

RUSSIAN COUNTER-SANCTIONS REGULATIONS: NEW DEVELOPMENTS

14 July 2023

On 12 July 2023, the Russian Ministry of Finance published an excerpt from the minutes of a meeting of the Sub-Commission of the Government Commission for Control over Foreign Investments (the ultimate decision maker in most matters concerning counter-sanctions), which introduced changes to the guidelines for approval of divestments by investors associated with unfriendly states. Also, the excerpt listed conditions for payment of dividends to shareholders associated with such states.

More specifically, from now on the following guiding principles (which include both new principles and the existing ones which the Sub-Commission already applies – see our comments below) will apply, as a rule:

1. the application package must include a valuation report prepared by an independent appraiser, supported by an expert opinion prepared by a self-regulatory organisation (SRO) of appraisers. Both the appraiser and the SRO must be on the relevant list recommended by the Sub-Commission - this guiding principle was already in application;
2. the purchase price should not exceed 50% of the fair market value as set out in the valuation report (already effectively applied);
3. there should be an undertaking to make a voluntary contribution to the Russian state budget which should be not less than:
 - if the purchase price exceeds 10% of the fair market value (appraised as per above), 10% of half of the fair market value (already in application); or
 - if it is less than 10% of the fair market value, 10% of 100% of the fair market value (also in application).

In either case, the contribution must be paid within three months after closing (this is new).

The excerpt is silent as to which party should make the contribution, but given the required timing (post-closing), it would follow that it would likely be the purchaser's responsibility. Neither does it specify what the contribution should be if the purchase price is exactly 10% of the market value – we would expect this to be specified in each relevant approval.

4. if the asset is a public joint stock company (*публичное акционерное общество*), up to 20% of the shares in it will need to be floated on a Russian stock exchange. The offering should start within one year after closing and be completed within three years. Further rules regarding public offerings were introduced for exit transactions in the form of mergers involving a public joint stock company, as well as for the dissolution of public joint stock companies or their reorganisation into other kind of companies (this is new);

5. key performance indicators (KPIs) should be set for the purchaser and/or the target, including the preservation of the target's technological potential, headcount, carrying on its core business and honouring its contracts with third parties. The competent authorities should monitor performance of the imposed KPIs (this is in effect some new detail on a guiding principle promulgated earlier);
6. If the seller has a repurchase right (such as a call option), it should be exercisable within two years after closing, at a strike price reflecting the fair market value at the time of the exercise and on terms economically profitable to the Russian party (this is a new principle, it is vague as to what "economically profitable" actually means);
7. the purchase price may be paid:
 - (i) in Russian roubles to a special C-type account opened with a Russian bank;
 - (ii) in Russian roubles to any other bank accounts in Russia opened with Russian banks; or
 - (iii) to the seller's account abroad, but only if payment is deferred (this is a new requirement – it does not provide for a minimum duration of the deferral, but a deferral of some kind will be required as a condition for a payment abroad); and
8. if the transaction requires any other regulatory approvals, the Sub-Commission will only clear it if all such other approvals have been obtained. This is a new requirement, and it is not clear whether the other approvals should be obtained before the counter-sanctions filing is submitted and should be included in the application package upfront or whether applications for them could possibly be run in parallel to that to the Sub-Commission, but the former appears to be the more prudent approach.

Furthermore, the Sub-Commission noted the following principles for granting approvals for payment of dividends to shareholders associated with unfriendly states, which was presented by the Ministry of Finance and the Central Bank of Russia – noting that those principles to a great extent repeat the currently applied ones, of which we informed you in our alert of 22 December 2022. The (slightly) updated principles are set out below:

- dividend payments may not exceed 50% of the net profit earned in the previous year;
- dividend payments should not differ materially from the company's dividend policy as manifested by the dividend payments made in the recent years;
- the foreign owners of the business concerned must be willing to continue business in Russia;
- views of the federal government authorities and the Central Bank of Russia as to the significance of the company's business should be taken into account;
- the KPI-related undertakings should be met, as confirmed by the relevant competent authorities (this condition, if met, will also enable permission of quarterly dividends).