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STONEBRIDGE LEGAL

Russian Foreign Investment Regime: New Developments

On 29 December 2022, the Russian President signed two laws aimed at strengthening control over foreign investments in Russia. By virtue of these laws, amendments were made to the Law On Foreign Investments in the Russian Federation (***Law No. 160***), the Law On Foreign Investments in Strategic Assets (***Law No. 57***) and the Law On the Protection of Competition (***Law No. 135***), with corresponding changes also made to certain sector-specific laws. The summary of what we view as the most important changes to the Russian foreign investment regime is set out below. We note, however, that this is a high-level overview only, which is not intended to, and does not, cover all the changes.

Law No. 160

The amendments came into effect on 9 January 2023 and relate primarily to the exercise by the Chairman of the Government Commission for Control over Foreign Investments in Russia (the ***Chairman of the Government Commission***) of his discretionary right to decide whether a transaction which involves a foreign investor and affects a Russian company, but does not meet the statutory tests triggering a "strategic" filing under Law No. 57, requires such a filing or not. In particular, the amendments:

(i) detail the procedure for submission by the Russian competition authority (the FAS) of information to the Chairman of the Government Commission for him to decide whether the transaction concerned is notifiable under Law No.57 or not. Please note that the determination process may take more than two months;

(ii) define criteria to be used by the Russian government authorities when assessing, at the FAS's request, the transaction concerned for the purposes of providing the Chairman of the Government Commission with the relevant opinions and proposals. In particular, the authorities should assess:

- the impact of the proposed transaction on the affected industry/sector; and
- whether the Government Commission should impose any remedies on the foreign investor;

(iii) introduce a list of "non-strategic" targets, transactions in relation to which do not, as a general rule, trigger a "strategic" filing, but must be reported to the Chairman of the Government Commission for him to decide whether such a filing is required or not. By way of example only, such targets include:

- "city-forming" (градообразующие) companies;
- dominant companies;
- certain energy or heat supply companies, as well as certain solid waste processing companies;
- Russian companies not controlled by foreign investors, which manufacture or provide unique products or services that are not manufactured or provided by any other Russian companies not controlled by foreign investors;
- companies that provide mobile satellite communication services;
- "strategic" entities in circumstances where the transaction does not trigger a "strategic" filing (e.g., where the stake acquired is below the threshold that makes the transaction notifiable under Law No.57);
- mining companies which operate at subsoil plots that meet certain quantitative or qualitative tests; or
- companies active in the construction or renovation of sea or river ports.

Law No. 57

The amendments will come into effect in March 2023 (most of them on 30 March) and include the following:

(i) the "strategic" foreign investment regime established under Law No. 57 will now extend to Russian companies which are not yet "strategic", but which have applied for a licence, permit or another authorisation to conduct "strategic" activities;

(ii) the concept of joint control over a "strategic" entity, which currently only exists in relation to foreign investors which are controlled by the government or an international organisation or did not disclose their beneficiaries and controlling parties to the FAS, will be extended to all other foreign investors (except, as a general rule, in the context of control over a public company listed on a stock exchange). If construed literally, the new rule means that if any foreign investor (not necessarily government-controlled) wants to acquire a small stake in a "strategic" entity and if that stake – when aggregated with the stakes held in such entity by other foreign companies – exceeds the relevant threshold set out in Law No.57, the foreign investor will have to make a pre-closing filing and a post-closing notification in relation to such acquisition;

(iii) if a Russian national who holds five or more per cent in a "strategic" entity obtains foreign citizenship or a foreign residence permit, he or she will have to notify the FAS of

same. The form of the notification and the time within which it must be submitted vary depending on whether the individual concerned controls the "strategic" entity or not;

(iv) transactions as a result of which a foreign-controlled "strategic" entity receives the right to catch "aquatic biological resources", and which meet the tests provided for by the newly introduced amendments to Law No.57, will now trigger a "strategic" filing under Law No.57;

(v) the list of exemptions from the requirements of Law No.57 has been expanded to include transactions where the (foreign) purchaser is collectively controlled by non-affiliated Russian nationals who are Russian tax residents (except where they have dual nationality). This amendment is probably the only one that could be considered a liberalisation of the currently existing foreign investment regime. However, to benefit from the new exemption, the purchaser will need to disclose its beneficiaries and controlling parties to the FAS to its satisfaction; and

(vi) the amendments detail the procedure for submission and review of filings in relation to transactions that became notifiable as a result of the newly introduced changes, and also define the legal consequences of non-compliance with the filing requirements.

Law No.135

The amendments came into effect on 9 January 2023 and relate primarily to transactions where the purchaser is a foreign party or, alternatively, has foreign shareholders, beneficiaries or controlling parties. The amendments provide for the following:

(i) the information requirements for merger control filings have been expanded to include detailed information that must be disclosed in relation to the beneficiaries, beneficial owners and controlling parties of the purchaser if the purchaser qualifies as a foreign investor or if the target is, or holds more than five per cent in, a "strategic" entity; and

(ii) the lists of grounds for the extension of the merger control review period and for denying merger control clearance have been expanded to include circumstances related to the notifiability or potential notifiability of the transaction concerned under Law No.160. In particular, the FAS now can:

- extend the review period if it is waiting for a decision of the Chairman of the Government Commission on whether the transaction requires a filing under Law No.57 or not; and
- deny clearance if the Chairman of the Government Commission decides that the transaction is notifiable under Law No.57 but the filing under Law No.57 has not been made.

We have yet to see how the changes introduced to the Russian foreign investment regime will work in practice, but it is already clear that the clearance process will, at least in certain cases, become more burdensome and time-consuming.

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