

## MONTHLY LEGAL UPDATE



Kiev, April 2016

### BANKING & FINANCE

#### CURRENCY CONTROL: EARLY REPAYMENTS UNDER CROSS-BORDER LOANS

By virtue of NBU Resolution No. 863 dated 4 December 2015 any prepayments of the principal and interest by Ukrainian legal entities or individuals under loans from foreign lenders were effectively prohibited, except where:

- + repayments are made by Ukrainian banks and such repayments are eventually invested by the foreign lender into the share capital of these Ukrainian banks;
- + repayments are made by Ukrainian borrowers from the proceeds under new loans extended with a longer tenor than those being prepaid; and
- + repayments are made to, or for the benefit of, international finance institutions (IFIs).

On 24 March 2016 the NBU issued Resolution No. 192 by which the above Currency Control restrictions were slightly relaxed and Ukrainian borrowers were allowed to:

- + change the frequency of interest payments under cross-border loans from annual to quarterly/monthly and/or from quarterly to monthly;
- + reschedule interest payments for the period not exceeding 180 calendar days; and



- + make early repayments under loans in the amounts corresponding to the participation in such loans of export credit agencies.

In addition, NBU resolution No. 192 enables Ukrainian banks to transfer foreign currency to a foreign investor on the basis of NBU's individual license required for certain FX transactions provided, however, that:

- + the transfer is made to the investment account of a foreign investor held with such Ukrainian bank;
- + foreign currency credited to the foreign investor's account will be used towards an increase in the share capital of such Ukrainian bank; and
- + the transfer is effected within the time limits provided for by a respective individual license.

The step made by the NBU to ease foreign Currency Controls is highly welcomed but still such minor changes are unlikely to have any significant positive effect on foreign exchange transactions and cross-border deals.

As a reminder, we note that last year the NBU committed to deregulation of foreign exchange transactions as part of its efforts to improve the investment climate in Ukraine.

## EMPLOYMENT

### INDEXATION OF SALARIES

The Cabinet of Ministers of Ukraine (CMU) has adopted a number of modifications to its Regulations relating to indexation of salaries for the period of December 2015 – February 2016.

In particular, the threshold requiring the indexation of salaries was increased from 101% to 103% of the consumer price index. This change is aimed at relieving the employers from the obligation to increase the salaries in case of a minor fluctuation of the consumer price index. The CMU also specified that only the increase of the base salary ("*oklad*") will be considered as the indexation.

At the same time, the CMU introduced a number of technical changes improving the process for imposition of sanctions for breaching the obligation to make the indexation.

Considering the above, the companies should pay more attention to compliance with the salary indexation rule.

## CORPORATE

### AMENDMENTS TO THE PRIVATIZATION LAW

On 6 March 2016, amendments to the *Law of Ukraine on Privatization of State Property* (the "Privatization Law") adopted by Verkhovna Rada of Ukraine on 16 February 2016 entered



into force. The amendments were adopted as part of the governmental privatization campaign launched in 2015 and are aimed at improvement of the privatization procedure.

The amendments introduce the following major novelties:

- Prohibition of participation in privatization for legal entities and natural persons related to a state recognized as an aggressor by the Ukrainian Parliament or included by Ukraine in sanctions lists.

On 27 January 2015, the Parliament of Ukraine recognized Russia an aggressor state for its military activities against Ukraine. According to the amendments to the Privatization Law, the following persons are prohibited from participating in privatization of Ukrainian state property:

- + legal entities beneficially owned or controlled by the state of Russia or its residents;
- + legal entities registered in Russia or sanctioned in accordance with the Ukrainian law;
- + Russian citizens or other natural persons sanctioned in accordance with the Ukrainian law.

The prohibition also applies to affiliates (legal entities and natural persons) of the mentioned persons.

- + Possibility to introduce an arbitration clause into the sale agreement concluded as part of the privatization procedure. Previously, disputes arising out of such agreements could be resolved only by Ukrainian commercial courts. Therefore, the amendments allow foreign investors to take advantages of international arbitration as a neutral, time and cost efficient form of disputes resolution.
- + Introduction of the requirement to disclose information about ultimate beneficial owners and financial status of the buyer;
- + Abolishment of the requirement to sell 5-10% of shares of state owned companies of privatization groups “B” and “Г” on a Ukrainian stock exchange prior to the tender, in order to avoid fragmentation of ownership and speed up the privatization procedure;
- + Development of the procedure for election of independent advisors engaged by the Government to consult on the preparation to privatization and privatization of large state owned companies.

## PUBLIC PROCUREMENT AND PPP

### NEW PUBLIC PROCUREMENT LAW SIGNED

On February 16, 2016, the Ukrainian President signed the new *Law of Ukraine on Public Procurement* (the “Law”). The Law will come into force on August 1, 2016; certain national contracting authorities will start applying the new Law on April 1, 2016.



The new Law requires for all bids to be submitted in electronic format by completing e-forms made available on authorized web-sites. All further correspondence, including award notices and appeals, should be made through the web-exchange as well. Each contracting authority is required to set a starting price of the procurement when initiating an open tender, whereas potential bidders are expected to supply products for the lowest price. If, a contracting authority is not able to define a starting price, a competitive dialogue must substitute the open tender. Under this form of procurement, other (non-price) criteria have priority over the lowest price.

The new Law provides for a possibility for contracting authorities to use privately run web-sites authorized by the Ukrainian Ministry of Economy to conduct public tenders. Further, the new Law introduces a possibility for a contracting authority to delegate entirely the operation of public procurement to private operators acting under the authority of the Ukrainian government (the so called “centralized procurement organizations”).

Besides, under the new Law, procurement made by holders of special or other exclusive rights granted on the basis of public tenders are not subject to public tender requirements. This rule is expected to apply, first of all, to private concessionaires and other private operators under various PPP agreements in Ukraine.

In addition, on February 24, 2016 the Ukrainian government adopted a special strategy to ensure implementation of the new Law in harmony with EU directives. The strategy serves as a guideline to fulfil the Ukraine’s goal of European integration in the area of public procurement.

## AMENDED PPP LAW SIGNED

On February 5, 2016, the Ukrainian Parliament finally adopted the long awaited amendments to the *Law of Ukraine on Public Private Partnership*, commonly known as the PPP law amendment.

The amended PPP law provides for a possibility of the tender's winner to establish an SPV to act as a private partner in the PPP project. Besides, central and local governmental authorities are not allowed to appoint a responsible public company to act as a public partner in the PPP project, which opens the door for more institutionalized PPPs.

Further, the amended PPP law recognizes asset management agreements as a possible PPP form, which makes various O&M models more certain under the Ukrainian laws. New opportunities are offered in connection with the use and ownership over PPP assets. More specifically, a private partner may retain the ownership rights over newly created / acquired PPP assets. Besides, the parties to PPPs may agree on joint ownership over the newly created assets. The lenders’ rights to directly participate in the PPP agreement and initiate replacement of the defaulted private partner under the PPP agreement became explicitly recognized. Yet, particular terms and conditions of such replacement need to be defined by the Cabinet of Ministers of Ukraine.



The amended PPP law provides for more options of compensation of the private partner's losses related to low prices for services rendered in a PPP project or failure of the public partner to fulfil its obligations. Notably, it declares that availability payments could be in place under the PPP agreement. It is worth adding that a similar provision already exists in the Ukrainian law on road concessions. However, the practical implementation of availability payments is rather difficult for the moment, because it still lacks an adequate procedure on the level of budget laws.

Last but not the least, the amended PPP law explicitly recognizes the possibility to settle PPP disputes in international arbitration.

The amended law will become effective 3 months after its signing by the President of Ukraine and publication.

## ANTITRUST/COMPETITION

### NEW LAW INCREASING MERGER NOTIFICATION THRESHOLD SIGNED

The Ukrainian anti-trust regulatory regime undergoes important changes in 2016 with the adoption of a new law increasing the merger notification thresholds as well as new guidelines explaining the penalty policy. The new law will come into effect on May 18, 2016.

According to the new law, starting from May 18, 2016, any transaction will require a prior approval by the AMC if the annual turnover in Ukraine of its participants exceeds the following financial thresholds:

- + EUR 4 million each in case if at least two parties are active in Ukraine, or
- + EUR 8 million if only the target or one of the JV's founders is active in Ukraine.

The turnover in Ukraine is to be calculated "with inclusion of relations of control", i.e. on the group-level. In other words, the indicated Ukrainian thresholds may be exceeded by combined sales achieved on any market in Ukraine by several undertakings of the group.

Under the Ukrainian law, any foreign-to-foreign transactions meeting the indicated financial thresholds, irrespective of their real economic effect in Ukraine, are deemed to be illegal without a prior approval by the AMC. We expect the Antimonopoly Committee of Ukraine (the "AMC") to be more attentive to the issue of compliance with the Ukrainian notification requirements of foreign-to-foreign transactions, even with no substantial economic impact in Ukraine.

The applicable fine for transactions completed without a prior approval is calculated by the AMC based on the general rate of 5% of the local turnover in Ukraine and taking into account the voluntary disclosure, low impact in Ukraine and overall duration of the violation. The fine will be higher the longer parties hesitate to contact the AMC for the post-closing



approval.

At the same time, the 2016 penalty policy offers a possibility of amnesty for past transactions closed without a prior approval by the AMC. More specifically, the amnesty rule envisages a low fine of approximately EUR 3,500, which applies to transactions voluntarily disclosed to the AMC. The possibility to apply for the amnesty is valid until September 15, 2016.

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