

Acquisition of a bank in Ukraine: obtaining approval from the National Bank

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Ukrainian businesses are dynamically adapting to the complex circumstances of the war. In some cases, this process is accompanied by changes in the ownership structure of key elements of the Ukrainian economy, especially of the banks.

The reason for this situation lies not only in financial problems of the owners but also in the increased transparency and the need to control financial flows received from partners and international creditors, as well as the filtration of the Ukrainian banking system from the influence of the aggressor country, i.e., russia.

The approval procedure by the National Bank of Ukraine (the NBU) of a substantial shareholding in Ukrainian banks is one of the tools to control this process.

1. Which shareholding is considered substantial?

Substantial shareholding in a Ukrainian bank can be direct or indirect. The size of a shareholding is calculated by adding a direct and an indirect holding in the bank over all the chains of equity rights ownership in the bank.

Direct ownership of a substantial shareholding in a bank is a holding of 10% of the bank's shares or more. Indirect ownership of a substantial shareholding in a bank is determined according to how the shares are controlled.

If a person owns a shareholding in a bank through legal entities, the amount of his participation shall be calculated according to a special formula established by the NBU. This formula takes into account the amount of ownership in such legal entities (as a percentage) and the number of levels of equity rights ownership in the bank.

To determine indirect ownership of a substantial shareholding, other factors aside from ownership of the bank's shares are taken into account. Indirect ownership of the shareholding in a bank also includes:

- a) a direct or indirect control by one or more bank members who own 10% of the bank's shares or more;
- b) voting right based on a power of attorney for the shares representing 10% of the bank's shares or more. At the same time, the power of attorney must give a proxy:
 - the right to participate and vote at all general meetings of the bank's members that may be called and held within one year from the date of the power of attorney;
 - the right to vote on all matters that may be brought before the general meeting of members (shareholders) of a bank having no instructions on how to vote on them;
- c) governance of 10% of the bank's shares or more, or shares in the charter capital of any legal entity in the chain of ownership of the bank's shares. The terms of such governance shall enable the managing person to exercise significant or decisive influence on the management or operations of the bank;
- d) a possibility of having a significant or decisive influence on the management or operations of the bank, which is independent of formal ownership.

Substantial shareholding is also determined based on joint ownership of the Ukrainian bank's shares by several persons, which:

- are associated persons;
- are bound by agreements or common economic interests;
- are economically or organizationally dependent on each other;
- have jointly acquired a substantial shareholding in the bank;
- have declared publicly or provided the NBU or another authorized body with the documents on the joint acquisition of a substantial shareholding in the bank.

2. When is the NBU approval required?

Approval by the NBU is required if a shareholding in the bank reaches or exceeds 10%, 25%, 50%, and 75% of the bank's charter capital. The point when it is necessary to apply for the NBU approval depends on the specifics of the establishment of control over the substantial shareholding in the bank.

For example, it is possible to obtain the NBU approval of an acquired or an increased substantial shareholding in the bank after its actual acquisition or increase, in particular, in the following cases:

- acquisition of the bank's shares as a result of the acquisition of a controlling interest;
- changes in the list of the owners co-owning a substantial shareholding;
- receipt of an inheritance.

The acquisition of a substantial shareholding in a newly incorporated bank after its state registration must be approved by the NBU simultaneously with the approval of the articles of association of this newly incorporated bank.

The approval of the NBU is also a prerequisite for the transfer of voting rights based on a power of attorney in respect of the shares in the bank constituting a substantial shareholding in the bank. While structuring such a devolution, it should be noted that the power of attorney, in this case, shall provide for the liability of a principal for the actions of the proxy and the obligation of the principal to take timely measures to prevent the insolvency of the bank.

Similar conditions are applied to the governance of a bank's shares or shares in the charter capital of any legal person in the chain of ownership of the bank's shares. Additionally, it shall be taken into account that this bank cannot be a trustee of the shares. Moreover, if more than one participant has transferred their shares for governance, even if each participant has less than 10%, these participants shall agree to obtain a common holding of a substantial shareholding in the bank.

3. When the documents are to be submitted to the NBU?

To approve the acquisition or increase of a substantial shareholding in a proposed bank, the documents shall be filed with the NBU at least two months before the planned date of such acquisition or increase. For the approval of an already acquired or increased shareholding in the bank, the documents must be submitted to the NBU within two months from the date of the actual acquisition or increase.

In the case of the establishment of a bank, the documents for the approval of the substantial shareholding in the bank shall be submitted to the NBU simultaneously with the set of documents for the approval of the articles of association of the newly established bank.

4. What kind of documents should be submitted to the NBU?

Among other things, the approval package of documents for the acquisition or increase of a substantial shareholding in a Ukrainian bank has to include:

- notification on the acquisition or increase of substantial shareholding in the bank;
- schematic layout of the bank ownership structure following the acquisition or increase of a substantial shareholding therein;
- conclusion (a preliminary conclusion) of the Antimonopoly Committee of Ukraine regarding the concentration and/or permission of the Antimonopoly Committee for the concentration (if required by the legislation of Ukraine);
- documents and information required to identify all legal entities in which an applicant and persons, who will hold a substantial shareholding in a bank, are the owners of a substantial shareholding and/or the managers;
- documents for the assessment of a financial and property status, as well as the business reputation of the person, who is or will become an ultimate beneficial owner of the bank as a result of the acquisition of a substantial shareholding, and all persons via whom he acquires or increases a substantial shareholding in the Ukrainian bank;
- copies of agreements or other documents (drafts thereof), based on which a substantial shareholding in a bank will be acquired or increased (this document shall not be submitted upon the establishment of the bank).

If the actual acquisition or increase of a substantial shareholding is subject to approval, the package of documents shall also contain:

- an extract about the balance of the paper securities of a bank shareholder, i.e., an ultimate beneficial owner of a bank or a legal entity via which the ultimate beneficial owner indirectly owns a substantial shareholding in the bank that confirms its ownership of the bank's shares;
- copies of agreements or other documents on ownership of bank shares and shares in charter capitals of legal entities in the chain of the ownership of the equity rights in the bank, concluded after the approval of an acquisition or an increase of a substantial shareholding by an ultimate beneficial owner of the bank or the persons, via whom he owns a substantial shareholding in the bank.

5. Peculiarities of the submission of the documents by foreign participants

To obtain approval of a substantial shareholding in a Ukrainian bank, foreign companies shall additionally provide:

- a copy of the resolution issued by a governing body of a foreign company on the shareholding in a bank in Ukraine;
- a written permit for a foreign company's shareholding in a bank in Ukraine issued by a competent supervisory authority of a state where the head office of the foreign legal entity is registered. If the legislation of this state does not contain such requirements, the company may file a written certification to that effect and does not need to provide this kind of permit.

A foreign individual entrepreneur shall also additionally submit a similar permit or a certification.

The foreign bank shall additionally submit a statement from a central bank or another authorized body of the foreign country that supervises its operations. Such statement shall contain:

- consent to an acquisition or an increase by a foreign bank of a substantial shareholding in a Ukrainian bank (if the legislation of the foreign country requires such consent) or a written certification of the foreign bank that there is no requirement to provide such consent in the legislation of the country of its registration;
- information on the financial condition of a foreign bank, its compliance with mandatory ratios and limits, any violation of the legislation over the past three years, as well as on the impact of the acquisition or increase of a substantial shareholding in a Ukrainian bank on the financial condition of the foreign bank, its compliance with mandatory ratios and limits, legal requirements.

An international financial institution shall additionally submit a decision of its authorized body on an acquisition or an increase of its substantial shareholding in a Ukrainian bank. At the same time, international financial institutions shall not submit documents on identification, and evaluation of the business reputation and financial condition (except for a strategy and a business plan).

In certain cases, the NBU's Supervisory Committee may establish exceptions as to the necessity to submit certain documents or their forms.

6. Procedure and the approval time frame

In general cases, the NBU considers the package of documents within two months of its receipt.

When planning bank share purchase agreements, it should be borne in mind that the NBU may temporarily (pending a decision on the approval) prohibit the exercise of voting rights concerning the relevant bank shares by those persons, who have acquired or increased a substantial shareholding in the bank without approval.

Moreover, when preparing the documentation package and planning the structure of an agreement to acquire a substantial shareholding in the bank, it should be taken into account that the NBU may prohibit the acquisition or increase of a substantial shareholding in the bank (may refuse to approve a substantial shareholding already acquired or increased in the bank) if:

- the package of documents is incomplete;
- the documents contain unreliable information or do not meet the requirements of the laws of Ukraine and the NBU regulations;
- information, which has a substantial significance for getting the approval of an acquisition or an increase of a substantial shareholding in a bank is not disclosed or concealed;
- business reputation of a person, and for a legal entity, also of the members of its executive body and/or supervisory board, at least one holder of a substantial shareholding in the legal entity, or at least of one person through whom the substantial shareholding in the bank will be indirectly held and/or controlled, does not meet the requirements established by the NBU;
- financial condition of a legal entity or the property status of an individual entrepreneur or at least of one person through whom the indirect holding of the substantial shareholding in the bank is to be held, does not comply with the requirements established by the NBU;
- acquisition or increase of the substantial shareholding in the bank by a person would threaten the interests of depositors and other creditors of the bank or contradict the antimonopoly legislation of Ukraine, or may lead to deterioration of the bank's financial situation;
- ownership structure of a legal entity or the ownership structure of a bank after the acquisition or increase of the substantial shareholding will not meet the transparency requirements established by the NBU.

7. Approval period of validity

Once approval has been granted, an acquisition or an increase of a substantial shareholding in the bank can be implemented within 6 months from the receipt of the approval.

The period may be extended. To do so, an application must be submitted to the NBU no later than 30 calendar days before its expiry.