

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.

## 9.2 Transactions Subject to Prior AMC Approval

Pursuant to Article 22 of the *Competition Law*, the following transactions may be subject to prior AMC approval: (i) mergers or consolidations of business entities; (ii) the acquisition of direct or indirect control over a business entity; (iii) the establishment of a business entity by two or more business entities that will engage in business activities independently over a prolonged period, provided that such establishment does not result in the coordination of the competitive conduct among business entities that established such business entity, or between the business entities and the newly established business entity; and (iv) the direct or indirect acquisition of, obtaining the ownership of, or management over the shares (participatory interests) of a business entity, if such acquisition results in the obtaining or the exceeding of 25% or 50% of the voting rights of the target business entity.

The foregoing types of transactions will be subject to prior AMC approval:

- If the aggregate asset value or the aggregate sales volume of all of the participants to the transaction (the Participants) for the previous fiscal year exceeds the UAH equivalent of EUR12 million (calculated on a worldwide basis) at the exchange rate of the NBU as of the last day of the previous fiscal year, provided that:
  - the aggregate asset value or the aggregate sales volume of at least two of the Participants (calculated on a worldwide basis) exceeds the UAH equivalent of EUR1 million at the NBU exchange rate as of the last day of the previous fiscal year; and
  - the aggregate asset value or the aggregate sales volume of at least one Participant on the territory of Ukraine exceeds the UAH equivalent of EUR1 million at the NBU exchange rate as of the last day of the previous fiscal year.
- Or (irrespective of the aggregate asset value or the aggregate sales volume of the Participants), if the market share of any Participant or the combined market share of the Participants in Ukraine exceeds 35 percent of the market, on which the transaction takes place, and/or the adjacent markets.

For the purposes of the calculation of the foregoing thresholds, the definition of the 'Participant' includes; not only the actual merging, consolidating, establishing or acquiring business entity, but also all of the business entities associated with such entity by relation of control.

### **9.3 Special Approval**

The *Competition Law* provides that the Cabinet of Ministers may grant its approval to the carrying out of certain transactions under special circumstances, even if the AMC has refused to grant its prior approval to such transaction on the grounds that such transaction may cause the emergence of a monopoly in a given market, or may materially restrict competition in a given market or in a substantial part thereof. Such special circumstances are limited to cases where the positive effects of the transaction will have a greater impact on the public interest than its negative effects. However, the Cabinet of Ministers must refuse to grant such approval if the restriction of competition would threaten the existence of the market economy in Ukraine.

### **9.4 Exemptions**

The Competition Law establishes a list of transactions that are specifically exempt from the prior AMC approval requirement, as follows:

- the acquisition of shares (participatory interests) of a business entity by a person (entity) whose principal business is the performance of financial or securities operations, provided that such acquisition has been undertaken with the purpose of the subsequent resale of the shares and such person does not vote on any governing body of the business entity. Such transactions may be carried out without the prior approval of the AMC, subject to the resale of such shares (participatory interests) within one year after their purchase;
- transactions between business entities associated by relations of control are not subject to prior AMC approval, provided that the relations of control were initially established in accordance with the requirements of the Ukrainian antimonopoly legislation; and
- the acquisition of control over a business entity or a division thereof, including the right to manage and to administer the property of such business entity, by an appointed receiver in bankruptcy proceedings or by a state official does not require prior AMC approval.

## 9.5 Liability

The *Competition Law* provides that the AMC is authorized to consider cases on the violation of the legislation governing the protection of economic competition, and to render decisions in such cases, including, *inter alia*:

- recognizing the fact of the violation of the legislation on the protection of economic competition;
- terminating the violation of the legislation on the protection of economic competition;
- eliminating the consequences of the violation of the legislation on the protection of economic competition;
- compelling state authorities, local self-governing authorities, and administrative management authorities to cancel or amend their decisions or to terminate agreements constituting anti-competitive actions of such authorities;
- recognizing a business entity as holding a monopoly (dominant) position in a given market;
- splitting up a business entity holding a monopoly (dominant) position in a given market;
- imposing penalties (in the amount of up to 10% of the Participants' group turnover for the preceding fiscal year); and
- blocking securities on securities accounts.