

The FAS unveils a new mechanism to ensure compliance with the Russian Strategic Investments Law

A seminal moment for foreign investors failing to comply with compulsory requirements of Russian Strategic Investments Law: Russian Antimonopoly Service has come up with a new mechanism enabling state courts to launch the process of involuntary transfer of shares of foreign investors in Russian strategic entities if the change of control in such entities was made without an approval from governmental commission and it is impossible to apply the consequences of void transaction.

The Federal Antimonopoly Service of the Russian Federation (the “FAS”) suggests amending certain laws in order to tighten control over foreign investors failing to comply with compulsory requirements of Russian legislation. A bill in question is published on the portal of draft regulations ([ID 02/04/08–18/00083472](#)).

Amendments will be made, inter alia, to Federal Law No. 57-FZ “On the Procedure for Making Foreign Investments in Business Entities of Strategic Importance to National Defense and State Security” dated 29 April 2008 (the “**Strategic Investments Law**”), which contemplates that the acquisition of control by foreign investors of Russian companies operating in strategic business sectors requires the consent from the Governmental Commission for Control over Foreign Investments (the “**Governmental Commission**”).

According to Russian legislation in effect, the failure to conform to these compulsory requirements of the Strategic Investments Law leads to both administrative and civil liability. Aside from opening a case on an administrative violation (as in article 19.8.2 (1) of the Code of the Russian Federation on Administrative Offenses), the FAS equally succeeds in challenging such transactions in court, seeking to restore the parties, as far as possible, to their original positions through restitution, or, if it’s impossible, requests the court to deprive a foreign investor of any voting rights in respect of share/stockholders’ meetings of strategic entity.

However, the FAS now suggests that deprivation of voting rights be accompanied with a transfer of shares (stocks) and (or) assets of strategic entities through a public auction. Not only a competent authority’s lawsuit will seek to deprive a foreign investor of its voting rights, a court will also order to sell the shares (stocks) and (or) assets of strategic entity owned by such foreign investor by virtue of the deal made without a clearance of the Governmental Commission. A public auction will be held provided that a foreign investor does not convey the shares (stocks) and (or) assets of strategic entity to another business entity, as set forth in the Strategic Investments Law, within a period of three months after the judgment has become final and binding.

As stated in explanatory note to the bill, the reason for such amendments is that the current mechanism of control over foreign investments is not efficient enough. In the event a foreign investor is deprived of voting rights by court judgment, a strategic entity remains under no control whatsoever, whereas a foreign investor cannot convey its share interest due to the nullity of the deal. “We were driven by the need to introduce a particularly new mechanism we were unable to find in foreign practice,” said Deputy Head of the FAS Andrei Tsyganov. “We took into account current procedure for privatization auctions. However, we have to go over it with a fine-tooth comb for it to be properly used in an issue as sensitive as disposal of foreign investor’s assets, with due observance of all the guarantees envisaged by legislation.”

The bill is also aimed at unification of requirements for foreign investors acquiring rights with respect to Russian entities of any types involved in strategic activities. In that context the provisions of the Strategic Investments Law will be applicable not only to corporations, but also to other entities which are not qualified as business corporations yet operate in activities contemplated in article 6 of the Strategic Investments Law and (or) hold licenses and (or) have other permissions to carry out such activities.

Aside from the Strategic Investments Law, the amendments will also be introduced to the Federal Law No. 115-FZ “On Concession Agreements” dated 21 July 2005 (the “**Concession Law**”), as well as to the Federal Law No. 99-FZ “On Licensing Certain Types of Activities” dated 4 May 2011 (the “**Law on Licensing**”).

Article 5 of the Concession Law will be amended by part 1.7 which stipulates that a foreign investor will be able to acquire rights under concession agreements (in the event a foreign investor acts as concessionaire under a concession agreement in relation to the assets of a strategic entity) only upon the consent of the Governmental Commission.

The Law on Licensing will be amended with regard to the list of documents required for obtaining the license. Also, a new reason for refusal to grant a license is added, which is a resolution of competent authorities that granting a license to a foreign investor may threaten national defense and security of the country. The final draft bill is yet to be considered by the Russian Government.

We will keep monitoring the bill and continue to update you on its status throughout its consideration by the Federal Assembly of Russia.

For more information please contact our Managing Partner [Andrei Danilov](#).

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