

Russia

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Law and policy

1 What, in general terms, are your government's policies and practices regarding oversight and review of foreign investment?

The Russian Foreign Investments Law is the general investment regulation in Russia. It is the declaration of the freedom of foreign investments in Russia with exceptions and qualifications stated by federal laws.

The Russian Strategic Investments Law defines spheres of strategically important activities (the list includes 42 spheres) that can be generally combined into the following groups:

- natural monopolies (eg, trunk pipeline transportation of crude oil and oil products, pipeline transportation of gas, transportation by rail);
- subsoil use;
- nuclear energy;
- military and defence;
- television and radio broadcasting;
- flight-safety services and aviation equipment;
- printing and publishing;
- encryption; and
- fisheries.

The Russian Strategic Investments Law restricts investments by foreign investors in companies that are deemed to be strategic (strategic companies) by requiring such investors to obtain prior Russian government clearance or to submit a post-transaction notification after entering into certain transactions or, in some cases, prohibiting such investments.

The Strategic Investments Law sets more stringent control thresholds with respect to Russian strategic companies that use subsoil deposits of federal significance (the strategic subsoil users (SSUs)).

Finally, Russian competition law regulates general merger clearance issues.

There are several other laws that contain additional restrictions for some specific areas (eg, ownership of agricultural land plots, setting up and controlling of mass media and so on).

2 What are the main laws that directly or indirectly regulate acquisitions and investments by foreign nationals on the basis of the national interest?

The main laws that directly or indirectly regulate acquisitions and investments by foreign nationals on the basis of the national interest are the following:

- Federal Law No. 57-FZ on the Procedure for Making Foreign Investments in Business Entities of Strategic Importance to National Defence and State Security dated 29 April 2008 (Strategic Investments Law);
- Federal Law No. 160-FZ on Foreign Investments in the Russian Federation dated 9 July 1999 (Foreign Investments Law); and
- Federal Law No. 135-FZ on the Protection of Competition dated 26 July 2006 (Competition Law).

3 Outline the scope of application of these laws, including what kinds of investments or transactions are caught. Are minority interests caught? Are there specific sectors over which the authorities have a power to oversee and prevent foreign investment or sectors that are the subject of special scrutiny?

Under the Foreign Investments Law, an 'acquisition' is broadly defined and includes the sale of shares, trust, assignment and other contracts, including indirect acquisitions.

The Foreign Investment Law imposes requirements of prior clearance with respect to the acquisition of rights, directly or indirectly, to hold more than 25 per cent of the votes attached to voting shares in any Russian company (not necessarily a strategic one) if the acquisition is effected by a foreign state entity.

In addition, the Strategic Investments Law provides requirements for the acquisition of strategic companies by requiring such investors to obtain prior Russian government clearance. The latest changes to the Strategic Investments Law have extended this requirement to, additionally, obtaining possession of more than 25 per cent of the assets of the strategic company.

Transactions requiring the prior consent of the Government Commission on Control over Performance of Foreign Investments, formed within the Russian government and chaired by the Prime Minister (Government Commission) include:

- the acquisition of rights to hold, directly or indirectly, votes attached to voting shares in a strategic company; or
- the acquisition of rights to appoint a CEO, to appoint a collective executive body or unconditional rights to elect a board of directors of a strategic company, in any of these cases as a result of which the number of votes acquired by a foreign investor or the make up of the executive body or board of directors appointed or elected by a foreign investor, exceeds the following percentages:
 - strategic companies – 25 per cent of foreign state entities and 50 per cent of foreign private investors; and
 - strategic subsoil companies – 5 per cent of foreign state entities and 25 per cent of foreign private investors;
- the acquisition of rights by a foreign state entity allowing the foreign state entity to block the passing of a decision taken by the management bodies of a strategic company;
- the acquisition of rights by a foreign investor allowing the foreign investor to determine the business activities of a strategic company or to perform the functions of its management company; and
- obtaining possession or ownership of 25 per cent of assets of the strategic company.

The Competition Law covers both direct and indirect acquisitions of shares and assets (Russian companies as well as foreign companies operating on the Russian market) that meet particular thresholds.

4 How is a foreign investor or foreign investment defined in the applicable law?

The Foreign Investments Law defines 'foreign investors' as foreign states, international organisations and companies under their control (foreign state entities) and foreign legal entities that are entitled under the legislation of their home state to invest in Russia, as well as foreign citizens and stateless individuals.

For the purposes of the Strategic Investments Law regulations, legal entities controlled directly or indirectly by foreign investors, including those formed in the Russian Federation, are also recognised as 'foreign investors'.

The term 'foreign investment' is defined in the Foreign Investments Law as the investment of foreign capital in an object of entrepreneurial activity in the territory of Russia in the form of objects under civil law owned by the foreign investor, unless trading in such objects under civil law is prohibited or limited in Russia under federal laws. This includes money, securities (denominated in foreign currency and the currency of Russia), other property, rights of property, exclusive rights on intellectual property, as well as services and information.

5 Are there special rules for investments made by foreign state-owned enterprises (SOEs) and sovereign wealth funds (SWFs)? How is an SOE or SWF defined?

Neither the Strategic Investments Law nor the Foreign Investments Law contains a definition of SWFs or SOEs.

Nevertheless, both laws contain special rules for acquisitions made by foreign state-controlled investors.

Requirements on prior clearance for acquisitions made by foreign state-controlled investors come into effect starting from the above-mentioned percentage of shares (strategic companies – 25 per cent, SSUs – 5 per cent and any other Russian company – 25 per cent). Moreover, there is a statutory prohibition on establishing 'control' over strategic companies for foreign state-controlled investors.

International financial organisations (IFOs) that are established under agreements to which Russia is a party or that have international treaties with Russia are exempted from the requirement to obtain clearance under these laws. A list of exempted IFOs has been approved by the Russian government and includes the European Bank for Reconstruction and Development, the International Finance Corporation, the International Bank for Reconstruction and Development and other major IFOs.

6 Which officials or bodies are the competent authorities to review mergers or acquisitions on national interest grounds?

The Federal Antimonopoly Service (FAS) is the principal state agency that receives all applications filed under the Strategic Investments Law, the Foreign Investments Law and the Competition Law.

The FAS processes any application under the Strategic Investments Law and the Foreign Investments Law and transfers them for review to the Government Commission, which is authorised to make final decisions.

Under the Competition Law all of the actions and final clearance are made solely by the FAS.

7 Notwithstanding the above-mentioned laws and policies, how much discretion do the authorities have to approve or reject transactions on national interest grounds?

Based on a preliminary review of the application, the FAS (taking into account the opinions of the Federal Security Service and Ministry of Defence) recommends a decision on the application to the Government Commission. However, it is entirely at the discretion of the Government Commission whether to approve or reject the application.

The FAS adopts decisions on Competition Law applications at its sole discretion.

Procedure

8 What jurisdictional thresholds trigger a review or application of the law? Is filing mandatory?

Filings under the Strategic Investments Law, the Foreign Investments Law and the Competition Law are mandatory.

There are no specific thresholds for the filings under the Strategic Investments Law and the Foreign Investments Law. As stated above, clearance shall be obtained if the Russian company is strategic and the foreign private or state-controlled investor acquires control over it or more than 25 per cent of its assets, or when the Russian company is not strategic and the foreign state-controlled investor acquires a certain percentage of shares or certain rights with respect to the company.

Thresholds triggering 'merger control' filing obligations are the same for a foreign investor as for Russian companies and depend on the volume of assets and the volume of shares possessed by the parties participating in the acquisition and their groups.

9 What is the procedure for obtaining national interest clearance of transactions and other investments?

Obtaining clearance under the Strategic Investments Law and the Foreign Investments Law requires the following:

- preparation and submission to the FAS of a filing, which includes an application and a set of documents;
- preliminary review of the filing by the FAS on formal grounds and (if the filing is complete and the acquisition indeed requires clearance) its registration;
- an inquiry by the FAS about opinions on transaction from the Federal Security Service, Ministry of Defence and industry-specific regulators conducting a preliminary check of the strategic company's activities, and preparing a summary for the Government Commission;
- review of the application by the Government Commission and adoption of a decision;
- signing by a foreign investor of an agreement with the FAS outlining certain obligations of the foreign investor (such as making a certain amount of investment and some post-transaction activities of a strategic company), which are stated by the Government Commission as conditions of the approval; and
- issuance of the written permission by the FAS.

No filing fee is paid for the review of applications under the Strategic Investments Law and the Foreign Investments Law.

Competition Law applications are filed with the FAS. The state fee for consideration of the Competition Law application (prior clearance) is 20,000 roubles.

10 Which party is responsible for securing approval?

The foreign investor is responsible for securing approvals under the Strategic Investments Law, the Foreign Investments Law and the Competition Law.

11 How long does the review process take? What factors determine the timelines for clearance? Are there any exemptions, or any expedited or 'fast-track' options?

The formal check and registration of the application by the FAS shall be done within 14 days following the submission of the application. The application review procedure by both the FAS and the Government Commission must not exceed three months from the registration date until the issue of a decision. In exceptional cases, the review period may be extended by an additional three months (to a maximum total of six months) by a decision of the Government Commission, but this is quite rare in practice. Additionally, the FAS states in the decision the term periods for signing the deal and the agreement on special investor's obligations, if any.

The statutory term for the review of the applications filed under the Competition Law is 30 days. The term can be extended to an additional 60 days if the FAS establishes that the planned transaction may potentially limit competition in any market in Russia.

If the transaction is also subject to clearance under the Strategic Investments Law, clearance under the Competition Law will not be granted before the clearance under the Strategic Investments Law is obtained.

12 Must the review be completed before the parties can close the transaction? What are the penalties or other consequences if the parties implement the transaction before clearance is obtained?

In most cases the review under the Strategic Investments Law, the Foreign Investments Law and the Competition Law must be completed before the parties can close the transaction.

However, there is an exemption, where, under the Strategic Investments Law, foreign investors are required to notify the FAS of an acquisition of more than 5 per cent of the shares in a strategic company (for instance, as a result of converting privileged shares into ordinary shares and so on) after entering into certain transactions, unless the transaction has already been granted prior clearance.

Execution of the transaction without submitting the clearance application and prior to the completion of the government review, in cases when a prior clearance is required under the Strategic Investments Law and the Foreign Investments Law, is deemed an administrative violation and penalised in an amount from 500,000 to 1 million roubles for legal entities and from 30,000 to 50,000 roubles for officers.

Update and trends

Due to the European and US sanctions, the Russian government is considering additional restrictions for foreign involvement in the activity of strategic companies. For example, new amendments to the mass media legislation require a reduction, until 1 January 2016, in the share of foreign investors in the mass media companies to less than 20 per cent. In addition, the spheres designated as strategic for national security interests are expanded (eg, all ports are to become strategic companies during this year). Economic sanctions have made the market unstable anyway, and most foreign investors are now thinking twice before proceeding with acquiring a share in a strategic company even if it seems a good investment during the present economic situation in Russia.

In addition, the following grounds exist for declaring a transaction executed in breach of the set procedure invalid:

- (i) completion of the transaction without the FAS approval under the Competition Law may be invalidated by a court if the FAS claims and proves in court that the transaction led or may have led to the restriction of market competition. Additionally, the acquirer and its officers will be subject to administrative fines for failure to submit clearance applications under the Competition Law. These fines range from 300,000 to 500,000 roubles for legal entities and from 15,000 to 20,000 roubles for officers;
- (ii) completion of the transaction without prior clearance under the Strategic Investments Law, where such clearance is required, is void. The parties to such transactions will be ordered to return everything received under the transactions. If it is not possible to effect a complete return, the court may deprive the defaulting foreign investor of voting rights at general meetings upon a claim of the FAS; and
- (iii) breach of procedures set in the Foreign Investments Law may theoretically imply invalidation of a transaction. Consequences of invalidation in this case will be the same as for the invalidation of the transaction, executed in breach of the Strategic Investments Law (see point (ii)). No specific administrative liability for a breach of the clearance requirements of the Foreign Investments Law is established.

13 Can formal or informal guidance from the authorities be obtained prior to a filing being made? Do the authorities expect pre-filing dialogue or meetings?

The Strategic Investments Law allows foreign investors to apply the preliminary inquiry to the FAS to clarify the necessity of the Government Commission's approval of the planned transaction. Such an inquiry shall be accompanied with the documents, which are mostly the same as those for the approval itself. The FAS shall provide an official answer within 30 days after receiving such an inquiry. A copy of the foreign investor's inquiry and an official answer shall be served by the FAS to the Government Commission.

Neither the Foreign Investments Law nor the Competition Law provides for a similar clarification procedure. However, a foreign investor may file an official request for clarification with the FAS upon general rules of Russian legislation.

14 When are government relations, public affairs, lobbying or other specialists made use of to support the review of a transaction by the authorities? Are there any other lawful informal procedures to facilitate or expedite clearance?

The Strategic Investments Law, the Foreign Investments Law and the Competition Law do not provide specific procedures for expedited clearance.

15 What post-closing or retroactive powers do the authorities have to review, challenge or unwind a transaction that was not otherwise subject to review?

The Strategic Investments Law, the Foreign Investments Law and the Competition Law do not permit the FAS or the Government Commission to interfere with a closed transaction that was not subject to review and clearance under these laws.

Substantive assessment

16 What is the substantive test for clearance and on whom is the onus for showing the transaction does or does not satisfy the test?

Formally, in the case of strategic companies, the substantive criteria is the absence of a potential threat from the transaction to Russian national defence and state security, as confirmed by opinions of the Federal Security Service and Ministry of Defence. In practice, full discretionary powers belong to the Government Commission.

With respect to the Competition Law clearance, the absence of a negative influence of the planned transaction on competition in the Russian market is the principal matter.

17 To what extent will the authorities consult or cooperate with officials in other countries during the substantive assessment?

We are not aware of Russian authorities cooperating with officials in other countries during the substantive assessment of applications filed under the Strategic Investments Law, the Foreign Investments Law or the Competition Law.

18 What other parties may become involved in the review process? What rights and standing do complainants have?

Third parties are not involved in the procedures made under the Strategic Investments Law or the Foreign Investments Law.

With regard to the Competition Law application, third parties can be involved at some stage if the FAS has concerns about the negative effect of the transaction on market competition and publish information about the planned transaction on its website, inviting all the interested parties to file their opinions on the effect of the transaction on competition.

19 What powers do the authorities have to prohibit or otherwise interfere with a transaction?

The Government Commission has full discretionary powers and may refuse to grant approval if, in its opinion, the transaction may pose a threat to Russian national defence and state security.

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As mentioned above, transactions entered into in violation of the clearance requirements under the Strategic Investments Law are void.

In addition, the parties to such transactions will be ordered to return everything received under the transactions. If it is not possible to effect a complete return, the court may deprive the defaulting foreign investor of voting rights at general meetings upon a claim by the FAS.

Decisions taken by management bodies of a strategic company and transactions made by the latter after a foreign investor has invested without prior clearance may be challenged by the FAS before the court.

The FAS may refuse to approve the transaction under the Competition Law if the service establishes that the transaction would have a negative effect on market competition, if the information disclosed to it with the application was untrue or incomplete, and in some other cases.

20 Is it possible to remedy or avoid the authorities' objections to a transaction, for example, by giving undertakings?

Such undertakings may be offered by a foreign investor in the application. However, they are finally imposed at the initiative of the Government Commission and are not restrained by a foreign investor offer. The same applies to the Competition Law applications.

21 Can a negative decision be challenged?

Yes. Decisions of the Government Commission issued pursuant to the Strategic Investments Law and the Foreign Investments Law may be contested in the Supreme Court of the Russian Federation.

FAS decisions issued pursuant to the Competition Law may also be contested in an arbitrazh court.

22 What safeguards are in place to protect confidential information from being disseminated and what are the consequences if confidentiality is breached?

The law obliges the FAS to keep confidential information provided with applications for clearances under the Strategic Investments Law, the Foreign Investments Law and the Competition Law. The FAS is liable for the disclosure of such information, including the obligation to compensate loss caused by such disclosure.

Recent cases

23 Discuss in detail up to three recent cases that reflect how the foregoing laws and policies were applied and the outcome, including, where possible, examples of rejections.

The American company Abbott Laboratories, on the second attempt, has received permission to acquire Verofarm Plc, the leading Russian oncological pharmaceutical company. Previously, a foreign investor's application to acquire Petrovax Pharm (a vaccine producer) was rejected by the Government Commission for national security reasons.

It is also should be mentioned that, upon the FAS's claim, the deal regarding the acquisition of Astrachan port Plc by a group of Iranian companies was found invalid due to a lack of preliminary clarification by the Government Commission.

Getting the Deal Through

Acquisition Finance	Dispute Resolution	Life Sciences	Real Estate
Advertising & Marketing	Domains & Domain Names	Mediation	Restructuring & Insolvency
Air Transport	Dominance	Merger Control	Right of Publicity
Anti-Corruption Regulation	e-Commerce	Mergers & Acquisitions	Securities Finance
Anti-Money Laundering	Electricity Regulation	Mining	Securities Litigation
Arbitration	Enforcement of Foreign Judgments	Oil Regulation	Ship Finance
Asset Recovery	Environment	Outsourcing	Shipbuilding
Aviation Finance & Leasing	Foreign Investment Review	Patents	Shipping
Banking Regulation	Franchise	Pensions & Retirement Plans	State Aid
Cartel Regulation	Gas Regulation	Pharmaceutical Antitrust	Tax Controversy
Climate Regulation	Government Investigations	Private Antitrust Litigation	Tax on Inbound Investment
Construction	Insurance & Reinsurance	Private Client	Telecoms & Media
Copyright	Insurance Litigation	Private Equity	Trade & Customs
Corporate Governance	Intellectual Property & Antitrust	Product Liability	Trademarks
Corporate Immigration	Investment Treaty Arbitration	Product Recall	Transfer Pricing
Cybersecurity	Islamic Finance & Markets	Project Finance	Vertical Agreements
Data Protection & Privacy	Labour & Employment	Public-Private Partnerships	
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