



Private Equity

in 33 jurisdictions worldwide

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Private Equity 2011

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Russia

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1 Types of private equity transactions

What different types of private equity transactions occur in your jurisdiction?

Notwithstanding numerous declarations of the Russian government about the importance and necessity of private equity development in the country, there is still a lack of special regulation aimed at private equity transactions and investments generally. Effective laws regulating investments are outdated and practically of no use, and even the effective legal definition of a private equity transaction is far from the accepted standard. Court rulings, which could close the gap in legislation related to private equity, are not recognised as sources of law in Russia. Business customs, although they are formally recognised as a source of law, also cannot close such a significant gap in regulation, and the courts usually hesitate to base judgments on business customs. This makes it harder to implement deals that have complex structures, limiting the vast majority of investors to the simplest types of private equity transactions directly regulated by the corporate legislation.

Consequently, the most widespread private equity transactions in Russia are acquisitions of controlling or blocking shares (or participation interests, depending on the form of the company) to achieve control over the target company and secure its development, and direct asset acquisition, when the object of investment is not a company itself, but some of its valuable assets or real estate. Other types of equity transactions such as leveraged buyouts, management buyouts, etc, are also available and performed from time to time; however, the number of such complex transactions is still insignificant, and in 2010 there were no such complex transactions involving significant amounts of capital.

2 Corporate governance rules

What are the implications of corporate governance rules for private equity transactions? Are there any advantages to going private in leveraged buyout or similar transactions? What are the effects of corporate governance rules on companies that, following a private equity transaction, remain or become public companies?

Owing to a lack of special regulation, investors follow the same general corporate governance rules while making private equity transactions as all other business entities operating in Russia, with no special preferences for any type of private equity transactions. All advantages and disadvantages of each type of private equity transaction therefore arise from general legislation regulating companies, the stock market, competition, currency control, etc. Regarding the two main types of transactions that have become common in Russia, this means that the acquisition of shares, participatory interests and assets of Russian companies by a private investor is subject to the same governance as any other respective acquisition; and since the law grants foreign individuals and companies the same legal status as Russian ones, foreign private investors have almost the same rights as local private investors (excluding several limitations mentioned below).

It is important to note that current Russian legislation does not formally divide public and private companies, although considering the latest amendments to the Civil Code of the Russian Federation and to the Federal Laws 'On limited liability companies' and 'On joint stock companies' it may be concluded that the government and legislators are moving in this direction, and the formal separation of public and private companies is only a matter of time. Presently, a joint-stock company that has performed a public offer of shares is understood as a public company. Corporate governance of such public companies does not substantially differ from the governance of private joint-stock companies whose shares are not publicly traded; however, some additional requirements regarding structure of its governing bodies and general transparency shall be complied with by such company.

3 Issues facing public company boards

What are the issues facing boards of directors of public companies considering entering into a going-private or private equity transaction? What is the role of a special committee in such a transaction where members of the board are participating or have an interest in the transaction?

The management structure of Russian companies differs from Anglo-American standards. The role of the board of directors in a Russian public company is less important, while majority shareholders tend to control the company's activities, including by means of holding of controlling or blocking shareholdings. Thus, boards of directors of public companies are not competent to make any important resolutions regarding going-private and private equity transactions; their role is to determine tactics of the company, provide the shareholders with certain recommendations (for example, if the company receives a voluntary or mandatory offer from one of the shareholders to buy out all other shares) and make necessary disclosures connected with private equity transactions when required by law. In several cases, individual members of the board may participate in transactions directly or have an interest in a transaction, although in these cases the law does not provide for the organisation of any special committee. Provisions regulating related-party transactions, however, shall become applicable, and these provisions shall be applicable both in cases where members of the board act as parties of such transactions and as beneficiaries of such transactions.

4 Disclosure issues

Are there heightened disclosure issues in connection with going-private transactions or other private equity transactions?

Due to the order of the state Federal Service for Financial Markets (FSFM) related to the disclosure of information by public companies, a company becomes obliged to disclose certain information that may significantly affect the price of a company's issued securities. Such information includes, for example, any acquisition by one

shareholder of 5, 10, 15 per cent and so on up to 75 per cent of shares of the company. Although there are no specific disclosure requirements connected with going-private transactions or other private equity transactions, the deal would most probably lead to necessary relevant disclosure, if it involves a listed company. Companies performing some specific activities (for example, credit institutions or managing companies of investment and pension funds) shall comply with additional disclosure requirements, as well as their respective members of boards and stockholders. Such additional requirements are provided by legislative acts and FSFM orders.

Another potentially necessary disclosure is to antimonopoly bodies, which is required if a transaction involving the purchase of shares or assets exceeds certain thresholds provided by antimonopoly bodies in normative acts regulating limitation of monopoly activities. In this case, the transacting parties shall, depending on the value of the deal and the assets of the parties involved, either inform the competent authorities of the deal or apply for the permit to enter into the deal, and within the framework of such notification or application, the purchaser will have to disclose certain information regarding both the target company and itself.

5 Timing considerations

What are the timing considerations for a going-private or other private equity transaction?

Russian legislation does not provide any limitations or requirements in respect of timing of a private equity transaction, so the parties are free to take as much time as they think necessary. As in other jurisdictions, the most time-consuming matters are adjustment of transfer conditions between the parties and complex due diligence of the target company or assets by the purchaser. Sometimes the companies involved in the transaction perform one or several corporate actions, approve the transaction, etc. If the transaction involves large companies, prior permission from antimonopoly bodies may be required, and this inevitably takes at least another one-and-a-half to two months. If the transaction involves the transfer of real estate located in Russia, or if participatory interest in a Russian LLC is purchased and foundation documents of such LLC are amended, it will be necessary to apply for state registration of the results of the transaction, which might also prove time-consuming. Usually, therefore, private equity transactions take several months from the beginning to the closing of the deal.

6 Purchase agreements

What purchase agreement provisions are specific to private equity transactions?

There are some important issues to be noted in respect of share or asset purchase agreements according to Russian law. Generally, this instrument has very limited use, since it is almost impossible to include in the agreement any provisions other than those directly related to sale and purchase, namely, transfer and payment for shares or assets. For example, covenants, representations and warranties as they are known in common law are not accepted in Russia, and the courts would most likely acknowledge this part of an agreement as void. This results in many investors seeking mechanisms allowing them to regulate the transaction under foreign law. Although it is theoretically possible to include some provisions regarding further financing in the purchase agreement, the parties to the private equity transaction usually have additional and detailed shareholders' agreements, often also regulated by foreign law. The purchase agreement related to a Russian-based company's stock or assets basically contains provisions defining the subject matter of the agreement, price of the agreement (consideration), mutual rights and obligations of the parties (including completion mechanics) and an arbitration clause if the parties to the agreement wish to submit their disputes to arbitration. If the parties use a foreign vehicle for the transaction and

conclude a purchase agreement in respect of such vehicle governed by foreign law, this agreement may include any provisions permitted by the applicable law and relevant to the essence of the transaction.

7 Participation of target company management

How can management of the target company participate in a going-private transaction? What are the principal executive compensation issues?

Classical management buyouts are quite rare in Russia. They mostly take place when rather small companies are going private, especially research and development and other venture companies, where the company's management consists of the founders of the company. However, the management of larger companies may still participate in going-private transactions in several ways, including bonuses, stock options and profit-sharing schemes. There are some cases when a company went private through purchase of its stock by a strategic investor jointly with the management with provision to the management of substantial equity stock in the company; such cases are not common, but do occur. Generally, practice shows that investors are interested in the preservation and motivation of competent management of a promising company; such motivation may include different means such as stock options, including phantom stock options, or bonuses connected to certain times, achievement of financial results, etc.

8 Tax issues

What are the basic tax issues involved in private equity transactions?

Give details regarding the tax status of a target, deductibility of interest based on the form of financing and tax issues related to executive compensation. Can share acquisitions be classified as asset acquisitions for tax purposes?

Since the modern Russian tax system is relatively young and is still forming, the parties to a private equity transaction may face some difficulties when implementing complex structures for the transaction connected not only to present and future taxation, but also to historic tax risks of the target companies, which could have implemented tax schemes in order to avoid paying VAT, profit tax and payroll taxes. We assume that, with the increase of overall payroll tax at the beginning of 2011, this issue will become even more important. Therefore, VAT, payroll and withholding tax issues in many cases will strongly require complex solutions, often with the participation of local consultants and auditors.

Currently, there are not many options for the parties to private equity transactions, but at the same time the tax system is constantly developing and there have been several attempts by the legislator to provide advantages to investors, for example, exemptions for dividends on strategic investments. Applicable taxes and tax issues differ slightly depending on the type of deal (acquisition of shares or assets); therefore, the methods of tax optimisation and decreasing tax risks also differ. In a share transaction the parties may decide to bring the transaction to a foreign jurisdiction, often offshore. This may provide the possibility not only to enjoy the advantages of a shareholders' agreement governed in accordance with western legal principles, but also to decrease taxation connected directly with the transaction, primarily profit tax, and to further use Russia's network of double tax treaties. In an asset deal, it is not possible to use an offshore deal structure, so the overall taxation shall be comparatively higher, include 18 per cent VAT and 24 per cent profit tax for the seller. However, to escape historic tax risks of the old company, the asset deal may be preferable.

All monetary income received by individuals, including executives' compensations, is subject to individual income tax, which is currently at a flat rate of 13 per cent.

Since the wording of the Russian Tax Code is often vague, which enables the tax bodies to impose sometimes doubtful claims, the Tax

Code itself is constantly changing and target companies in Russia (especially those with a long history) shall most likely have significant tax risks, it is strongly recommended to perform a detailed tax analysis in respect of each private equity transaction.

9 Existing indebtedness

What issues are raised by existing indebtedness at a potential target of a private equity transaction? How can these issues be resolved?

Existing indebtedness of a target company generally does not restrict or limit the possibility of a private equity transaction involving its shares or assets. However, it is something that the parties to the transaction must be aware of. Private equity transactions usually include a legal and financial due diligence procedure arranged by a potential purchaser that shall check and reveal information regarding indebtedness of the target and its details. Existing indebtedness is usually handled in two ways, depending on its nature. Third-party debts (commercial indebtedness to suppliers and financial indebtedness to banks and other lenders) usually remain after a private equity transaction until they are repaid by the target company, as they are considered as a part of the enterprise value of the target company. In the case of indebtedness to selling shareholders, such debt, usually upon agreement of the parties to the transaction, shall be assigned by the old shareholder to a new one or otherwise redeemed before the completion of the transaction. There is also a third way to handle the indebtedness – to convert debts into stock. This option had been prohibited until recently, but the government finally decided to remove the prohibition. Therefore we assume that, after completion of the legislation base for this option and several successful transactions, this option shall become as widespread as it is in other jurisdictions where it is enabled.

Indebtedness of a target company may be secured with various securities, including a pledge, a guarantee, etc. The purchaser shall be aware of such security and may demand implementation of the respective provisions related to the security or its cancellation in the text of relevant agreements.

10 Debt financing structures

What types of debt are used to finance going-private or private equity transactions? Do margin loan restrictions affect the debt financing structure of these transactions? Are there any other restrictions in your jurisdiction on the use of debt financing for private equity transactions?

Russian legislation recognises only two types of debt – credit provided by banking institutions and loans provided by any company or other entity. There may, therefore, be separate debt financing using banking credits and debt financing using loans, although both types would have very similar consequences for the target company. The concept of a margin loan or common business practice as a separate type of debt is not known in Russian law; therefore, no specific restrictions are applicable to such arrangements. There are no specific restrictions on the use of debt financing for private equity transactions either, so investors are free to use any debt financing they find suitable to perform the transactions.

11 Debt and equity financing provisions

What provisions relating to debt and equity financing are typically found in a going-private transaction? What other documents set out the expected financing?

A typical private equity transaction in Russia combines debt and equity financing, where debt usually precedes equity. Debt financing is usually provided through loan or credit agreements. Equity financing is possible through the initial subscription of the investor for the issued shares of the target company, and also through the purchase of shares from the other shareholder. If the target company

is a Russian-based LLC, the law also provides its shareholder with a possibility to invest funds directly into the company's assets without further compensation, which sometimes proves to be a rather useful financial instrument. As mentioned above, fully valid convertible debt arrangements shall be available and widespread soon, without the necessity to structure them through other instruments such as seizure of pledged shares, etc. This will become another step towards the possibility of structuring private equity transactions within exclusively Russian jurisdiction that will be convenient for transactions in respect of small targets, including venture companies.

12 Fraudulent conveyance and other bankruptcy issues

Do private equity transactions involving leverage raise 'fraudulent conveyance' or other bankruptcy issues? How are these issues typically handled in a going-private transaction?

Apart from the bankruptcy context, the concept of 'fraudulent conveyance' is not recognised by Russian law. However, to protect the company and its creditors throughout a private equity transaction, especially connected with the change of shareholders in the target company, from any actions possibly leading to bankruptcy or just from the undesired performance of the target, the parties usually perform actions aimed to increase control over the target company's activities throughout the deal. This may include limitation of powers of executive bodies to the lowest level possible and economically reasonable scope and close control over the company's operations and bank accounts.

13 Shareholders' agreements

What are the key provisions in shareholders' agreements covering minority investments or investments made by two or more private equity firms?

One of the most noticeable problems that private equity firms face in Russia is the current practical unavailability of comprehensive shareholders' agreements regulated by Russian law.

The necessity of legal regulation of shareholders' agreements as comprehensive binding documents concluded between the shareholders in forms currently used in foreign countries has been evident for a long time and noticed by many domestic lawyers. However, a law that will govern all the basic aspects of shareholders' agreements exists only as a bill at present and has yet to be enacted.

Although amendments to the Federal Law 'On limited liability companies' and 'On joint-stock companies' have made available agreements between participants or shareholders regarding the use of participants' or shareholders' rights, such agreements have not become a common practice. Such agreements are similar in many aspects to shareholders' agreements as they are understood internationally; however, they still provide fewer possibilities compared to similar agreements regulated by foreign law. In such agreements, the parties still may agree on a limited range of matters related to the exercise of several rights of the participants or shareholders, including principally voting upon certain matters of a target company, on general meetings and on the conditions of sale of participatory interests and shares in the company.

Provisions of such agreements shall comply with mandatory provisions of the respective law. Since the possibility of a participants' and shareholders' agreement appeared recently, legal regulation of such agreements is apparently insufficient and, due to limited possibilities provided to the parties by the said agreements, conclusion of such agreements has not yet become a widespread practice for investors in Russia, with most of them still relying on common shareholders' agreements regulated by foreign law and concluded in respect of special purpose vehicles. Moreover, it will not be possible for parties to include some issues in shareholders' agreements regulated by Russian law even in the distant future – for example, representations and warranties, which are completely unfamiliar in the Russian legal system.

Update and trends

The consequences of the financial crisis had led to a further decrease of investment activities throughout 2010, both by foreign and domestic investors. The state continued supporting private equity and managed to support the investment market, and in 2010, as in 2009, funds that received support from the state were the main active investors on the market. In addition to supporting investors, the government has started a state project, the Skolkovo Innovation Centre, which shall attract investors and provide an impulse for further development of investments and private equity. As expected, the state also continues to develop legislation on the matter; however, norms regulating state control over investments are yet to be implemented.

Infrastructure development and the IT and telecom sectors will remain attractive for investors for the foreseeable future, especially in view of recent government declarations and arrangements in respect

of the modernisation of the Russian economy and a number of global sporting events to be held in Russia in the next few years that need to be prepared for and supported.

Russian corporate law is also undergoing substantial changes aimed at providing more flexibility to private companies' governance rules, which may attract investors and decrease their willingness to use foreign law for their transactions. We do not expect, however, a quick shift in Russian law governing documentation among investors, since the law should be tested first in the courts. Considering the general conservativeness of the Russian court system we believe English law will, for the time being, remain dominant on the Russian private equity scene and it shall be the sole option for all complex transactions for a long time.

This is the reason why, currently, the parties to a private equity transaction, even if both parties are Russian, are in most cases forced to bring their deal outside Russian borders by using special purpose vehicles (usually offshore) in order to execute a comprehensive and effective shareholders' agreement that would set out the obligations of the parties in respect of further financing and operation of the target company, as well as mutual representations and warranties, and to submit this agreement to foreign law, usually one of the common law systems. This situation, combined with tax optimisation considerations, are the main reasons leading to a major part of private equity transactions targeted at Russian companies being concluded abroad. Therefore, to structure the deal and to execute a valid shareholders' agreement, the parties often engage foreign advisers specialised in such matters, and it usually means that the key provisions of shareholders' agreements intended to operate a target company in Russia are in all essential aspects the same as in shareholders' agreements concluded all over the world.

14 Limitations on transaction size

Do private equity firms have limitations on the size of transactions they may engage in?

Russian law does not limit the size of transactions of private equity firms. However, depending on the size, certain obligations may arise for such companies related to antimonopoly and similar provisions. These obligations may include disclosure of certain information in respect of the transaction and receiving permission of antimonopoly bodies to effect a transaction (which cannot be withheld unless the transaction violates antimonopoly regulations and limits competition). Regarding Russian-based mutual investment funds and incorporated investment funds, there are limitations on the maximum part of assets that may be invested in instruments issued by the same issuer and similar limitations, but they refer to proportions of assets of the said funds and not directly to the size of the transactions they may engage in.

15 Exit strategies and investment horizons

How do the exit strategies and investment horizons of private equity firms affect the structuring and negotiation of leveraged buyout transactions?

As noted above, leveraged buyout transactions are not common in Russian investment practice. There have been solitary examples of leveraged buyout transactions and it is impossible to estimate the influence of the exit strategies and investment horizons of private equity firms on the structuring of leveraged buyout transactions. As for exit strategies of investors operating in Russia in general, the main strategy in the past and in the foreseeable future is a sale to a strategic investor or to the state (including state banks or state-owned

companies). IPOs were not common practice until 2007 to 2008, and almost no IPOs of Russian companies took place in 2009 and 2010 due to the global financial credit crunch and its consequences. However IPOs are still a possible exit strategy and it is expected that with credit stabilisation more IPOs will take place.

16 Principal accounting considerations

What are some of the principal accounting considerations for private equity transactions?

The principal consideration is to be very cautious when dealing with accounting information. IFRS is not widespread in Russian companies and official financial statements shall be provided in the form set by Russian accounting standards. This is the reason why it is sometimes hard for an investor, especially a foreign one, to receive accurate information on the financial condition of the target company, especially if the company had been involved in joint ventures, associations with other companies, etc. There may be two solutions to this problem, which complement each other. The first is to demand accounting information composed in accordance with IFRS from the target company or seller. This may take additional time and delay the transaction, but it is, in our view, a fair exchange for accurate and proper information. The second way is to engage experienced local advisers and auditors who can estimate the accuracy of the provided information and possible financial risks.

17 Target companies and industries

What types of companies or industries have typically been the targets of going-private transactions? Has there been any change in focus in recent years? Do industry-specific regulatory schemes limit the potential targets of private equity firms?

Traditionally, the scope of investment activities in Russia was more or less limited to real estate, retail and production of consumer goods as the most profitable spheres. Recently, other spheres such as IT and telecommunications have also begun to provide vast opportunities for investors operating in Russia, while retail, real estate and consumer goods have kept their role as the leading investment areas. However, in 2009 the focus has significantly changed and this tendency has continued throughout 2010. The debt-ridden real estate and retail businesses are out of favour. Investors are looking mostly for infrastructure projects, especially in view of the 2014 Olympics, the high-tech sector, energy and high-margin natural resources companies, such as those providing timber, oil and gas, precious metals and stones or even peat. Some sections of the real estate market still attract investors, such as the hotel business.

In accordance with the Federal Law of the Russian Federation 'On order of investments in business companies having strategic importance for country defence and state safety', the participation

of foreign investors (and investment groups that include foreign entities) in companies acting in several spheres of industry is limited. Among these areas are aviation equipment development and production and TV and radio broadcasting. Participation of a foreign investor in a company with a dominant position on the market and included in a special register of dominant companies is also limited. The Land Code of the Russian Federation provides limitations on foreign entities' ownership of agricultural land. As for other sectors and companies, there are no legal limitations on the participation of foreign private investors. There are also a number of businesses available for investors, both domestic and foreign, only on the basis of prior obtainment of a special permission (licence). The list of such activities is provided by the Federal Law on Licensing of Certain Activities and includes more than 100 types of activities, including production and use of aviation, weapons, chemicals, medical equipment and goods, etc.

18 Cross-border transactions

What are the issues unique to structuring and financing a cross-border going-private or private equity transaction?

As noted above, due to lack of regulation and the cautious position of the Russian courts in respect to shareholders' agreements, in practice most significant private equity transactions are indeed cross-border. This fact, in combination with the absence of special regulation of private equity transactions, causes the parties to combine within the framework of the single transaction the laws of several jurisdictions, including general rules and more specific rules covering activities of the parties to the transaction and the target company. All issues related to international treaties, double taxation and dispute resolution shall be closely examined and coordinated by the parties. A positive aspect is that, unlike in the past, currency control has become unnecessary owing to general liberalisation of the currency legislation, so currency control shall not notably affect private equity transactions.

19 Club and group deals

What are the special considerations when more than one private equity firm (or one or more private equity firms and a strategic partner) is participating in a club or group deal?

Since Russian law does not provide special regulation for private equity transactions as a concept, it does not provide any special considerations related to club or group deals. Such deals are treated like all other private equity transactions. Since the agreement between shareholders is inevitable, such transactions shall most likely involve foreign law with all subsequent issues arising on account of the cross-border nature of such transactions.

20 Issues related to certainty of closing

What are the key issues that arise between a seller and a private equity buyer related to certainty of closing? How are these issues typically resolved?

The key issues related to certainty of closing of private equity transactions in respect of Russian-based targets are generally the same as for targets located in other jurisdictions, provided that the most important contractual documents in respect of the transaction are regulated by the laws of such foreign jurisdictions. Should the parties choose to subdue their relation to Russian law they may face difficulties in structuring the closing conditions and other issues, especially termination fees, which could be dramatically decreased by the court. Therefore, if the matter of certainty of closing is crucial for the parties to the transaction, it is strongly recommended for them to choose a system of law that is thoroughly familiar with private equity transactions and to use all instruments available, including closing conditions, termination rights and fees, lock-up agreements, escrow instruments, etc.



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