DLF
ATTORNEYS-AT-LAW

Purchasing a Ukrainian bank: obtaining approval from the National Bank of Ukraine

In 2015 Ukrainian legislation related to the acquisition of a significant shareholding in a bank was substantially amended. This was due to the harmonisation of Ukrainian legislation with EU legislation. Changes were, therefore, made to the laws of Ukraine as to the transparency of ownership structure, including the ultimate beneficiaries, of the banks, increase in the liability of the shareholders and related persons of the bank, etc. This article discusses the current procedure for obtaining approval from the National Bank of Ukraine on the acquisition of a significant shareholding in a bank and provides practical comments in relation to some aspects of such procedure.

The main act that regulates the process of obtaining the NBU's approval is the Regulation of the NBU On Procedure of Registration and Licensing of Banks and Opening Branches (the Regulation). In addition, On Banks and Banking Activities Act of Ukraine (the Act) also encompasses some important provisions.

A significant shareholding is direct and/or indirect ownership by one person separately or collectively with other persons of 10% and more of the capital and/or shares of the bank or the opportunity, irrespective of a formal ownership, to exercise significant influence on the management or activities of the bank. A person might be recognised as the owner of an indirect shareholding whether or not it exercises control over the direct owner of a bank or in relation to any other person in the chain of ownership of corporate rights of the bank.

If a legal entity or individual decides to acquire a significant shareholding in a bank, the following documents shall be filed with the NBU:

- A notification from the purchaser of its intention to acquire the bank as per the NBU standard form, which is provided in the Regulation. This form is used both in cases of direct or indirect acquisition of ownership. The signature of an individual person intending to acquire a significant shareholding shall be notarized. The signature of the director of a legal entity intending to acquire a significant shareholding shall be sealed;
- A scheme of ownership structure after acquisition of significant ownership by the purchaser;
- Merger clearance of the Anti-monopoly Committee of Ukraine for acquisition of the bank, if required under Ukrainian legislation. Note that the process of obtaining of the clearance is almost inevitable due to the low financial thresholds provided by the anti-monopoly legislation of Ukraine and should be obtained not simultaneously, but prior to submission of the required documentation to the NBU;
- The agreement on the sale and purchase of corporate rights of the bank (or its draft) or any other agreement (or its draft) which would result in the purchaser acquiring a significant shareholding in the bank. We recommend submitting drafts of any agreements with each page signed by the parties to the agreement;
- A document confirming payment for the services of the NBU. Note that the NBU announced its intention to adopt a special act in which the amount of, and

procedure for, payment would be specified, but at the time of writing this article no such act has been adopted. Therefore, the documents should be submitted without confirmation of payment for the time being.

In addition, the legal entity shall submit the following documents:

- Identification documents Duly notarized constitutional documents. In certain foreign jurisdictions a company may function on the basis of a legislative act which serves as its constitutional document (e.g., Implementing Rules and Regulations in the UAE pursuant to Law No.9 1992 for regulation of activities of Free Zone Companies and Free Zone Establishments). In such cases we recommend that the applicant submits a letter to the NBU certifying that the company is functioning on the basis of a particular legislative act together with a copy of such act and its translation into Ukrainian;
- Extract from the state, trade, court or other register confirming registration of the company and containing information about its address, managers and shareholders.

Financial documents The audited financial statements of the legal entity. A Ukrainian entity shall provide the audited financial statements for the last reporting year and the interim audited financial statements for the last reporting period prior to submission of the documents to the NBU. A foreign entity shall provide the audited financial statements for the last three reporting years and interim audited financial statements for the last reporting period. A foreign public company or a company with a credit rating of investment grade shall provide the audited financial statements for the last year only. The auditor's opinion shall contain information on the availability of the funds necessary for acquisition of a significant shareholding in the bank, the sources of origin of such funds, and an assessment of the financial condition and solvency of the entity on the basis of recommended indicators specified in the Regulation. If the auditor is not from an EU member state, then the opinion of a Ukrainian auditor approving the foreign auditor's opinion is required;

Statements from the bank accounts of the purchaser, which will be used for payment for the shares of the bank, on movement of the funds for the last three months, and that the bank has performed the necessary check of sources of origin of such funds. In our experience, the major foreign banks are reluctant to provide a written statement on the latter arguing that a check of sources of funds is performed per se when the funds are accepted by the bank. The NBU is not pedantic in relation to this requirement and accepts such an explanation.

Business reputation documents Questionnaire about the legal entity. Note that this questionnaire requires the provision of information on the price for acquisition of shares in the bank. If the price quoted in this section is more than the amount of available funds shown in the audited financial statements, the financial position of the purchaser will not be deemed as appropriate / adequate;

Questionnaire about the executive body and supervisory board of the legal entity;

Certificates on the existence or absence of criminal convictions of the members of the executive body or supervisory board of the legal entity. In our experience, this is not always available in certain jurisdictions, but may be provided in a free form by the state authority (preferably, the Ministry of Internal Affairs) and sealed;

Credit report from the qualified credit bureaus. The qualified bureaus for residents

of Ukraine are the First All-Ukrainian Bureau of Credit Histories, the International Bureau of Credit History and the Ukrainian Bureau of Credit Histories. Information from all of the above-mentioned bureaus is required. Non-residents of Ukraine shall refer to the largest credit bureau in their country.

The Act specifies that a foreign company shall also provide to the NBU: A copy of a resolution of the executive body of the company approving acquisition of the bank; and

A copy of a permit for acquisition of a significant shareholding in a bank in Ukraine issued by the competent supervisory authority of the country of origin of the company, if such is required by the laws of the respective country. However, if no such requirement is in place, the company shall provide a letter in free form confirming this.

An individual (including the ultimate beneficiary) shall submit the following documents:

- Identification documents A copy of the relevant pages of a passport with the owner's photo, name, date of birth, passport serial number and date of issue, name of the issuing body and registered address. All copy pages shall be certified by the signature of the owner or be notarized. A foreign citizen, if his / her passport does not contain information about the registered address, shall provide a document certifying such citizen's registered address. A copy of a relevant recent utility bill shall suffice;
- A copy of the document showing the personal tax number certified by the signature of the owner or notarized.

Financial documents Statements from the bank accounts of the purchaser, which will be used for payment for the shares in the bank, on movement of the funds for the last six months and funds remaining in the accounts, and that the bank has performed the necessary check of the sources of origin of such funds;

Tax declaration (certificate from the tax authorities) for one or more of the last reporting years, indicating the amount of income and taxes paid as well as any outstanding tax liabilities. If, under legislation of the relevant country, obtaining such tax declaration (certificate) with the relevant information is impossible, a purchaser shall provide a letter to the NBU with a relevant explanation;

Information on sources of personal funds provided in the form of a letter to the NBU. A short description of any entrepreneurial activities, dividends or bank deposits shall suffice. Such letter shall be signed and notarized;

Any other documents that contain evidence of the purchaser's good financial standing.

It should be noted that the NBU's assessment of the of the individual's financial standing shall be deemed as proper if the income of the individual exceeds the amount of regulatory capital of the bank pro rata to the amount of the significant shareholding to be acquired. In relation to sources of funds which could be used for the acquisition of a significant shareholding, this could be from any source specified in the Tax Code of Ukraine (i.e., salary, royalty, investment, etc.), or funds, holdings, property legally obtained and evidenced by the appropriate documentation.

- Business reputation documents Questionnaire about the individual. In this questionnaire a purchaser shall provide, inter alia, information about his / her affiliated persons and legal entities wherein he / she has a significant or controlling shareholding or is a member of its governing bodies;
- Certificate on the existence or absence of criminal convictions;
- Credit report from the appropriate qualified credit bureaus.

The Law specifies that a foreign individual shall also provide a copy of a permit for the acquisition of a significant shareholding in a bank in Ukraine issued by the competent supervisory authority of the country of origin of the individual if such is required by the laws of the respective country.

It should be noted that the NBU is entitled to demand any other document, information, etc. not specified above. Also note that all documents provided to the NBU shall bear the apostille stamp (be legalized) and accompanied by a duly notarized Ukrainian translation. Therefore, with a view to keeping notarial fees to the minimum, we advise that, where appropriate and possible, bilingual documents should be prepared (e.g., letters, questionnaires).

The documents specified above are submitted within the general procedure for obtaining approval of the NBU on the acquisition of a significant shareholding. Special procedures apply to the acquisition of a significant shareholding by international financial institutions, governments, private investment vehicles and in relation to the shares of insolvent banks.

The NBU decides whether to approve the acquisition of a significant shareholding within three months following receipt of all necessary documentation.

The NBU may refuse to approve the acquisition of a significant shareholding in the event of any failure to comply with the required standards of business reputation and financial standing, lack of funds, lack of transparency in the ownership structure or due to the submission of unduly obscure or ambiguous or corrupt documents or in the event that the acquisition of a significant shareholding would damage the interests of the depositors or creditors of the target bank. In addition, the NBU is also entitled to refuse approval of the acquisition of a significant shareholding to a foreign purchaser if the state of its residence does not provide for the due implementation of international standards in the area of combating legalization (laundering) of proceeds from crime and terrorist financing or in which banking supervision, according to the relevant international bodies, is not consistent with the Core Principles for Effective Banking Supervision published by the Basel Committee.