

Russian merger control and foreign investments rules

This note provides a general overview of Russian merger control rules as well as key foreign investment control rules and restrictions.

Note that the application of the Russian merger control and foreign investment rules, including those outlined below, strongly depends on the choice of transaction structure and parties and industries involved. We would be happy to advise you further on any merger control, foreign investment or other corporate or competition law related matters.

Scope of Russian merger control

What kind of transactions are caught?

The Competition Law¹ sets out a broad list of transactions caught by Russian merger control. In particular, Russian merger control is applicable to the following transactions in respect of Russian entities or non-Russian entities with supplies of goods, works or services to the Russian market in excess of 1 billion roubles (approximately €13.3 million²) during the year preceding the date of the transaction³:

- > **Acquisitions of shares and assets**, including, in particular:
 - direct acquisition of more than 25%, more than 50% or more than 75% of the voting shares in a Russian joint stock company;
 - direct acquisition of more than 1/3, more than 50% or more than 2/3 of participation interests in a Russian limited liability company;
 - acquisition into ownership, usage or possession of more than 20% of the main production assets and intangible assets of another business entity provided that such assets are located in the Russian Federation;

¹ The Russian merger control regime is set out in the Federal Law of the Russian Federation №135-FZ dated 26 July 2006 "On Protection of Competition" (the "**Competition Law**") (as amended).

² All currency conversions herein have been calculated on the basis of €1 = 75 roubles, however, calculations should be made on the basis of the relevant currency rate established by the Central Bank of Russia for the relevant date.

³ This 1 billion rouble supply threshold only applies to non-Russian entities.

Contents

Scope of Russian merger control	1
Process and result of review of the application ...	4
Liability for failure to obtain merger control clearance ..	6
Scope of foreign investment control	7
Process and result of review of the application .	10
Liability for failure to obtain foreign investment clearance.....	11

- acquisition of rights allowing to determine the business activities of a Russian entity or to perform the functions of its management body or the acquisition of over 50% of shares or other control over a non-Russian entity which supplied goods, works or services to the Russian market in excess of 1 billion roubles or it, in turn, controls Russian entities (“**acquisition of control**”);
- > **Intra-group transactions** if they result in the above;
- > **Incorporation of a company** if its charter capital is paid for with shares and/or assets of another company and the established company receives the rights described above with respect to such shares and/or assets;
- > **Entry into an agreement between competitors regarding joint business activities on the territory of the Russian Federation** (including the creation of a joint venture, incorporated or unincorporated);
- > **Mergers and accessions** of companies.

The transactions described above may require clearance of the Federal Antimonopoly Service of the Russian Federation (the “**FAS**”) subject to the relevant financial thresholds described below.

Please note there are separate rules and thresholds for financial organisations⁴ which further differ depending on the type of business, e.g. different for credit institutions and insurance companies.

What are the relevant thresholds for notification?

The financial thresholds vary depending on the type of transaction potentially subject to merger control.

Outlined below are the most commonly used thresholds applicable to acquisitions of shares or control over a Russian or non-Russian entity with sales in Russia on non-financial markets.

Such acquisitions require pre-transaction clearance of the FAS if:

- > the total value of the assets of the acquirer (including its group worldwide) and the target (including the group worldwide, including the seller(s), if the seller(s) is a member of the target’s group)⁴ exceeds 7 billion roubles (approximately €93 million) and at the same time the total value of assets of the target (and its group worldwide) exceeds 400 million roubles (approximately €5.3 million); or
- > the total turnover of the acquirer and the target (and their respective groups worldwide) exceeds 10 billion roubles (approximately €133 million) and at the same time the total value of assets of the target (and its group worldwide) exceeds 400 million roubles (approximately €5.3 million).

⁴ Please note if the seller (and its group) loses control over the target as the result of the transaction, assets of the seller (and its group) are not taken into account.

Note that the thresholds for transactions involving financial organizations, acquisitions of assets and joint business agreements will differ.⁵

Is there any exemption for intra-group transactions?

Formally, all transactions outlined above will trigger clearance requirements if the financial thresholds are met, even if they are carried out intra-group.

However, the Competition Law provides for two alternative clearance procedures for such intra-group transactions.

- > **Intra-group disclosure and notification:** where pre-transaction clearance is required for an intra-group transaction, if the transaction does not qualify for the “Strong Control” exemption outlined below, a post-transaction notification may be submitted instead within 45 days after closing under the following conditions:
 - if the full group (with details) is disclosed to the FAS in the specified format at least one month before the transaction(s), which the FAS will then publicly disclose on its website; AND
 - the group does not change in any way until after the closing of the transaction.

- > **Intra-group “Strong Control” exemption:** where the parties to the intra-group transaction are connected by a chain of ownership of more than 50% of the voting shares at each level, no clearance or post-transaction notification is required at all.

⁵ For example, the pre-transaction clearance threshold for a transaction in respect of a target bank is assets of the bank exceeding 33 billion roubles (approx. €440 million) while the pre-closing clearance threshold for a transaction in respect of a target micro-financial organization is assets of the micro-financing organization amounting to 3 billion roubles (approx. €40 million).

Process and result of review of the application

What is the timing for the review of the application?

There is no specific deadline for applying for pre-transaction clearance, however, transactions subject to pre-transaction clearance may not be completed before relevant clearance is received.

Post-transaction notifications (when required for intra-group transactions) must be submitted within 45 calendar days after the closing of the respective transaction.

The minimum official timeframe for consideration of a merger control application is 30 calendar days.

This period can be extended by two months if the FAS requires more time to review the application or has made a preliminary determination that the transaction described in the application may result in a restriction of competition including as a result of the creation or strengthening of a dominant position of an entity (or its group).

Further, if the transaction raises serious competition concerns, the FAS may impose pre-clearance remedies with up to 9 months for their implementation by the parties. The FAS then has one month to review and confirm the implementation of the remedies and issue the clearance. Therefore, for transactions raising serious competition concerns, the review period could be up to 13 months in total (should pre-clearance remedies be imposed).

All timings described above assume no other Russian filings are required which would suspend the merger control review.

Note that there is no “deemed to have been received” cut off point where the parties can proceed with the transaction in the absence of a regulatory clearance even if the above timeframes have expired. The parties must continue to wait for the official decision.

What will be the results of the merger control review?

Based on the review of an application, the following resolutions may be issued by the FAS:

- > *unconditional clearance* if the transaction in question does not result in a restriction of competition;
- > *conditional clearance* with imposition of conditions (remedies) on the parties, target(s), or their groups aimed at ensuring competition; either behavioural or structural, or a combination thereof; or
- > *refusal* to clear the transaction if the transaction leads to a restriction of competition including as a result of creating or strengthening the dominant position of an entity, or if the FAS establishes that the information provided in the filings is incomplete or insufficient.

In practice, the FAS rarely refuses to clear a transaction (a clearance with significant remedies is more likely). However, note that the FAS will easily refuse to clear a transaction based on the “lack of transparency of the

ownership structure” behind the acquirer, i.e., in case of absence of information on its ultimate shareholders (beneficiaries).

What is the duration of validity of the FAS clearance?

The FAS clearance expires one year from the date of issuance of such clearance if the transaction is not entered into. This term cannot be extended, but clearance can be reapplied for.

Liability for failure to obtain merger control clearance

The failure to obtain Russian merger control clearance (including closing the transaction after submitting the application but before formal clearance is issued) may result in:

- > the invalidation of the transaction further to a court decision if the transaction led or may lead to a restriction of competition in the Russian market; and/or
- > administrative fines imposed on the acquirer (up to 500,000 roubles, (approximately €6,700) for companies and up to 20,000 roubles (approximately €270) for their officials); and/or
- > reputational and associated intangible risks, including a possible deterioration of relations with the FAS.

Scope of foreign investment control

In addition to Russian merger control, foreign investment into Russian entities (direct or indirect) may also be subject to Russian foreign investment regulations. Key clearances which may be required for a foreign investor wishing to establish a presence in Russia include strategic investment clearance⁶ and foreign investment clearance⁷. The regulator responsible for coordinating the issuance of such clearance is also the FAS which is responsible for Russian merger control. The decision is taken by the Governmental Commission for Foreign Investments which is presided over by the Russian Prime Minister and consists of other members of the Russian government and senior officials.

For the avoidance of doubt, please note that foreign ownership restrictions are not limited to the restrictions in the Strategic Investment Law and the Law on Foreign Investments. Further foreign ownership restrictions also exist in such areas as aviation, banking, insurance, fishing, agriculture and other industries and should be addressed separately.

What types of investors and targets can trigger strategic investment or foreign investment clearances?

Foreign investment and strategic investment filings are only triggered if the transactions result in an acquisition (direct or indirect) of shares or rights or assets of a Russian target entity.

> **Types of Russian entities which trigger a foreign investment or strategic investment filing:**

- Strategic Russian Entity: entity established in Russia and engaged in at least one activity (of 50+) that is of strategic importance for ensuring national defence and security⁸ ("**Strategic Activity**");
- Subsoil Strategic Russian Entity: a Strategic Russian Entity which carries out geological studies, exploration and/or extraction of subsoil resources on land plots of federal significance;
- Ordinary Russian Entity: entity established in Russia and not engaged in any Strategic Activity.

⁶ Regulated by the Federal Law No. 57-FZ dated 29 April 2008 "On Foreign Investments into Commercial Entities of Strategic Significance for the Defence of the Country and Security of the State" (the "**Strategic Investment Law**").

⁷ Regulated by the Federal Law No. 160-FZ dated 9 July 1999 "On Foreign Investments in the Russian Federation" (the "**Law on Foreign Investments**").

⁸ In addition to the obvious sectors, such as weaponry and military machinery, oil and gas, energy (including nuclear energy), space and aviation, metals and mining, also included are companies in sectors such as telecommunications, media (including TV, radio and publishing industries), fishing and pharmaceuticals, as well as others.

> **Types of investors which may trigger a foreign investment or strategic investment filing or restrictions for the transaction:**

- Restricted Foreign Investors: foreign states, international organizations, foreign investors which have not officially disclosed their beneficiaries to the Russian regulator (“**Undisclosed Investors**”), and any Russian or foreign company directly or indirectly controlled by them; and
- Ordinary Foreign Investors: any other Russian or non-Russian company controlled by non-Russian companies or non-Russian citizens (including Russian citizens who also have a foreign nationality).

What kind of transactions are caught?

Under Russian foreign investment regulations, transactions may require (i) pre-closing clearance; (ii) pre-closing disclosure of beneficiaries, (iii) post-closing approval; or (iv) post-closing notification.

In some cases a transaction may be prohibited, depending on the transaction structure, industry of the Russian target’s business and identity of the foreign investor. As noted above, additional industrial restrictions may apply in other strategic industries such as media, insurance, banking, air & space, etc., and are not covered herein.

> **Pre-closing clearance**

The acquisition by a foreign investor of shares or rights or assets of a Russian entity may trigger pre-closing clearance requirements.

The key triggers are as described further:

- acquisition of control over a Strategic Russian Entity (or a Subsoil Strategic Russian Entity) by an Ordinary Foreign Investor;
- acquisition of over 25% of shares in, or blocking rights in respect of, a Strategic Russian Entity (or over 5% of shares in or blocking rights in respect of a Subsoil Strategic Russian Entity) by a Restricted Foreign Investor;
- acquisition of any number of shares in a Subsoil Strategic Russian Entity if the foreign investor or his group already hold over 25% (but no more than 75%) in the Subsoil Strategic Russian Entity;
- acquisition by an Ordinary Foreign Investor of ownership, usage or possession of main (fixed) production assets of a Strategic Russian Entity (or a Subsoil Strategic Russian Entity) the book value of which is 25% or more of the balance sheet value of total assets of the Strategic Russian Entity

- acquisition of over 25% of shares in, or blocking rights in respect of, any Russian entity if the investor is controlled by a foreign state or an international organization.

Note that stakes of Restricted Investors are aggregated for the purpose of the above thresholds.

> **Pre-closing disclosure of beneficiaries**

New rules adopted in 2018 regulate that any foreign investor willing to acquire a stake in a Russian Strategic Entity shall be deemed a Restricted Investor until such foreign investor formally discloses its beneficiaries and controlling persons. To obtain the status of an Ordinary Investor the foreign investor must submit a formal disclosure no later than 30 calendar days prior to the proposed date of closing of the transaction (if no other clearance is needed).

> **Post-closing approval**

Post-closing approval must be obtained in a situation where a foreign investor acquired Control over a Strategic Russian Entity other than through its own actions, e.g., as a result of a purchase of by a company of its own shares into treasury, conversion of preference shares into voting shares, etc.

> **Post-closing notification**

Post-closing notification is required in case of:

- acquisition – direct or indirect - by a foreign investor of 5% or more of the shares of a Strategic Russian Entity;
- completion of the transactions or actions for which pre-closing clearance was received.

What transactions are prohibited?

Foreign states, international organisations and Undisclosed Investors and any entities under the control thereof are not allowed to enter into transactions or make other actions which result in:

- > establishment of their Control over Strategic Russian Entities (or Subsoil Strategic Russian Entities);
- > acquisition of ownership, usage or possession of main (fixed) production assets of a Strategic Russian Entity the book value of which is 25% or more of the balance sheet value of total assets of the Strategic Russian Entity.

Process and result of review of the application

What is the timing for the review of the application?

- > **Pre-closing clearance:** clearance must be received before closing.

The whole process of obtaining a Russian strategic investment clearance may take 3 to 12 months, or even longer, as the Governmental Commission convenes on an ad hoc basis and is not a permanently functioning authority. Term of validity is decided by the Governmental Commission during the review process on the basis of the investor's proposal.

The whole process of obtaining a Russian foreign investment clearance takes 1-2 months, and validity of clearance is unlimited as long as transaction details do not change.

- > **Pre-closing beneficiaries disclosure:** If no other pre-transaction foreign or strategic investment filing is triggered by the transaction, the beneficiaries' disclosure must be submitted no later than 30 days prior to proposed closing of the transaction. Delays may be caused by the regulator and are unregulated.
- > **Post-closing approval:** the approval is to be requested within 3 months after acquiring control. If denied, the foreign investor should dispose of a sufficient number of shares within 3 months, so it will no longer have control.
- > **Post-closing notification:** a notification is to be submitted where required or where pre-transaction clearance was received within 45 calendar days after closing.

What will be the results of the review?

Based on the review of a strategic investment application, the following resolutions may be issued:

- > *unconditional clearance;*
- > *conditional clearance* with imposition of conditions (remedies) on the parties, target(s) or their groups aimed at protecting the interests of the Russian Federation;
- > *refusal* to clear the transaction if the transaction is against the national interests of the Russian Federation.

Based on the review of a foreign investment application, the following resolutions may be issued by the FAS:

- > *return of the application* if the Russian target entity is not a Strategic Entity;
- > *decision to refer the application for strategic investment review* if the Russian target entity is a Strategic Entity or the Russian Government or Prime Minister has identified the need to submit the proposed transaction for review by the Governmental Commission.

Liability for failure to obtain foreign investment clearance

Entry into a transaction (i) which is prohibited under the Strategic Investment Law or (ii) which requires prior or subsequent clearance under the Strategic Investment Law without obtaining such clearance may lead to the following:

- > transactions entered into in breach of the relevant provisions of the law are null and void *ab initio*;
- > deprivation of the foreign investor of voting rights at the general shareholders' meeting of the relevant strategic entity where invalidation is impossible;
- > invalidation of the resolutions adopted on the general shareholders' meeting of the strategic company and invalidation of the transactions entered into by the relevant strategic company after the entry into the transaction which is prohibited or was not cleared;
- > administrative fines imposed on the non-compliant entities in the amount of 500,000 - 1 million roubles (approximately €7,000-14,000) and a fine of up to 50,000 roubles on their officers (approximately €700).

The violation of the subsequent notification requirements may lead to the imposition of a fine in the amount of up to 500,000 roubles (approximately €7,000) on the non-compliant entities and a fine of up to 30,000 roubles on their officers (approximately €400).

Contacts

For further information
please contact:

Denis Uvarov

National Managing Partner,
Head of Corporate Practice

+7 495 797 9728

denis.uvarov@linklaters.com

Evgeniya Rakhmanina

Head of Competition Practice,
Russia and CIS

+7 495 797 3007

evgeniya.rakhmanina@linklaters.com

Authors: Evgeniya Rakhmanina

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Linklaters CIS

Paveletskaya sq. 2, bld. 2
Moscow 115054

Tel: +7 495 797 9797

Fax: +7 495 797 9798

Linklaters.com