that have or have obtained purposefully the status of the parties to foreign economic relations and employs skilled staff.

Considering abovementioned legislative innovations, such economic activities as wholesale and exportation of the agricultural commodities, that are carried out even by the owners of stores at their own expense (p.51.2-51.7 of the KVED), and prescribed by the class 51 National Classifier of Types of Economic Activity of Ukraine, **shall become impossible** for the economic entities, that during last years provide **90 percent of grain exports**, almost **100 percent of exported** sunflower seeds oil, and significant volumes of other agricultural commodities exports from Ukraine. It is worth special attention, that currently Ukraine is one of the leaders in the world market of grain and sunflower seeds oil. But in case the Draft Law is adopted, Ukraine may lose its positions in the world market of grain and sunflower seeds oil.

## **2. Violation of the national law and bilateral agreements with Ukraine regarding protection of foreign investments**

Whereas enactment of the Draft Law No. 8053 shall actually lead to monopolization of the market of exportation of agricultural commodities, and, consequently, worsen investments climate in Ukraine, business reputation of the country when it comes to such business partners as European Bank of Reconstruction and Development, World Bank, business community, and a number of governments. The aforesaid will result in material decrease of agricultural sector investments, as long as major investors will be deprived of the right to freely operate, use, enlarge or control investments, gain profits, as well as forced to suspend projects aimed at development of elevator and port infrastructure, logistics, **financing of agricultural production**, etc., until they fully cease to perform their activity, which they have developed in Ukraine during last 20 years.

It is worth emphasizing that most parties to foreign economic activity connected with export of agricultural products are companies with foreign investments, thus adoption of the Draft Law No. 8053 would violate multilateral agreements signed by Ukraine, as well as bilateral commitments connected with protection of foreign investments.

Presently, Ukraine is a Contractual party to over 50 bilateral agreements on encouragement and mutual protection of investments (for example, the USA, EU, Russian Federation, Macedonia, Greece, Portuguese, Italy, Spain, etc.), which envisage Ukraine's undertakings *not to obstruct, through applying motiveless or discriminatory measures, the management, operation, holding, use, enlargement or administration of investments, and incomes earning*. But the monopolization of the market of agriproducts export by the State Agent and enabling other market participants to export commodities will obstruct such participants from the use and obtainment of earned income, as well as impede enlargement and administration of investments.

In addition, Ukraine undertook to ensure fair and unprejudiced regime towards investments in order to buttress robust background for investment flow and use economic resources as effectively as possible. Ukraine as a Contractual party acknowledged that foreign investments shall encounter anytime fair and impartial treatment and be under total protection and assurance on the territory of the other Party.

However, here we observe a hidden expropriation that is defined by the Seoul Convention establishing the Multilateral Investment Guarantee Agency 1985 (p. «a» (ii), Art. 11) *as any legislative action or administrative action or omission attributable to the host government which has the effect of depriving the holder of a guarantee of his ownership or control of, or a substantial benefit from, his investment*.

Furthermore, the aforesaid will substantially affect the implementation of U.N. World Food Programs, which urged Ukraine to introduce the strategic program until 2017, envisaging the production of grain in the amount of 80 million tons. The implementation of the said program can be possible solely provided market conditions for Ukrainian agrarian sector development are maintained and monopolization of the market of agricultural products export is prevented.

### **3. Competition restriction and monopolization of the agricultural products market**

As Draft Law No. 8053 enactment will lead de facto to monopolization of the market of agricultural products export, its adoption may cause material restriction of competition on the agricultural products market. That is in violation of part 2 of Article 42 of the Constitution of Ukraine in part concerning assurance of the protection of competition in the field of business; impermissibility the abuse of dominance, unlawful restriction of competition and unfair competition.

The restriction of competition that will be in place provided the Draft Law is adopted violates the provisions of the Commercial Code of Ukraine, in particular:

- § part 2 of Article 5 of the Commercial Code of Ukraine, assuring the constitutional fundamentals of the lawful business order, in particular, the state protection of the competition in the field of business, the prevention of the abuse of the monopolistic standing on the market, the illegitimate restriction of the competition and the unfair competition;
- § part 3 of Article 18 of the Commercial Code of Ukraine, prohibiting the state authorities and local self-government bodies from adopting acts and committing actions that eliminate competition or are unreasonably conducive to business activities of specific competitors, or impose restrictions on the market that are not envisaged by the legislation;
- § part 2 of Article 25 of the Commercial Code of Ukraine, prohibiting state authorities and local self-government bodies that regulate relations in the field of business from adopting acts or performing actions that determine the privileged stance of business entities of a certain ownership form or discriminate against specific categories of business entities, or otherwise violate the rules of the competition;
- § part 1 of Article 380 of the Commercial Code of Ukraine, saying that the state regulation of foreign economic activities shall be focused on the protection of ... rights and legitimate interests of parties to foreign economic activities, the creation of equal conditions for the development of all types of entrepreneurship in the field of foreign economic relations, and the use of income and investments by parties to foreign economic activities, the encouragement of the competition and the restriction of monopolism of business entities in the field of the foreign economic activities.

The Draft Law adoption will violate the Law of Ukraine “On Grain and Grain Market in Ukraine”, in particular, part 2 of Article 4 contemplating that economic entities, state authorities, self-government bodies and bodies of administrative management & control shall facilitate development of competition and avoid misconduct that may adversely affect competition, and Article 18 in part concerning granting of the right of (any) owner for free dispose of own resources of grain, and conclusion of agreements on its sale, including its export.

Furthermore, the Draft Law contradicts the antitrust legislation, in particular part 1 of Article 15 and Article 13 of the Law of Ukraine “On Protection of Economic Competition” in part concerning prohibition or obstruction of certain types of commercial activity and restriction of certain types of commercial activity, production, sale or purchase of certain commodities, and granting benefits or other advantages that favour a firm or group of firms over others, such that competition is denied, eliminated, restricted or distorted.

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