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ALERT MEMORANDUM

Russian Countermeasures: The Governmental Commission Imposes Additional Conditions on Exits by Investors From Unfriendly Jurisdictions

July 18, 2023

On July 7, 2023, the Governmental Commission for Control over Foreign Investments (the "Governmental Commission") adopted a new set of conditions for exits by investors from "unfriendly" jurisdictions (those that have imposed sanctions against Russia) (the "Decision"). The Decision provides substantial updates of the clearance process with respect to the sale of shares and participatory interests in Russian companies by parties from "unfriendly" jurisdictions, as well as the payment of dividends to such foreign parties.

If you have any questions concerning this memorandum, please reach out to your regular firm contact or the following authors

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Conditions for the Approval of the Transactions by the Governmental Commission

1. Sale of Shares and Participatory Interests by Foreign Investors

Prior to the Decision, the Governmental Commission had already imposed various conditions when approving sales of interests in Russian companies by parties from "unfriendly" jurisdictions. Such conditions were typically communicated to the applicants in the excerpts from the minutes of the Governmental Commission meetings. The Decision lists new conditions that should "generally" be imposed by the Governmental Commission when approving such sale transactions (the language of the Decision seems to be deliberately vague to allow the Governmental Commission flexibility in interpretation and providing exceptions):

- If the target is a public joint stock company, there shall be a commitment to list up to 20% of the shares of such company on a stock exchange within 1 to 4 years from the date of the sale;
- If the sale terms include a call option providing for the seller's right to buy back the target in the future, such call option shall only be exercisable at a fair market value and with economic benefit to the Russian buyer of the assets, provided that the exercise of such call option may only be pre-approved for a term "generally" not exceeding two years from the date of the exit (thus, if exercised later, a separate approval of the Governmental Commission could be required at the time of the exercise);

- The purchase price shall be paid to the "unfriendly" sellers to either (i) "S-type" accounts (special restricted accounts, funds on which are in practice frozen), (ii) Russian bank accounts, or (iii) foreign bank accounts, but only subject to deferral of the payment (which, as we understand, could also be further conditioned on the performance of the KPIs);
- All other relevant approvals (i.e., merger control approvals) for the transaction shall be in place before the review of the application by the Governmental Commission.

The Decision also reiterates the conditions that the Governmental Commission has already been imposing on the buyers, including:

- The requirement to provide an appraisal report from an independent appraiser approved by the Government, determining a fair market value of the target;
- The requirement that the appraisal report be accompanied by a fairness opinion of a Self Regulatory Organization of appraisers approved by the Government;
- The requirement to commit to business KPIs that the target shall meet in the future;
- The requirement that the purchase price be with at least 50% discount off the market value of the target, as determined in the appraisal report;
- The requirement of a "voluntary" payment into the Russian federal budget (the "Exit Tax"). If the price discount is less than 90% of the market value as determined by the approved appraiser, the budget payment shall be at least 5% of the market value. If the discount is more than 90% (which would include deals at nominal value), the budget payment is supposed to be at least 10% of the market value.

Notably, the existing conditions to approval have undergone several amendments and clarifications:

- The KPIs shall now include performance indicators related to (i) retaining the technological potential and competencies of the target, (ii) retaining the employees, and (iii) due performance under contracts with counterparties. The performance of the KPIs shall be monitored;
- Contrary to the previous practice of the Governmental Commission which considered deferred payment of the purchase price in installments as an alternative to the Exit Tax, the Decision now seems to require payment of the Exit Tax in addition to potential deferral of the purchase price payment (if funds are paid to an account outside of Russia);
- The Exit Tax shall be paid by the buyer within three months from the sale (before the Decision, there had been no clarity as to who should pay the Exit Tax and when).

  Although the above conditions are drafted in such a way as to suggest that the Governmental Commission has certain discretion to apply them to specific approvals, it is expected that in practice they will be imposed in the majority of cases. The Decision does not contain any clarification with respect to intragroup transactions, despite the information that the Governmental Commission is swamped with requests to clarify that the conditions shall not apply to any intragroup transfers not connected with exits from Russia.

2. Distributions (Payment of Dividends) to Foreign Shareholders of the Company

The Decision also lists conditions that the Central Bank of Russia and the Ministry of Finance shall take into account when approving payment of profits (dividends) to foreign shareholders:

- The amount of the distributions (dividends) shall not exceed 50% of the net profit for the previous year;
- Historic pattern of distributions (dividends) shall be taken into account;
- Commitment of the foreign shareholders to continue business in Russia;

- The positions of federal executive authorities and the Central Bank of Russia ("CBR") on the significance of the company's activities and the impact of the company's activities on the technological and industrial sovereignty, social and economic development of the Russian Federation;
- The applicants shall have undertaken to fulfil KPIs, and compliance with such undertakings shall be confirmed by the CBR;
- Disbursements (payments of dividends) may be made on a quarterly basis, provided that the established KPIs continue to be met.

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