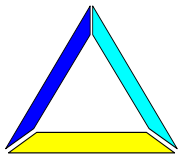
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T29

Comments on the Draft Law "On Agricultural Advisory Services Activities"

1 Introduction

The development of rural areas should be a major goal of Ukrainian policy, and advisory services are a useful tool to increase living standards and prosperity in rural areas. That is why advisory services should be financed from the state and regional budgets, particularly when their future clients are too poor to pay for private services. A draft law which stipulates the establishment of agricultural advisory services ("On Agricultural Advisory Services") is currently discussed in the Verkhovna Rada. The goal of this paper is to analyse this law, discuss its drawbacks, and suggest ways for improvement.[1] If agricultural advisory activities are supposed to be increasingly financed by budget money (either by giving grants to private suppliers or by establishing a state advisory service), establishing a legislative framework is a necessary step in this process. But the legislative basis has to be as clear and simple as possible in order to both:

a) support the establishment of a functioning public service;

b) not discourage the activities of existing or emerging private advisory services.

Based on this, we would like to mention three major problems related to the current version of the law:

1. It does not represent a sound legal basis for financing a public advisory service, as the financial responsibilities are not clearly allocated to the different levels of government involved.
2. It does not distinguish public from private services, and does not clarify with which of these two most basic categories (from a legal point of view) it is dealing with.
3. It stipulates various regulatory elements (e.g. mandatory certification, obligatory membership in professional organisations, mandatory insurance etc.) for advisory

[1] In a previous paper on extension services development in Ukraine, we considered the current situation on the market of extension services and determined the directions of its development. See "Extension Services Development in Ukraine", German Advisory Group on Economic Reform and Institute for Economic and Policy Consulting, T 26, January 2004.

services which may (partly) be useful for publicly-financed services, but not necessary at all for the functioning of private services.

We will elaborate on these issues in the following chapters. Before, we would like to clarify the terminology. We think it obsolete to distinguish between "extension" and "consultancy" services, as it is tried in the law, and will use instead the term "advisory service" throughout the paper. The only relevant distinction regarding the legal treatment of an advisory service is whether it is public or private regarding ownership and financing.

2 Is the Draft Law a Sound Legal Basis for the Financing of Public Advisory Services?

The current version of the law which passed the first reading in the Rada seems to be designed to support and extend the current situation with advisory services. Over the last ten years, several donor projects have been launched to ensure the provision of advisory services in Ukrainian agriculture. Thanks to the coordinating function of the MAP, extension services are now operating in most Ukrainian oblasts. However, many advisory services are undersupplied and thus can serve only a limited number of clients. In most oblasts where the donors' projects are currently operating, there is only one organisation providing these services to farmers and the rural population.

Based on external funding, most of these services will enjoy guaranteed financial support for some years to come. Most of the projects are performing well, and allocating money in the state budget to keep them going would yield payoffs in the future in terms of both agricultural growth and improved rural welfare. But experience shows that as soon as the financing from outside had been reduced or eliminated, the supply of advisory services significantly declined, or the activity of a corresponding organisation was suspended due to lacking financial resources. Regardless of the fact that these services were of great importance to farmers and the rural population, only very few local administrations agreed to provide financial support for advisory services in order to keep them in operation. Moreover, no funds have been allocated from the central budget so far for this purpose.

Assuming that the law was drafted as an attempt to keep existing advisory services in operation in the face of declining donor support, it is nevertheless doubtful that enough money would be earmarked in the budget to sustain existing services. The major reason is that the draft law does not mention the government level which is planned to be responsible for carrying out this task. In Article 7, the law calls advisory services a joint task of the Central Government and local government entities. But as there is no provision for which government level will be responsible for the administration of advisory services, the funds (if any) will come simultaneously from state, oblast and regional sources. This prospect of mixed finance makes it unlikely that the government levels involved will agree on the same service and could end up

in a situation that two services in one oblast are financed simultaneously, one from the state budget and the other from the oblast budget.

To keep the current services running, a long-term commitment should be made for at least the next five years in order to keep experienced consultants working there from changing into the private consultancy sector. But it is more likely that both the limited size and duration of funds will make it difficult to keep the existing services in operation.

3 What Kind of Advisory Services is the Law About?

In the beginning, the law tries to define advisory services in agriculture (Art. 2) in a specific way, distinguishing services aimed at socially oriented goal versus such aimed at increasing the profit of a farm enterprise. The background for this kind of distinction can be found in the transition of agriculture from a planned to a market economy. Following the privatisation of the CAEs, agricultural production had been separated from the maintenance of the "social sphere" in rural areas, a task which was fulfilled by agricultural enterprises in the past. Now agriculture has become an ordinary business aimed at making profits by producing agricultural commodities.

However, the law targets both business and social sphere in rural areas and, thus, encompasses not only agriculture but rural development in general. Article 1 of the draft defines advisory activities as "the set of actions and measures directed at satisfying the needs of agricultural producers and the rural population to increase their level of practical skills in conducting profitable management, ensuring welfare improvement and social infrastructure development of a village." Article 2 provides a detailed description of the various goals of advisory services. In this context, Article 4 distinguishes between (i) services which are to be financed from the state budget ("socially desirable services - which at present development of social and economic conditions are unprofitable, it is impossible to find them in the market of agricultural consulting services") and (ii) 'paid' services, which have the aim to increase the profit of the consumers of these services ("Paid consulting services - services which create conditions for reception of the additional profit by agricultural commodity producers and agricultural population. Granting of paid consulting services is carried out due to the customer.") It seems that 'profitability' is supposed to serve as a criterion to distinguish private services. On the other hand, the mentioning of 'socially desirable' services in the law is obviously supposed to justify the financing of special advisory services from public or foreign donor sources. In fact, the source of financing and the legal status should serve as the main criteria which distinguish services to which this law should apply: services under public ownership and/or funding. But the law should **not** be applied to services under exclusively private ownership and/or financing, because this would mean an unnecessary interference with civil liberties. But this is neither made explicit, nor is that distinction further elaborated on or exploited in the regulative part of the law, and thus stands isolated without any legal consequence. The problem with this kind of impreciseness is that a lot of regulation as described in

the further course of the law may be applied to private services without justification.

Finally, dividing the groups of services by the name ("extension" versus "consultancy") is a difficult approach and could lead to misunderstanding or misuse of the law.[2] It would be much more logical to define activities by the source of financing. If an advisory service receives financial support from the budget, the company has to follow the rules of this law. Privately-financed services, on the other hand, should not be affected by this law. To clarify this vagueness, it should simply be written in a separate article of the law that it applies only to public advisory services.

4 Is there a Need for Mandatory Certification and Special Insurance of Advisory Services?

There are also questions regarding certification and registration procedure, proposed in the draft law, for enterprises occupied with advisory activity in agriculture. Article 9 stipulates that the Ministry for Agrarian Policy "issues a certificate confirming that the entity enters the market for advisory services and is registered in the State register". After that, the legal person acquires a status of an enterprise providing advisory service and must elaborate and adopt "regulations and procedures to provide effective operation of agriculture advisory service" within three months from the registration day. Articles 11 and 12 define the grounds on which a certificate is granted, while Article 13 defines the procedure of suspending the validity of the certificate. It is worth noting that the rules of this draft law regarding the mandatory certification of legal and natural persons involved in advisory activity should not thwart the development of advisory services in Ukrainian agriculture. Certification should be voluntary but not mandatory.[3] A certification as laid down in the law may serve as a deterrent to enter the market for advisory services. The failure of the law to determine whether certification is mandatory only for publicly-financed or also private services could be misused at lower levels of the administrative chain to discourage the entrance of new competitors into the market.

The registration procedure is also designed for an advisory service with a long term perspective. But it is more likely that the services will be in a permanent change. If there is a financing source, they will hire consultants; if not, they will have to reduce the staff and, as a result, the quality of advisory services provided will suffer. A certification does not really help in this case, but would rather disguise the deteriorating quality of the service. Instead, it could be useful to have an open list of all advisory services in Ukraine and publish it e.g. on the web site of the MAP. This

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[2] From our own questioning of agricultural advisers, it became clear that the terminology used in the law to distinguish public and private services was not clear at all to the respondents.

[3] "Extension Services Development in Ukraine", German Advisory Group on Economic Reform and Institute for Economic and Policy Consulting, T 26, January 2004.

would improve the awareness of customers of these services. But any kind of registration procedure would hamper the whole system.

Article 16 stipulates compulsory liability insurance for agricultural advisory services in order to cover losses of customers due to 'bad' advice. The insurance fund is supposed to operate at the expense of mandatory deductions from the costs of advisory services supplied to the amount determined by the planned All-Ukrainian public organization (see next chapter). So, this rule of the draft law introduces an additional insurance type that is mandatory and will influence the price of the advisory services. Mandatory insurance would by far exaggerate the need for protecting the clients of advisory services. In Germany, for example, doctors or lawyers have to buy a personal liability insurance policy, but this can be justified by the fact that an ordinary client of a doctor or lawyer cannot easily judge upon the professional quality of advice and services. In the case of agricultural advice, the farmer can much better assess whether advice really makes sense, and he himself influences the outcomes (including, e.g. harvest failures) of his farm business much more than the adviser. To prove that damage has been caused by the adviser in such a setting would be very difficult and rarely accepted by courts. Thus, an obligatory insurance would only enrich insurers at the expense of both advisers and farmers.[4]

5 Are Additional Administrative Bodies Needed on the Market for Advisory Services?

The draft law foresees the foundation of an All-Ukrainian public organization that represents agricultural advisers (Articles 14 and 15). This public organization is also expected to regulate agricultural advisory activity. In particular, it should keep participants' activities within the law and other policy regulations on agricultural advisory services; it should ensure the quality of the advisory services, conduct arbitrages, promote competition and advanced vocational training of advisers by means of attestation. However, it is likely that the creation of an additional administrative structure will operate in parallel with the authorities and duplicate some their functions. Generally, Ukraine does not seem to suffer from a lack of control, but rather too much of regulation. Lawmakers should use this insight as a guideline in order to support the initiative of the entrepreneurial part of the population, rather than discouraging it with one regulation after the other.

The draft of the law provides for the foundation of the Advisory Board on agricultural advisory activity (Article 17). This is one more bureaucratic structure that will deal with certification and revoking the certificate issued to the entity providing advisory services, harmonization of regulations on agricultural advisory activity, arbitrage, and

[4] This does not mean that, for instance, a **lawyer working within an advisory service** should not be insured, because he or she is delivering the kind of specialised knowledge that would justify insurance.

provision of recommendations for professional skills development of agricultural advisers. Obviously, this Advisory Board duplicates the functions of the All-Ukrainian public organization that unites agricultural advisers (Articles 14 and 15).

Article 19 provides principles for the professional training of agricultural advisers, conducted by higher educational establishments of III-IV levels of accreditation. Article 20 determines the procedure of granting the title 'agricultural adviser'. It seems unreasonable to determine such kinds of procedures in this draft. Principles for professional training and master's certificate documentation are in competence of higher education establishments and the Ministry of Education and Science of Ukraine. Moreover, it is not useful to create an own profession. A public service may request an agricultural masters degree from its employees as appropriate. But the most important qualification to render advisory services should be experience in the fields required (production technology, farm planning, accounting, legal advice; the latter two are not even taught extensively at Agricultural Faculties), not formal titles.

The same logic applies to the procedure of making decisions on documentation and revocation of master's certificates (Article 21). Only the court of justice has the right to revoke such a master's certificate, but not a public organization or advisory board. This article also underlines that any person is prohibited from providing agricultural advisory services which is not authorised by a masters certificate. Thus, one is prohibited not only from conducting advisory activity, financed from the state budget, but also from conducting commercial advisory activity. In contrast, Article 23, on the rights of advisory entities, allows not only agricultural advisers to be involved in the advisory activity but also other experts and entrepreneurial business entities if there is a necessity. So, this disposition contradicts to the disposition in Article 21.

Article 22 defines the principles of maintaining a register of agricultural advisers. The question arises whether there is a need to maintain a separate register if the state already maintains a register of entrepreneurial business entities?

In the end all additional bureaucratic structures cost additional money. The budget for financing of the services would be reduced by the costs for the bureaucratic structures. The expected benefits, if there are benefits at all, will be comparatively small against additional costs.

6 Conclusions and Recommendations

The main drawback of the draft Law is that it is trying to form a legal basis for a public advisory service in Ukraine without clearly distinguishing between public and private services. Instead, the text of the law takes resort to numerous unnecessary regulatory details, without clarifying to what activities they actually apply. As such, the law breathes the spirit of over-regulation inherited from Soviet times. Its main principle seems to be: 'Only those activities are allowed which are **explicitly** allowed and

regulated in laws'. In a modern open society, it is quite vice versa: 'Any activity is allowed which is not explicitly forbidden'. This may be called the most basic legal principle in all western countries. It does not prohibit the legal regulation of certain activities in general, but it calls for a restrictive use of regulation, and for proper justifications in accordance with basic constitutional rights. In the case of agricultural advisory services, a justification of regulation is valid as long as tax money is involved, but definitely not for commercial services.

It may not have been the primary intention of the authors, but the draft law does seem to have the goal to regulate **all** types of advisory activity in Ukrainian agriculture. This approach seems unreasonable, since the state has to control only those services that it pays for. Commercial advisory services are subject to the agreement between the adviser, a natural or a legal person, and the customer, and this has proven to be enough in international experience. The most important aspect related to the success of an advisory service is the adviser's good standing among agricultural producers and rural population, whatever his formal education or compliance with bureaucratic requirements. All disputes between advisers and clients must be resolved through the civil legislation in force. A new legal framework to regulate consulting in general is not necessary.

To improve the current draft law and to support its preparation for the second reading in the Verkhovna Rada, we recommend the following:

1. The law should explicitly say in the very beginning that establishing and maintaining a rural advisory service is considered a public task to be carried out by the Ministry of Agricultural Policy. Funding should become the responsibility of the Central Government, while the implementation of the services could become a delegated task for the oblast of Ukraine.
2. The law should talk about *rural* advisory service, and not *agricultural* advisory service in order to reflect the broader client base targeted by the authors.
3. Do not introduce mandatory certification for all entities engaged in advisory activities. Such a certification should be required only for entities financed from the state and local budgets.
4. An all-Ukrainian public organisation that unites agricultural advisers should not be stipulated by the law. This kind of public organisation can be created in the current legislative framework on the founding of public organizations in Ukraine. An NGO representing agricultural advisory services is already operating. It could be mandated with public tasks in the area of advisory services by the Ministry of Agricultural Policy if this is considered to be necessary and appropriate. However, the authors of the law should decide whether they want to entrust the administration of public advisory services to local government entities, **or** to an NGO, but not to both of them at the same time.

5. It is unreasonable to establish an additional administrative structure by way of the 'Advisory Board on agricultural advisory activity' that will duplicate the Ministry of Agricultural Policy functions and functions of higher education establishments in training and certification issues.
6. It is unreasonable to introduce an additional type of mandatory insurance and to create an insurance fund of agriculture advisory activity. Each legal and natural person occupied with advice in agriculture is responsible for its activity in the current legislation framework of Ukraine.
7. It is generally not recommended to overload laws with regulatory details that are the subject of other legal documents.

The best way would be to reduce the law to the minimum in order to address the most important points – the financial support from the budget – and to avoid harmful effects for the whole sector. All details should be ruled by the organisation which provides financing, or by the CMU. It would make it easier to react to new situations and new requirements.

S.D., D.T., Lector A.K.

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