

*Prevention of Negative Impact of the Global Financial Crisis*” foresees the possibility of waiver of the auction requirement in cases of lease of the land plots for developing of affordable residential construction. The procedure of holding the auctions has been adopted by the Cabinet of Ministers, but was immediately terminated by the President and submitted for consideration to the Constitutional Court. As a result, there is no effective procedure today and auctions on land lease rights mostly are not performed.

## **7.5 Third Party Rights**

The *Land Code* recognizes certain rights of third parties over a land plot within the concepts of “servitudes” (easements) and “good-neighborliness”. The *Land Code* contains detailed descriptions of various types of servitudes, their application, and the procedures for their establishment and termination.

Under the concept of “good-neighborliness,” land owners and land users are obliged to use the land in a manner that will cause the least possible inconvenience and discomfort to the landowners and land users of neighboring land plots (in particular, in terms of shading, smoke, odor nuisances and noise pollution).

# **8. PRIVATIZATION**

## **8.1 General Background**

In 1992, Ukraine embarked on a mass privatization program which combined both voucher privatization by citizens and limited cash privatization. In March 1992, the Verkhovna Rada enacted two major pieces of legislation on privatization, one covering large scale privatization, *i.e.*, the Law “*On the Privatization of the Property of State Owned Enterprises*” (the *Privatization Law*), and the other covering the privatization of small-scale enterprises, the Law “*On the Privatization of the Property of Small State-Owned Enterprises*” (the *Law on Small Privatization*). These two laws established the basic principles of privatization: the possible objects of and participants in privatization; the role of the state authorities in the privatization of state property; the general characteristics of the methods and procedures for privatization; and various other principles.

The specific objectives, quotas, and methods of privatization for each year are outlined in the state privatization programs adopted by the Verkhovna Rada. In addition, various aspects of the privatization process are regulated by resolutions of the Verkhovna Rada, resolutions and decrees of the Cabinet of Ministers, decrees of the President, and orders of the State Property Fund of Ukraine (the SPF).

In 2000, the Verkhovna Rada adopted the *Law “On the State Privatization Program”* approving the state privatization program for the years 2000 through 2002 (the 2000 Privatization Program). The *2000 Privatization Program* sets forth the objectives and priorities for privatization, and provided a detailed procedure for the privatization of different kinds of state property for the following three years. Although since 2004 numerous drafts of the new privatization program have been submitted to the Verkhovna Rada, none of them has ever been approved. For instance, the draft *Law “On the State Privatization Program for the years 2009 - 2013”* has been recently voted down by the Verkhovna Rada in its last third reading. Hence, the *2000 Privatization Program* is effective today and will continue to remain in full force and effect in 2009 and thereafter, until such time as a new state privatization program is adopted.

## 8.2 Objects of Privatization

Under the *Privatization Law*, the following state-owned assets are subject to privatization:

- assets, production facilities, and structural units of an enterprise that constitute an integrated property complex;
- unfinished construction sites;
- state-owned shares in enterprises; and
- land under objects subject to privatization.

The *2000 Privatization Program* divides all state-owned assets into six groups. Group A includes small enterprises and their structural units, which have been sub-divided into separate enterprises having up to 100 employees, or over 100 employees if the value of the fixed assets is not sufficient to form an open joint stock company (*i.e.*, during 1 January 2008 - 31 March 2008 it will be UAH643,750 (approximately US\$127,475 or EUR86,993); during 1 April 2008 - 30 September 2008 it will be UAH656,250 (approximately US\$129,950 or EUR88,682); during 1 October 2008 - 30 November 2008 it will be UAH681,250 (approximately US\$134,900 or

EUR92,060); and with effect on 1 December 2008, it will be UAH756,250 (approximately US\$149,752 or EUR102,195). Group B includes enterprises with more than 100 employees and fixed assets sufficient to establish an open joint stock company (OJSC). Group G covers integrated property complexes, monopolies and companies of strategic importance. Group D covers unfinished construction sites and objects of mothballed construction. Group E includes state-owned shares in private enterprises of any legal organizational form and the last Group J covers social objects regardless of their value.

The privatization of property complexes of the monopolists on certain markets, military-industrial establishments which require conservation, companies whose privatization is carried out with the attraction of foreign investments and other objects referred to Group G, should be carried out upon the agreement with the Cabinet of Ministers of Ukraine.

### **8.3 Participants in Privatization**

Under the *Privatization Law*, foreign individuals and legal entities may participate in the privatization process, along with Ukrainian citizens and legal entities. Foreign investors may pay for the privatization objects they intend to purchase in any freely convertible foreign currency rather than in local currency.

The *Privatization Law* stipulates that joint ventures and foreign investors which are legal entities must submit a declaration of the origin of the funds which they intend to use as consideration for the property being privatized, regardless of the value of the purchase.

The *2000 Privatization Program* contains a number of restrictions with respect to potential purchasers of shares of OJSCs that enjoy a monopoly position in the national market for the relevant products, or that are of strategic significance to the national economy and/or security. In such cases, only a majority stake in such an OJSC may be offered for privatization and, if the relevant OJSC operates in any of the fields of energy, metallurgy, the oil and chemical industry, radio-electronics, aviation, or machine building, then such majority stake may be acquired only by an “industrial investor.” The latter is defined as a national or foreign investor or a consortium of investors with demonstrated interest in maintaining the relevant market share of the OJSC that during not less than three years produces similar

products or consumes the products of such an OJSC in its main production as its main raw materials, or which produces products which are consumed by such an OJSC in its main production, or which has maintained direct control over such OJSC for at least one year. The 2000 Privatization Program specifically provides that an “offshore entity,” *i.e.*, a legal entity established in a tax haven jurisdiction, may not qualify as an industrial investor.

## 8.4 Methods of Privatization

Under the *Privatization Law*, state-owned property may be privatized through the sale of state property at auctions, or through a tender or a buy-out of the state property under alternative privatization plans. Shares offered for sale through a tender may be sold only in one block in the quantity stipulated by the privatization plan.

An “open tender” is defined as a method of privatization which is applied to the competitive sale of blocks of shares of OJSCs carried out with the participation of financial advisers authorized by the SPF. The authorized adviser may be either a resident or a non-resident legal entity. The authorized adviser is responsible for the preparation of the tender documentation, the initial evaluation of the block of shares to be sold, and the organization of marketing campaigns.

Large blocks of shares (*i.e.*, more than 25%) in OJSCs with a turnover exceeding UAH100 million for the previous reporting year, or with a balance sheet value of fixed assets exceeding UAH100 million, are normally offered for sale through an open tender. Only one block of shares at a time of a particular OJSC may be offered for sale through an open tender. Proposals to buy a portion of the tendered block of shares are not acceptable.

The SPF may organize the tender for the sale of shares in OJSC in the form of an open auction. In such a case, the winner is determined on the basis of the auction held in accordance with the procedure established by the privatization regulations.

There are additional requirements for the sale of shares in “strategic enterprises.” If an enterprise which is to be sold through an auction or a tender or at a stock exchange is identified as “strategic,” the bidders must prepare and submit to the privatization authorities additional disclosure documentation determined by the SPF and the Antimonopoly Committee of Ukraine (the AMC). If the stake to be

acquired in a strategic enterprise exceeds 25% or is otherwise deemed to grant controlling powers in the highest management body of the enterprise, then the approval of the AMC must be obtained prior to the purchase.

The *2000 Privatization Program* provides that the state may (but is not obliged to) retain 25% or 50% (depending on the category of the enterprise undergoing privatization) of the outstanding shares plus one share of every OJSC created on the basis of state-owned monopolies or strategic enterprises. Such a shareholding will ensure that the state will retain the right to control the decision-making process at the shareholders' meeting (the highest governing body of a joint stock company), either by the exercise of a veto or by outright majority ownership of the shares, with regard to the following issues: the amendment of the charter of the joint stock company; the termination of its activities; the creation or termination of a subsidiary, branch, or representative office of the joint stock company; the participation of the joint stock company in other enterprises and associations; and any pledge, lease, sale, or any other alienation of its assets, the balance value of which exceeds 25% of the charter fund of the joint stock company.

The lists of enterprises to be sold through auctions, tenders and buyouts must be approved by the SPF with respect to state-owned property, by the Parliament of the Autonomous Republic of Crimea with respect to property of Crimea, and by local councils of deputies with respect to municipal property. The list of objects covered by Group G, which privatization is supposed to be carried out with the attraction of foreign investments, should be approved by the Verkhovna Rada upon submission of the Government of Ukraine.

Title to privatized property is evidenced by the sale and purchase agreement entered into by the purchaser and the corresponding privatization authority. The sale and purchase agreement must be executed in written form and certified by a notary.

## **8.5 Investment Obligations**

The *Privatization Law* also provides for investment obligations where the investor acquires an entire integrated property complex. Such possible investment obligations include:

- Implementation of know-how and new technologies;
- Preservation of employment;
- Adherence to antimonopoly regulations;
- Preservation of the range and amounts of the goods produced;
- Implementation of anti-pollution measures;
- Commitment of direct investments in addition to the purchase price payment;
- Taking measures aimed at the social well-being of personnel; and
- Repayment of debts.

The parties to the privatization process may agree upon other investment obligations.

The period for the fulfillment of such investment obligations may not exceed five years. Any transfer of shares (property) which are subject to investment obligations must be approved by the state privatization authorities and is generally prohibited until the investment obligations are performed in full. If the state privatization authority approves such a transfer of shares (property), the investment obligations must be assumed by the new owner of the shares (property) in question.

## **8.6 Privatization Developments, Results and Prospects for 2009**

Notwithstanding the ambitious agenda for full-scale privatization embodied in each of the state privatization programs, until recently an effective program for the systematic large-scale transfer of state-owned assets to private entities and/or individuals had not been implemented in Ukraine.

Although the Ukrainian Government began to transform state enterprises into joint stock companies within the scope of the “corporatization” process, and to sell

minority stakes through auctions and competitive tenders, most enterprises privatized during 1993-1996 were small and medium-sized businesses involved in the areas of retail trade, food service, construction, and other service-related activities. This so-called “small privatization” is practically complete in Ukraine. A significant number of privatized enterprises have been privatized by their workers’ collectives through the buy-out mechanism.

As of the end of 1998, Ukraine began to implement a new stage of privatization, offering for tender both blocking (*i.e.*, 25%) and majority (*i.e.*, 50% and more) stakes in its “blue chip” companies.

According to Resolution of the Cabinet of Ministers No. 1517-p “*On Approval of List of Companies and Holdings, in which State Shareholdings (Interestholdings) are subject to sale, and State Enterprises, Holdings and Open Joint-Stock Companies, which are to be Prepared for the Sale in 2009*”, dated 3 December 2008, the privatization of a number of state-controlled companies was scheduled for 2009, including Ukrtelecom, a telecommunication monopoly, and Odesa Portside Plant, a large chemical enterprise.

## **9. COMPETITION LAW**

### **9.1 General**

On 18 January 2001, the Verkhovna Rada adopted the Law of Ukraine “*On the Protection of Economic Competition*,” which became effective on 2 March 2002 (the *Competition Law*). In 2005 the *Competition Law* was amended adding a new requirement regarding the transactions subject to the prior approval of the Antimonopoly Committee of Ukraine (the AMC).

The *Competition Law*, inter alia, defines and sets forth the principal features of (i) anti-competitive concerted actions of business entities; (ii) abuse of monopoly (dominant) position on the market; and (iii) restrictive and discriminatory activities by business entities and their associations.

The *Competition Law* also describes the transactions which require the prior approval of the AMC, subject to the satisfaction of certain thresholds.