



RUSSIA

Foreign investment and investment in strategic industries – recent changes

Foreign investors in Russia operate on an equal footing with domestic investors. According to the general rule, as set forth in Article 4 of the Law on Foreign Investments¹, their legal status cannot lead to less advantageous treatment than the legal status of Russian investors.

However, restrictions are possible in certain cases to protect the foundations of Russia's constitutional system, morality, health, and the rights and lawful interests of third parties, as well as to ensure state security. The legal grounds for these restrictions include, among other things, the Law on Strategic Investments.²

Before investing in Russia, you should check whether or not a strategic industry is involved. Foreign investors in the public sector should also find out whether approval is required to purchase equity interests. Certain changes have taken place recently in this regard, which we briefly explain below.

INVESTORS IN STRATEGIC INDUSTRIES

Foreign investors include foreign legal entities and partnerships, as well as foreign organisations that are not legal entities. They also include companies under the control of the aforementioned investors. Therefore, they may also include companies incorporated under Russian law.

Foreign countries and international organisations, as well as legal entities under the control of foreign countries or international organisations, are also considered foreign investors.

FOREIGN STATE INVESTORS

In accordance with paragraph 4 of Article 6 of the Law on Foreign Investments, approval must be received for capital investments by a foreign country, international organisation or the parties controlled by them, as well as for the acquisition of other rights allowing these persons to block the decisions of the management bodies of Russian companies. The threshold here is a blocking minority of more than 25 percent.

In response to our request, the anti-monopoly authority recently announced that, in its opinion, the term "foreign country" includes not only states as understood under international law, but

also regional and municipal entities.³ For this reason, enterprises belonging to a federated state in Germany or a municipality, for example, must also go through the aforementioned procedure in Russia before acquiring participation interests of more than 25 percent. According to the anti-monopoly authority, this obligation covers not only acquisition but all processes involved in the foundation of a company in Russia. The foreign companies in question should take this into account when making investments in Russia.

INVESTMENTS IN STRATEGIC ENTERPRISES

The Law on Strategic Investments places restrictions on foreign investors' participation in the capital of business entities of strategic importance for national defence and state security. The same is true for the acquisition, ownership or use of the assets of these companies, as well as for all other transactions or actions that result in a foreign investor gaining control over companies of strategic importance.

A foreign investor is considered to have control if it can influence the decisions of the general meeting of participants, board of directors, or other management bodies using its voting rights. This is also true in those cases where a foreign investor can perform management functions or appoint more than one-fourth of the members of the governing bodies, board of directors, or other management body based on an agreement. More stringent special rules are applied to Russian companies engaged in the extraction of minerals.

Amendments to the law in the summer of 2020⁴ added additional transactions to this list, to prevent transactions from being concluded in circumvention of the law. Now the temporary assignment of voting rights based on a trust management agreement, pledge agreement, repo agreement, security deposit or other agreement or transaction is sufficient for there to be control in the sense of the law.

APPROVAL PROCEDURE

If the conditions listed above are present, a transaction or the acquisition of control is not prohibited per se, but the performance of investment requires approval. The Government Commission on

¹ Federal Law No. 160-FZ dated 9 July 1999 "On Foreign Investments in the Russian Federation".

² Federal Law No. 57-FZ dated 29 April 2008 "On the Procedure for Foreign Investments in Business Entities of Strategic Importance for National Defence and State Security".

³ A reference to Federal Law No. 297-FZ dated 3 November 2015 "On the Jurisdictional Immunities of a Foreign Country and the Assets of a Foreign Country in the Russian Federation" was given as grounds.

⁴ Amendments to Federal Law No. 255-FZ dated 31 July 2020 "On Amending the Federal Law 'On the Procedure for Foreign Investments in Business Entities of Strategic Importance for National Defence and State Security'", which entered into force from 11 August 2020.

Monitoring Foreign Investment in the Russian Federation, headed by the Chairman of the Government (the Prime Minister), makes the decision whether or not to approve the transaction. In some cases, a notification is sufficient.

Extensive application documentation is submitted through the Federal Antimonopoly Service (FAS). The deadlines for considering an application are determined on an individual basis, with the minimum period (excluding the period needed to prepare the documentation) equalling three months.

The Commission decides whether a transaction or acquisition of control should be allowed or prohibited. Approval is often given on the condition that the foreign investor fulfils certain obligations. The recent amendments to the law⁵ expanded these conditions considerably. Obligations may include the continued supply of products (work, services) under defence contracts, continued performance of work to support mobilisation capabilities, provision of services at fixed prices, adherence to a provided business plan, maintenance of a certain number of employees, and processing of minerals in Russia. These conditions are set forth in a separate agreement.

A simplified approval procedure was introduced for certain industries in March 2021 (for example, for water supply or production facilities associated with the use of infectious agents such as meat-packing plants, poultry plants or cosmetics manufacturers), if the corresponding types of activity are not the company's main line of business. In this case, the decision is taken by the Federal Antimonopoly Service based on the findings of the competent federal agency.

CONSEQUENCES OF VIOLATION

A violation of the restrictions leads to serious punishments being handed down by FAS. Transactions may be declared null and void. The decisions of a company of strategic importance may be declared invalid as well, and the investor may be stripped of voting rights at general meetings. A foreign investor may also lose voting rights if obligations under an additional agreement are not met.

CONCLUSION

Investors always see rules restricting investment as a problem, but at the moment they are a generally accepted practice worldwide. A draft law is currently being discussed that would restrict investment in the fishing industry. Before undertaking any operations in Russia, you should check carefully whether the investment is subject to the aforementioned special rules. If it is, the prescribed procedure must be followed to the letter. That being said, experience shows that most applications to make investments in strategic industries are approved; only 23 of 288 applications have been rejected since the law entered into force.



Vasily Ermolin

Attorney-at-law | Partner
BEITEN BURKHARDT Russia
E-mail: Vasily.Ermolin@bblaw.com



Prof. Dr Rainer Wedde

Maître en droit
BEITEN BURKHARDT Russia
E-mail: Rainer.Wedde@bblaw.com

⁵ Amendments to Federal Law No. 40-FZ dated 9 March 2021 "On Amending the Federal Law 'On the Procedure for Foreign Investments in Business Entities of Strategic Importance for National Defence and State Security'", which entered into force from 20 March 2021.

Imprint

This publication is issued by
BEITEN BURKHARDT
Rechtsanwaltsgesellschaft mbH
Ganghoferstrasse 33 | D-80339 Munich
Registered under HR B 155350 at the Regional Court Munich/
VAT Reg. No.: DE811218811

For more information see:
<https://www.beiten-burkhardt.com/en/imprint>

EDITOR IN CHARGE

Prof. Dr Rainer Wedde

© BEITEN BURKHARDT Rechtsanwaltsgesellschaft mbH.
All rights reserved 2021.

PLEASE NOTE

This publication cannot replace consultation with a trained legal professional.

If you no longer wish to receive this newsletter, you can unsubscribe at any time by e-mail (please send an e-mail with the heading "Unsubscribe" to newsletter@bblaw.com) or any other declaration made to BEITEN BURKHARDT.

YOUR CONTACT

MOSCOW

Turchaninov Per. 6/2 | 119034 Moscow
Falk Tischendorf
Tel.: +7 495 2329635 | Fax: +7 495 2329633
Falk.Tischendorf@bblaw.com