

SEEKING COMPENSATION FOR LOSSES RESULTING FROM RUSSIAN MEASURES AGAINST FOREIGN COMPANIES AND ASSETS

Since February 2022, around 1,200 companies have announced their intention to curtail operations, in part or in full, in Russia. In response, Russia has enacted a series of measures, which significantly affect such companies' operations and exit options from the country.

In some cases, companies seeking to exit have been put under State-controlled management, while some other companies have been asked to divest operations "voluntarily" within short timeframes. In most exits, the sale price is being determined by the State at severely discounted levels. Litigations against companies seeking to exit have also increased.

In this briefing, we explore the most significant measures and analyse potential options for remedies available to affected investors, including claims for compensation under Russia's bilateral investment treaties ("**BITs**") and before domestic and other international fora.

RUSSIAN MEASURES AGAINST FOREIGN INVESTORS

Significant restrictions on disposing of investments

Russia has enacted several measures which significantly expand the regulatory clearance requirements for transferring stakes in Russian entities by foreign investors from "unfriendly" States. In addition to transactions involving acquisition of securities, these measures also apply to acquisition of real estate assets, provisions of loans or credit facilities to the investors, payments of dividends, currency operations in connection with loans, and transfers by Russian residents to their foreign accounts. In some cases, foreign-to-foreign transactions, not involving a Russian entity, also fall within the scope of the regime.

Among other things, the regime imposes onerous commercial conditions for granting clearances (including regulating the sale price based on value of

Key issues

- The latest measures in Russia demonstrate an increasingly aggressive treatment towards foreign investors from "unfriendly" States.
- Such measures include significant restrictions on disposing investments by foreign investors from "unfriendly" States and making payments to foreign creditors under existing obligations.
- Russia's measures may be in breach of its obligations under its BITs, and thus entitle the affected foreign investors to compensation.
- Foreign investors may consider pursuing other international and domestic remedies against Russia, such as bringing claims before the European Court of Human Rights.

assets); does not stipulate any statutory timelines for the procedure of obtaining the clearances; and gives broad discretion to the regulatory body designated to decide the matter (i.e., the Sub-commission on Monitoring Foreign Investment) in terms of refusals and conditional clearances. The regime also imposes restrictions on direct or indirect foreign ownership of the Russian buyer of the asset.

One of the conditions for granting approval is to apply discount of at least 50% from the market value of the asset to obtain approval for a transaction, and pay a substantial portion of the market value of the asset to the State budget. Additionally, there is a provision requiring placement for public offering of up to 20% shares of the target entity.

Russian public prosecutors are authorised to file court claims for invalidation of transactions made in violation to the Russian measures (i.e., without the clearances).

Further, any payments made to "unfriendly" entities in the framework of decreasing the charter capital or the bankruptcy or liquidation of Russian entities are severely restricted. Payments to foreign bank accounts can only be made in instalments. Alternatively, payments can be made through the highly restrictive Type C accounts, which effectively means that such payments will be frozen unless special permission is granted by Russian authorities.

The State also has a super-preferential right to buy assets sold by foreign owners with a significant discount for subsequent sale at market price. Additionally, buy-back options are severely limited and can only be exercised within 2 years of the exit at market value.

Regulation of performance of Russian debtors' obligation to certain categories of creditors, and Type C accounts

Decree No 95 introduced a temporary regime for discharge by Russian resident debtors of their obligations under credits, loans and financial instruments. If the debt is owed to a creditor from an "unfriendly" State, a Russian debtor may pay the Rouble amount of the debt to a special Type "C" account (denominated in Russian Roubles) with a Russian bank, in the name of the foreign creditor.

Temporary external management over Russian assets of foreign companies

Decree No 302 allows the Russian government to install a temporary external management in companies from "unfriendly" countries. The temporary management appears to be empowered to have full operational rights, except for selling or otherwise disposing of the assets. This mechanism was used in establishing external management over majority stakes of the Russian subsidiaries of Uniper, Fortum, Danone and Carlsberg groups. Decree No 302 has a wide scope, as the temporary external management regime is not linked to any specific industries.

Use of intellectual property without compensation

Decree No 299 authorizes local companies and individuals to use patents of patent holders from "unfriendly" States without their consent and without any compensation for the use of their inventions, models, or designs if such use is required to ensure the defence and security of Russia and the protection of citizens' life and health.

The Russian Parliament has also reportedly adopted a Federal Law No. 46-FZ of 8 March 2022) which allows the government to exempt certain goods from intellectual property rights protection.

Measures affecting the aviation sector

The Russian government is reportedly taking measures to keep foreign-manufactured and foreign-owned aircraft in Russia, including their possible nationalization. Russia's Federal Air Transportation Agency ("**FATA**") allegedly ordered airline executives to submit applications to the central office of the FATA for the re-registration of all aircraft currently in use, including those leased, on the aircraft registry of the Russian Federation, notwithstanding the prohibition of dual registration of aircrafts under Article 18 of the 1944 Chicago Convention. It has also been reported that the Russian Parliament passed a law allowing Russian airlines to place aircraft leased from foreign companies on Russia's aircraft register.

Other measures targeting foreign companies

Given the developing political situation, Russia may take further measures against foreign investors and their assets. There are reports of other draft laws and decrees in place which lay the groundwork for taking adverse measures against foreign companies.

RECOURSE TO INTERNATIONAL ARBITRATION UNDER RUSSIA'S BITS

Russia has more than 60 BITS which offer investment protection against nationalization and expropriation of foreign investors' assets carried out without payment of compensation. BITS also provide investors with other safeguards against the host-State's regulatory changes, through standards such as fair and equitable treatment, constant protection and security, non-discrimination, and most-favoured nation treatment. These safeguards may provide addition protection to foreign investors.

These BITS are in force with several States now declared to be 'unfriendly' by Russia, including: Germany, the United Kingdom, France, the Netherlands, Italy, Switzerland, South Korea, Luxembourg, Norway, Finland, Sweden, Denmark, Greece, Spain, Austria, Canada, Japan, Lithuania, Turkey, Hungary, the Czech Republic, Slovakia, Romania, Bulgaria and Singapore.

Similar remedies would also be available under the Energy Charter Treaty (1994) (the "**ECT**") for investments made between 1994 and 2009.

Investors that own or control their Russian operations through any of these States or ECT Member States may be entitled to commence investment arbitration proceedings under the relevant treaty with Russia.

RECOURSE TO OTHER REMEDIES

Foreign investors that may not be able to rely on a BIT in force with Russia may be able to access other international and domestic remedies.

The Council of Europe Summit has established a Register of Damage for Ukraine as a first step towards an international compensation mechanism for victims of Russian aggression for loss or injury caused in the territory of Ukraine, on or after 24 February 2022. Claims can be submitted by natural and legal persons, in addition to the State of Ukraine. The exact form of the

compensation mechanism is yet to be determined, and may include a claims commission and compensation fund.

Investors may also have access to domestic remedies in their own jurisdictions. For instance, possible remedies for investors based in the United States (which does not have a BIT in force with Russia) could include claims before the Foreign Claims Settlement Commission ("FCSC"). The FCSC allows US nationals and corporations to resolve claims against foreign governments, provided that the FCSC is granted authority to adjudicate such claims through Congressional legislation or by referral from the Secretary of State. Foreign investors should carefully observe whether the US authorises the FCSC to adjudicate claims against Russia, or if any other country implements a similar mechanism.

STEPS TO TAKE IF YOUR INVESTMENT IS AFFECTED

- Conduct a case assessment. Assess whether Russia's measures affect the structuring of your transaction or adversely affect the value of your investment.
- Preserve relevant documentation in relation to the operations and valuation of Russian assets.
- Assess mitigation strategies to minimise the adverse impact of Russian measures on the value of your investment, including options under your existing political risk insurance.
- Assess whether your home-State is a signatory to a BIT with Russia. If you can access a treaty as an investor, consider the standards of protection provided in it and the prospect of bringing an arbitration claim. You can seek legal advice to form a preliminary view on the merits of your case and the chances of success.

OUR EXPERIENCE

Clifford Chance has established a focus group monitoring international and Russian measures closely dealing with international sanctions and Russian measures on a regular basis. We also regularly advise and represent clients in investor-State arbitrations, with our global team having advised on more than 100 investor-State proceedings.

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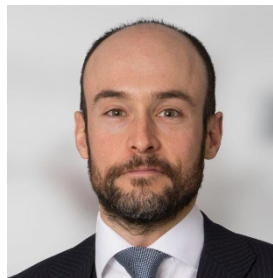
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