

# IV. OVERVIEW BY SECTORS

## 1. AGRICULTURE

### AGRO BUSINESS. Legal Aspects

BAKER & MCKENZIE

#### 1. MAIN SPHERES

The main spheres of agro business, which may be of interest to the investors in Ukraine, are as follows:

- cereal crops growing and realization;
- sunflower growing and realization;
- cattle and chicken growing for production and realization of milk, meat and eggs;
- vegetable growing; and
- grape growing.

#### 2. SPECIAL REQUIREMENTS

In order to conduct agro business in Ukraine in certain cases a legal entity is required to obtain such approval documents as permits, certificates, and licenses. Also, the agricultural products must comply with quality, sanitation and health safety requirements established by Ukrainian legislation for certain types of agricultural products.

The legal entities shall also insure certain agricultural products, such as cereal crops.

In recent years, licensing, quotas, as well as indicative prices were used to apply to some types of cereal crops, sunflower oil, and seed, based on the balance of supply

and demand on the internal Ukrainian market. Thus, the Ukrainian Government has established quotas for the export of wheat, barley, corn, rye, buckwheat, as well as mixtures of rye and wheat, until December 31<sup>st</sup>, 2010. The indicative prices with respect to the export of any agricultural products have not been fixed. The Government representatives have continually emphasized the necessity to establish such export quotas for 2011 as well. Also, there are quotas for production of sugar beets and sugar to be realized on the internal market of Ukraine. It cannot be excluded either so that fixing quotas with respect to other agricultural products may be reinstated. The accession of Ukraine into WTO may also have a certain impact on the regulatory requirements to the export of agricultural products, but exact implications are yet unclear.

The export of agricultural products is subject to licensing. Licensing is a declarative procedure carried out as part of the export monitoring policy and it does not have any restrictive impact on the export of goods.

#### 3. STATE SUPPORT

Ukrainian state authorities regulate the prices for certain types of agricultural products, inter alia, cereal crops, sunflower, sugar, etc. State authorities establish the minimum and maximum prices for agricultural products, implement trade and financial

interventions, and administrative regulation in order to maintain the prices for definite agricultural products within the margin between the minimum and maximum prices.

The state also supports the producers of the agricultural products by way of (i) granting budget credits; (ii) compensating the whole or partial amount of the interest under the credit agreements between the producers of agricultural products and banks; (iii) providing subsidies; and (iv) providing of cash grants.

As an additional measure of support for agricultural production due to the world financial crisis, the Parliament of Ukraine ruled that refinancing of the banks by the National Bank of Ukraine is subject to the prolongation by such banks of the credits of the agricultural enterprises for the term of refinancing, but no less than 365 days.

#### 4. CERTAIN TAX ISSUES

Instead of the application of general taxation, agricultural enterprises are allowed to be registered as payers of a fixed agricultural tax ("FAT"). In order to be a FAT payer, the enterprise's profits derived from realization of agricultural products must exceed 75% of the total amount of the gross profit of the enterprise for the current (preceding) year. FAT substitutes a number of other taxes and obligatory payments, which are applicable under general rules of taxation of Ukrainian legal entities.

The agricultural enterprises (qualifications are the same as for FAT) may also choose the special value added tax ("VAT") regime. Under this regime, the amount of the VAT calculated with respect to the agricultural products supplied by the agricultural enterprise is not payable to the budget, but rather the VAT amount may be used by the agricultural enterprise for the compensation of the VAT amount paid for the production factors and for other purposes necessary for agricultural production. Moreover, as an additional measure

for support of agricultural production due to the world financial crisis, the Parliament of Ukraine ruled that the amount of VAT paid by the processing enterprises for selling milk and milk products, meat and meat products must be entirely used for providing cash grants to the agricultural enterprises supplying milk and meat to respective processing enterprises.

#### 5. LAND FOR AGRICULTURAL PRODUCTION

##### Right of ownership

Ukrainian land law provides for certain conditions and limitations with respect to the persons entitled to acquire agricultural land in Ukraine. According to Ukrainian law, only Ukrainian citizens and companies founded by Ukrainian individuals and/or legal entities may acquire and own agricultural land provided that the company's charter documents foresee such activity as agricultural production.

The Land Code contains a number of transitional provisions which postpone or limit the application of certain provisions of the Land Code until a future date. These transitional provisions establish that (i) until 1 January 2015 individuals and legal entities may acquire agricultural land of up to 100 hectares and (ii) until the laws "On Land Market" and "On State Land Cadastre" are adopted, certain agricultural land (in particular, land shares, land plots formally designated for commodity agriculture and/or land plots allocated in kind to the owners of the land shares for the private agricultural household) may not be sold or otherwise disposed of unless such alienation results from inheritance or withdrawal of land for public purposes as well as agricultural land plots of municipal and state ownership may not be sold.

As a general rule, once the above restrictions are lifted, acquisition of rights to the state-owned or municipal land plots without structures on it shall require an auction.

**Right of Lease**

Ukrainian individuals and legal entities, foreign individuals, legal entities, and joint ventures may lease the agricultural land plots of the state, municipal or private form of ownership. The lease right is based on the agreement concluded between the owner of the land plot and the entity, and shall be subject to the compulsory state registration. As a general rule, the lease right to the state or municipal land without structures on it may be sold and acquired through the auction. The land share (“payi”) can also be leased under the land share lease agreement.

**Emphyteusis**

The Civil Code and Land Code introduced a notion of “emphyteusis”, which is the right to use someone else’s land plot for agricultural purposes under agreement between the landowner and the land user. In many aspects the emphyteusis is similar to the regular land lease. However, to the best of our knowledge, currently there is little prac-

tice with respect to the application of emphyteusis in Ukraine. The reason for this is, inter alia, the lack of the statutory procedure for the state registration of the emphyteusis agreements, which is the condition for the emphyteusis agreement to be valid. However, such procedure shall become effective from 1 January 2011, which may substantially broaden the practice of the application of emphyteusis in the sphere of agricultural production.

**Alternative Options of Obtaining Rights to Agricultural Land**

The entity interested in carrying on the agricultural activity in Ukraine may consider the ownership of the agricultural land plots indirectly through the establishment of, or acquisition of a stake in, a holding entity the subsidiaries of which will act as the direct lessees or owners of the agricultural land plots. The above option will help avoid possible procedural and administrative complications involved in the re-execution of the title documents to the land plots.

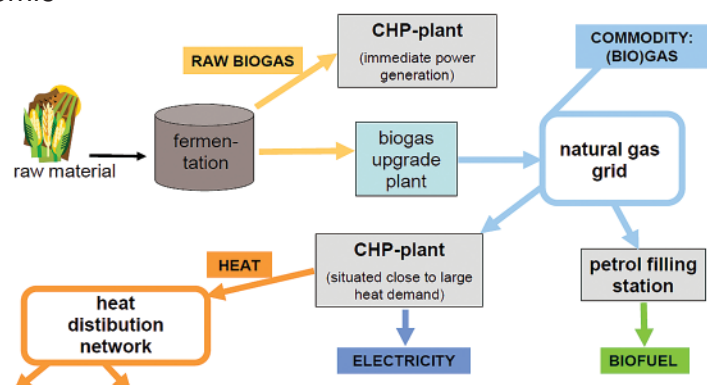
## Biogas – “Energy of Regions” and the Question of an Overall Concept



Just with its designation the “Party of the Regions” marks an outstanding initiative. According to scientific studies there is a significant interrelation between regional decision-making authorities and the economic power: the more decentralized the allocation of sovereignties is, the stronger flourishes the economy.

A contribution to regional development far away from metropolises of Kyiv and Donetsk can also be made by means of enhancing the biogas production. While the law-maker currently supports only the production of electric energy from renew-

able sources via “green tariffs”, biogas falls by the wayside. Yet its applicability is extremely manifold, as the following scheme shows:



Thus, biogas can be burnt immediately after its generation in a heat and power cogeneration plant or it can be refined to attain the quality of natural gas, so that it's possible to feed it in the natural gas grid. Being taken therefrom, it can perform any function, which can also natural gas can perform (as their chemical properties after refinement are completely identical): as fuel for industry and households, as motor fuel or, after being burnt in a heat and power cogeneration plant, as electricity and heat.

The current one-sided promotion of electric power (from biomass, however, only as long as it is of plant origin, whereby animal waste is omitted and the classification reference of landfill gas remains in question) is astonishing. After all, Ukraine has no actual deficits in this sphere (even if the introduction of „green tariffs“ is basically to be welcomed). On the contrary, natural gas must be imported on a large scale. Such dependence could be reduced step by step, for instance, but not only, through a „green tariff“ for feed-in of biogas or by means of tax incentives for biogas as biofuel. The opportunities for promotion are as manifold as the possibilities to use biogas.

However, in this consideration it is also important what the biomass is obtained from. Nowadays, Ukraine has enough cultivation areas, so that even the targeted cultivation of biomass would be justifiable (in terms of cost effectiveness). In the long run, a world-wide food shortage is forecasted, so that it will result in competition for cultivation areas. Whether then energy or bread are cultivated, will be determined by the market prices.

For efficiency reasons alone, utilization of plant and animal wastes still enjoys the priority. The implementation costs are reduced here to logistics and transport costs, or storage costs, respectively. In this regard, small-scale plants absolutely make sense. They can be limited to the needs of an agricultural farming enterprise or, depending on the size of the enterprise, include the

supply for smaller neighbouring communities. Not only do decentralized energy solutions contribute to better efficiency of farming and animal-breeding enterprises, they also create workplaces in the regions, especially in structurally weak areas. Moreover, decentralized solutions prevent losses in the grid, which inevitably occur in case of central generation and further distribution over many miles.

However, biogas is not to be regarded as the solution for problems of energy supply in general. Biogas is to be viewed as an element of an overall solution. The way to clarify the energy issue considered in its entirety is per se the subject of an energy strategy. Although Ukraine disposes of such one, not many people will ever consider it as a thought-out basis.

From the viewpoint of strategy, staking on „green tariffs“ only makes as little sense as sticking to nuclear power. The challenges to the future's energy mixture will be enormous in any case. It's a matter of own resources and of how they can be used ecologically, it's a matter of imports and of the price for dependency thereon, it's a matter of the ability of consumers in industry and households to bear the growing energy costs, whereas especially the „green tariffs“ become a cost driver in the course of further development of renewable energies. The way to the „green Age“ leaves indeed no alternatives, as the conventional energy sources are exhaustible and the mankind is, thank God, more and more interested in sustainable development and is less and less willing to accept the wear-out of their environment.

Ukraine should simply have the courage to take its own way. Copying of „western“ laws alone will not be enough, the more so as their patterns in the countries of origin by no means encounter undivided support and often lead to economically unreasonable distortions. Furthermore, each advancement („green tariff“) must also be made in one strategic context. An essential element of

such an energy strategy in future should quite certainly be the (decentralized) biomass use.

*Wolfram Rehbock, Attorney, Senior Partner  
Arzinger Law Firm*

## **NB: Taxations of biofuels**

For the purpose of enhancing the production and use of biological types of fuel and in order to develop the national fuel market in Ukraine by introducing biomass as sustainable raw material for manufacture of biological types of fuel, Ukrainian legislation provides for a wide range of allowances regarding taxation of activities connected with the use of biological types of fuel (apart from other alternative types of fuel and energy efficient technologies).

### **1. Income tax allowances**

The Law of Ukraine “On Company Profit Tax” of December 28<sup>th</sup>, 1994 # 334/94-BP (namely Article 7) stipulates the following allowances:

Temporarily, for the ten years’ term, starting from January 1<sup>st</sup>, 2010 the following shall be exempt from taxation:

- Biofuel manufactures’ profit derived from sale of biofuel;
- Companies’ profit derived from simultaneous production of electric and heat power and/or from the production of heat power with the use of biological types of fuel;
- Machinery, equipment and tools producers’ profit as specified by Article 7 of the Law of Ukraine “On Alternative Types of Fuel” of January 14<sup>th</sup>, 2000 # 1391-XIV for manufacture and reconstruction of technical tools and means of transport including self-propelled agricultural machinery and power plants consuming biological types of fuel received from sales of the machinery, equipment or tools referred to above,

which were manufactured in the territory of Ukraine.

Amounts released in connection with the provision of tax allowance shall be directed by tax payers at reduction of prices for products.

### **2. Allowances on payment of import customs duties**

Pursuant to Article 19 of the Law of Ukraine “On Single Customs Tariff» of February 5<sup>th</sup>, 1992 #2097-XII the following shall be exempt from customs duty payments:

- Within the period from January 1<sup>st</sup>, 2010 till January 1<sup>st</sup>, 2019 machinery, equipment and tools applied for reconstruction of existing and construction of new biofuel production units and for manufacture or reconstruction of technical tools and means of transport for the purpose of consumption of biofuels which are classified according to the UKT ZED Codes (codes of goods groups) specified by Article 7 of the Law of Ukraine “On Alternative Types of Fuel” provided that such products are not being manufactured and have no analogues in Ukraine.
- Technical tools and means of transport, including self-propelled agricultural machinery and power plants which consume biological types of fuel and are classified under UKT ZED codes specified by Article 7 of the Law of Ukraine “On Alternative Types of Fuel”, provided that such products are not manufactured in Ukraine.

### **3. Allowances for Value Added Tax**

The VAT Law provides for exemption from valued added tax with regard to the following transactions:

- On supply of machinery, equipment and tools determined by Article 7 of the Law of Ukraine “On Alternative Types of Fuel”, in the territory of Ukraine;

- In similar cases subject to exemption from import customs duties (see 5.2. above).

In the event of violation of regulations regarding the special purpose use of products referred to above, the tax payer is obliged to increase tax liabilities in compliance with the taxation period results in which such viola-

tion occurred to the value added tax amount which was due to payment on the date of import of such goods, as well as to pay a penalty charged on such amount of tax in terms of 120 % of the discount rate of the National Bank of Ukraine as of the date of increase of the tax liability and for the period from the date of import of such goods up to the date of increase of tax liabilities.

*Anna Pogrebna, Attorney, Partner*