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Strengthening control over foreign investments in strategic companies in Russia: planned changes in legislation



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The Federal Antimonopoly Service of Russia (the "FAS") has drafted a number of bills¹ aimed at changing how foreign investments are governed in Russia, particularly foreign investments in business entities that are strategically important to national defense and state security ("strategic companies").

If passed into law, these bills will affect both the activity of foreign in-

vestors that have already invested in strategic companies and those that are only planning to do so.

At present, the bills stipulate the following innovations:

- expansion of the scope of regulation of Federal Law No. 57-FZ dated 29 April 2008 "On the Procedure for Foreign Investment in Business Entities of Strategic Significance for National Defense and State Security" (the "Law");
- introduction of a mechanism for the compulsory sale of shares (interests) in and/or the assets of strategic companies;
- regulation of scheduled and unscheduled audits by the FAS to monitor compliance with legislation on foreign investments;
- introduction of liability for violating foreign investment legislation, and also for obstructing or avoiding audits in this area.

Scope of regulation of foreign investments in strategic companies

The FAS proposes expanding the regulation of foreign investments in stra-

tegic companies to legal entities that are not business entities but which perform strategic activities². At the moment the Law governs only foreign investment in business entities.

It also proposes extending the requirement to receive consent from the Government Commission on Monitoring Foreign Investments (the "Government Commission") to the acquisition by foreign investors of rights under a concession agreement, if the subject of this agreement is an asset intended for the performance of strategic activities.

Compulsory sale of shares (interests) in and/or the assets of strategic companies

The FAS's initiatives foresee the inclusion in the Law of a mechanism for the compulsory sale of shares (interests) in and/or the assets of strategic companies.

At the moment, if a foreign investor carries out a transaction that establishes its control over a strategic company without the consent of the Government

¹ Draft Federal Law "On Amending Certain Legislative Acts of the Russian Federation to Improve Control over Compliance with Legislation on Foreign Investment in the Russian Federation", and draft Federal Law "On Amending the Code of Administrative Offences of the Russian Federation". On 28 August 2018 the drafts were published on the federal website for draft laws and regulations (<http://regulation.gov.ru/projects/List/AdvancedSearch#npa=83472>, <http://regulation.gov.ru/projects/List/AdvancedSearch#npa=83477>).

² These activities are specified in Article 6 of the Law.

Commission, then the courts will apply the consequences of the invalidity of this transaction by reversing everything performed under the transaction (i.e. the return of interests (shares) and/or assets acquired in violation of the law). In certain cases the court issues a decision to deprive the foreign investor of the right to vote at the general meeting of participants (shareholders) of the strategic company.

The mechanism proposed by FAS presupposes that the court, in addition to the decision to deprive a foreign investor of the right to vote, will also take a decision on the compulsory sale of shares (interests) in and/or the assets of the strategic

company that were acquired by this foreign investor without the consent of the Government Commission. This compulsory sale will be performed via public auction held by the federal executive agency determined by the Government of the Russian Federation.

Scheduled and unscheduled audits of foreign investments

Another initiative is to explicitly enshrine in the Law the authority of the FAS to conduct scheduled and unscheduled legislative compliance audits of foreign investments in the Russian Federation. Plans include giving FAS the right to perform audits con-

cerning the possible establishment by foreign investors of control over strategic companies in violation of the requirements or procedure set forth by the Law, and concerning the performance by foreign investors of obligations assumed.

The FAS also proposes supplementing the Code of Administrative Offenses of the Russian Federation (the "Code") with a separate article establishing administrative liability for obstructing or avoiding a compliance audit of foreign investments in the Russian Federation. This administrative violation will be punishable by an administrative fine:

- on an official – in the amount of RUB 20,000-50,000;



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The FAS proposes expanding the regulation of foreign investments in strategic companies to legal entities that are not business entities but which perform strategic activities.

- on a legal entity – in the amount of RUB 300,000-500,000.

Administrative liability for a violation of the legislation on foreign investments

The FAS proposes that a separate article be included in the Code stipulating liability for the performance of transactions and other actions pro-

hibited by the legislation on foreign investments in the Russian Federation. This administrative violation will be punishable by an administrative fine:

- on an individual – in the amount of RUB 20,000-50,000;
- on an official – in the amount of RUB 50,000-100,000;
- on a legal entity – in the amount of RUB 1,000,000-2,000,000.

It should be noted that the current Article 19.8.2 of the Code already stipulates the elements of administrative offenses regarding foreign investments in the Russian Federation – for failure to provide petitions, notices, data, for the submission of inaccurate data or violation of the procedure and deadlines for submitting the petitions stipulated by the legislation on foreign investments in the Russian Federation.

The bills considered above have not yet been submitted to the State Duma of the Russian Federation and are still being revised. This affords the opportunity to take an active part in their public discussion and to influence their adoption and/or contents. |