

NATIONAL BANK OF UKRAINE TAKES ACTIONS PREVENTING ASSIGNMENT OF CROSS-BORDER LOANS

The National Bank of Ukraine (the "NBU") has taken actions to prevent the conversion of borrowings extended by Ukraine-based lenders to cross-border borrowings. This was announced by the top NBU official as the primary purpose of the new NBU regulation, no.551 of 20 August 2015 (the "**Regulation**") which supplements regulation no. 354 of 3 June 2015). However, the wording of the Regulation seems to be somewhat far-reaching and concerns the rights of the foreign lenders under cross-border borrowings extended to Ukrainian residents.

Specifically, the Regulation says that the NBU will not register:

- (i) the amendments to the agreement for granting FX loan to a Ukrainian resident (other than a bank) by a non-resident, should such amendments provide for a change of the lender and/or borrower in a respective loan agreement; and
- (ii) the agreement on providing FX loan by and to a Ukrainian resident in case of assignment by a resident lender to a non-resident of the receivables under such loan agreement.

As known, cross-border loan agreements under which foreign lenders provide loans to Ukrainian borrowers, are subject to the registration by the NBU. The same registration obligation exists for the amendments to the principal terms of such cross-border loan agreements, including their extension as well as assignment of rights under the agreements from one non-Ukrainian lender to another non-Ukrainian resident that would assume the rights of the lender.

With respect to the amendments to the loan agreement (i.e. in no. (i) above), the Regulation does not specify whether this restriction should apply to cases when a foreign lender is replaced with a Ukrainian resident. Rather, its broad wording prevents registration by the NBU of any assignments and subsequent amendments to loan agreements, even those which are executed between foreign parties, which is often the case in various types of cross-border financial agreements.

For intra-group assignments, it is provided that the NBU may, at its discretion, take an *ad hoc* decision allowing registration in either of the above two cases provided that the borrowers and/or lenders are control related undertakings. Obviously, receiving such a decision from the regulator will be unlikely a straightforward and transparent procedure. Furthermore, there is a question whether it is at all appropriate for the NBU to provide for the discretion factor in its decision making.

As a matter of practice, groups of companies often used corporate lending as a mean of financing for the Ukrainian group of companies' operations. In the case of M&A

transactions, the shareholders' loans are often assigned to buyers of Ukrainian companies, while as a result of the Regulation, such assignment will become questionable, if not impossible at all.

The agreements executed by Ukrainian residents with international financial institutions (such as e.g. the EBRD) are expressly exempt and the amendments thereto will be registered by the regulator.

So far, the prohibition to register the mentioned amendments to FX loan agreements and newly executed FX loan agreements applies until 3 September 2015 together with other currency control restrictions set forth previously by the NBU regulation no.354 of 3 June 2015. However, considering the restrictive policy of the NBU so far, further extension of their application is the likeliest scenario.

Considering other effective currency control restrictions, such as the requirement of conversion into UAH of 75% of foreign currency proceeds (including cross-border loan amounts received by Ukrainian residents) and the prohibition on earlier repayments by Ukrainian borrowers under cross-border lending, the new restrictive measure eventually blocks the possibility to exercise the contractual rights by foreign lenders. The interference by the state regulator into private contractual relations for the sake of dubious short-term goals does not match the generally accepted market practice and will be harmful for the market in the long run.

In the meantime, we are planning to use all possible means, including with the help of Ukrainian business associations, to alarm the NBU on the negative consequences of this new regulation and request for this limitation to be canceled or not extended after 3 September 2015.

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